

# The International Crimes And International Criminal Court Act 2000

## Introduction

History was created at the Rome Conference<sup>1</sup> on 17 July 1998 when the United Nations adopted the Rome Statute of the International Criminal Court (“the Rome Statute”).<sup>2</sup> This established the permanent International Criminal Court (“ICC”).<sup>3</sup> The need for such a mechanism to consider serious violations of international criminal law has long been obvious and the adoption of the Rome Statute was the culmination of a long period of planning and negotiation.

The International Crimes and International Criminal Court Act 2000 (“the Act”)<sup>4</sup> enables New Zealand to fulfil its obligations under the Rome Statute. It has two purposes. The first is to make provision in New Zealand law for the punishment of genocide, crimes against humanity and war crimes.<sup>5</sup> The second is to enable New Zealand to co-operate with the ICC in the performance of its functions.<sup>6</sup> The Act includes a large number of provisions that pertain to this second purpose. These include provisions dealing with the arrest and surrender of a person to the ICC<sup>7</sup> and enforcement of ICC penalties.<sup>8</sup>

Significantly, section 8 of the Act provides that the Act applies retrospectively to the crimes of genocide and crimes against humanity<sup>9</sup> and has extra-territorial effect in respect of all three.<sup>10</sup> However, the

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<sup>1</sup> The United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court convened in Rome, Italy, from 15 June to 17 July 1998.

<sup>2</sup> Rome Statute of the International Criminal Court, 17 July 1998.

<sup>3</sup> Ibid Art 1, UN Doc. A/CONF 183/9\* *reprinted in* 37 ILM 999 (1998). Art 126 provides that the statute will enter into force on the first day of the month after the 60<sup>th</sup> day following the date of the deposit of the 60<sup>th</sup> instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. As at 31 August 2001, 37 parties had ratified, accepted, approved or acceded to the Rome Statute. New Zealand ratified the Rome Statute on 7 September 2000.

<sup>4</sup> Section 2 provides for when the various sections of the Act will come into force. The Act as a whole is not yet in force but ss 9, 10 and 11, providing for the crimes of genocide, crimes against humanity and war crimes, respectively, took effect on 1 October 2000.

<sup>5</sup> Section 3(a). Article 5(1)(d) of the Rome Statute also provides for the crime of aggression. However, this crime was not included in the Act because a definition of the crime is yet to be adopted in accordance with arts 121 and 123 of the Rome Statute.

<sup>6</sup> Section 3(b).

<sup>7</sup> Part 4.

<sup>8</sup> Part 6.

<sup>9</sup> Sections 8(1)(a)(ii) and 8(4).

<sup>10</sup> Section 8(1)(c).

consent of the Attorney General is required before a prosecution for genocide, crimes against humanity or war crimes can commence.<sup>11</sup> This provision operates to curb the extensive powers in section 8.

The focus of this commentary will be on the first purpose of the Act, the introduction of the three international crimes into New Zealand's statute books.<sup>12</sup> In particular, it will examine how the definitions of these crimes elevate them to international status. As the definitions in the Act<sup>13</sup> refer to the definitions in the Rome Statute, it is crucial to closely examine the provisions of the Rome Statute and how they reflect the intense negotiations that occurred in Rome. This commentary will also assess the effectiveness of the definitions and discuss the role played by the concern of some states over issues of sovereignty.

## Genocide

Section 9(2) of the Act defines 'genocide' by reference to Article 6 of the Rome Statute. The definition of the crime of genocide was one of the few issues arising out of the Rome Statute that was negotiated with relative ease. As early as the first session of the United Nations Preparatory Committee for the Establishment of an International Criminal Court ("Prepcom"),<sup>14</sup> there was general agreement<sup>15</sup> that the definition of genocide in the ICC statute should follow verbatim the definition in Article 2 of the Genocide Convention.<sup>16</sup> This definition of genocide was quickly and unanimously agreed upon at the Rome Conference.<sup>17</sup> Article 6 of the Rome Statute provides:

For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;

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<sup>11</sup> Section 13(1).

<sup>12</sup> A number of international crimes were punishable in New Zealand before the enactment of the Act under the principle of universal jurisdiction and the Geneva Conventions Act 1958.

<sup>13</sup> Sections 9 (genocide), 10 (crimes against humanity), and 11 (war crimes).

<sup>14</sup> The United Nations General Assembly established the Prepcom in 1995 to finalise a draft ICC statute prior to the negotiations at Rome. The Prepcom met six times prior to the Rome Conference.

<sup>15</sup> Hall, "The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court" (1997) 91 *Am J Int'l L* 177, 180.

<sup>16</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

<sup>17</sup> Arsanjani, "The Rome Statute of the International Criminal Court" (1999) 93 *Am J Int'l L* 22, 30.

- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

### 1. “*In Whole or in Part*”

The acts specified in the definition do not raise any particularly controversial issues. The key issue with Article 6 was the need for the listed acts to be committed with intent to destroy *in whole or in part* the relevant group of people. This is essentially the threshold that distinguishes the international crime of genocide from lesser crimes of a similar nature.

During the negotiations, there was some disagreement as to the appropriate size of this group. It was generally agreed during the third Prepcom session that it was inappropriate to define the size of the group in terms of a specific number of people.<sup>18</sup> The United States and a small number of other States wanted the threshold size to be a “substantial part” of the group.<sup>19</sup> The difficulty with the present definition is that the word ‘part’ is extremely vague and no guidance is given as to how to assess what qualifies as a ‘part’ of a group.<sup>20</sup>

The United States raised an important point. It is difficult to consider that a very small number of individuals from a large group of people should constitute a part of a group for the purpose of the grave crime of genocide. Generally, ‘part’ has been interpreted to mean ‘substantial part’, in accordance with the serious nature of the crime.<sup>21</sup> The International

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<sup>18</sup> Hall, “The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court” (1998) 92 Am J Int’l L 124, 126.

<sup>19</sup> Ibid.

<sup>20</sup> See Rodriguez, “Slaying the Monster: Why the United States Should Not Support the Rome Treaty” (1999) 14 Am U Int’l L Rev 805, 822 for criticism on this issue.

<sup>21</sup> Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (1997) 37.

Criminal Tribunal for Rwanda (“ICTR”) has recently examined this issue and stated:<sup>22</sup>

The Trial Chamber opines, therefore, that “in part” requires the intention to destroy a considerable number of individuals who are part of the group. Individuals must be targeted due to their membership of the group to satisfy this definition.

This statement is consistent with the prevailing academic opinion that ‘part’ should be read as meaning a ‘substantial part’.

## Crimes against Humanity

Section 10(2) of the Act defines the acts that constitute ‘crimes against humanity’ by reference to Article 7 of the Rome Statute. The negotiation of Article 7 was particularly difficult. A number of the controversial aspects of this definition are discussed below.

### *1. Article 7(1): the Chapeau*

One of the key issues in the definition of crimes against humanity was the problem of how to distinguish between crimes that are sufficiently serious to come within this category and ordinary crimes that are not so grave. As well as serving to provide the technical legal distinction between crimes against humanity and ordinary crimes, any threshold provision also performs the crucial function of marking out when state sovereignty is ceded and the crime becomes an international one. This issue of sovereignty was behind many of the negotiations and compromises that led to the ultimate definition. The chapeau of Article 7(1) of the Rome Statute provides:

For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

### *2. International Armed Conflict*

The chapeau does not provide that crimes against humanity must necessarily occur in or be limited to the context of international armed

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<sup>22</sup> *Prosecutor v Kayishema and Ruzindana* (21 May 1999) ICTR-95-1, para 97 available at ICTR website <<http://www.ictt.org/>> (last accessed 12 September 2001).

conflict. The first codification of crimes against humanity, Article 6(c) of the Nuremberg Charter,<sup>23</sup> was interpreted to mean that only acts committed in international armed conflict constitute crimes within the jurisdiction of the Nuremberg Tribunal. The obvious problem with this interpretation is that atrocities committed in peacetime and internal conflicts fall outside the definition. Crimes committed in these situations should be treated as crimes against humanity: they are completely analogous to, and no less justifiable than, similar crimes committed in international armed conflict.

The move away from the traditional nexus requirement was summed up by the International Criminal Tribunal for the former Yugoslavia (“ICTY”):<sup>24</sup>

It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed ... customary international law may not require a connection between crimes against humanity and any conflict at all.

This point did not pose too many difficulties for negotiators at the Rome Conference. As early as the first Prepcom session the majority of delegations agreed that the definition of crimes against humanity had evolved since Nuremberg and that the nexus requirement was now obsolete.<sup>25</sup> To require a nexus would ignore the fact that atrocities can be and are committed internally in countries without the presence of an armed conflict.<sup>26</sup> It was essential to the credibility of the definition that the nexus to international armed conflict be excluded.

### 3. “Widespread or Systematic”

There was considerable debate over the inclusion of the terms ‘widespread’ and ‘systematic’. While the meanings of the terms were not in issue,<sup>27</sup> the debate centred on whether the terms should be disjunctive (widespread *or* systematic) or conjunctive (widespread *and* systematic). The first option results in a lower threshold and, therefore, greater erosion

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<sup>23</sup> Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945, 8 UNTS 279.

<sup>24</sup> *Prosecutor v Tadic*. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) No. IT-94-1-AR72, para 141, *reprinted in* 35 ILM 32 (1996).

<sup>25</sup> Hall, “First Two Sessions”, *supra* note 15.

<sup>26</sup> A recent example of this is the alleged human rights abuses that have occurred in East Timor.

<sup>27</sup> See *Prosecutor v Akayesu* (2 September 1998) ICTR-96-4-T, para 580 available at ICTR website <<http://www.icttr.org/>> (last accessed 12 September 2001) for a definitive statement of these terms.

of state sovereignty than if the terms were interpreted conjunctively. This worried a number of countries including the United States, the United Kingdom, France, the Russian Federation, India, Egypt, Turkey and Japan.<sup>28</sup> They considered that such a low test would capture activities that they did not deem to be serious enough to constitute crimes against humanity. Other delegations pointed to the Statute of the ICTR, which merely requires “widespread or systematic attack against any civilian population”.<sup>29</sup>

The Canadian delegation put forward a compromise proposal that was adopted in the final text of the Rome Statute with only slight modifications.<sup>30</sup> The proposal suggested that the terms be disjunctive but added an extra criterion to allay the concerns of those countries that wished the threshold to be higher. The extra criterion was a definition of the phrase “attack against any civilian population”. Thus, Article 7(2)(a) of the Rome Statute provides that:

[An] ‘attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack...

Article 7(2)(a) effectively confirms that a policy element is required for all crimes against humanity. The term ‘systematic’ already incorporates such an element<sup>31</sup> and, accordingly, a number of Non-Governmental Organisations present at the Rome Conference criticised this definition as effectively introducing a higher threshold through interpreting the terms conjunctively rather than disjunctively.<sup>32</sup>

However, it appears that the term ‘systematic’ requires a much higher level of state or organisational policy than that required under Article 7(2)(a).<sup>33</sup> As noted in *Akayesu*, the term ‘systematic’ implies thorough organisation and the following of a “regular pattern on the basis of a common policy involving substantial public or private resources”.<sup>34</sup> By contrast, the term ‘policy’, as used in Article 7(2)(a), does not require

<sup>28</sup> Van Schaack, “The Definition of Crimes Against Humanity: Resolving the Incoherence” (1999) 37 Colum J Transnat’l L 787, 844.

<sup>29</sup> Statute of the International Tribunal for Rwanda, Art 3, SC Res. 955, annex, UN SCOR, 49<sup>th</sup> Sess., Res. & Dec., at 15, UN Doc. S/INF/50 (1994), reprinted in 33 ILM 1602 (1994); Robinson, “Defining ‘Crimes Against Humanity’ at the Rome Conference” (1999) 93 Am J Int’l L 43, 47.

<sup>30</sup> Van Schaack, supra note 28.

<sup>31</sup> Supra note 27.

<sup>32</sup> Hwang, “Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court” (1998) 22 Fordham Int’l L J 457, 498-499; Van Schaack, supra note 28, 845 n 279.

<sup>33</sup> Van Schaack, supra note 28, 845 n279; Robinson, supra note 29, 50-51.

<sup>34</sup> Supra note 27.

such a formalisation of the policy.<sup>35</sup> It is best to consider the context in which Article 7(2)(a) arose, that is, as a compromise between the two competing alternatives and interpret it accordingly.<sup>36</sup>

This major compromise represents a sensible solution to a difficult problem. It addresses the concerns of both sides of the debate and provides a threshold that is neither too low, capturing too much conduct and eroding state sovereignty further; nor too high, capturing too little conduct and making prosecution very difficult.

#### 4. *The Acts*

Article 7(1) of the Rome Statute also lists the acts that constitute crimes against humanity, should the threshold be reached. These include murder, extermination, enslavement, torture and persecution. Of particular note is the inclusion of a number of gender-based crimes such as rape, sexual slavery and forced pregnancy.

### War Crimes

Section 11 of the Act defines ‘war crimes’ by reference to Article 8 of the Rome Statute.

#### 1. *Article 8(1): the Threshold*

Article 8(1) effectively provides a threshold for war crimes in the same way that the chapeau of Article 7(1) provides a threshold for crimes against humanity. It states:

The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.

Like the chapeau of Article 7(1), this provision was the subject of much debate during the negotiations leading up to the adoption of the Rome Statute. Again, the erosion of state sovereignty was the key issue. At the third Prepcom session it was argued, most notably by the United States, that there should be a chapeau restricting the definition to offences “committed as part of a systematic plan or policy or as part of a large-scale commission of such offences”.<sup>37</sup>

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<sup>35</sup> Robinson, *supra* note 29, 50-51.

<sup>36</sup> Van Schaack, *supra* note 28, 845 n 279.

<sup>37</sup> Hall, “Third and Fourth Sessions”, *supra* note 18, 128.

The concept of having a threshold was subsequently criticised at the fifth Prepcom session by most states and the International Committee of the Red Cross.<sup>38</sup> These parties considered that a threshold had never been included in previous definitions of war crimes and that it could lead to confusion between war crimes and crimes against humanity.<sup>39</sup>

This debate carried on into the Rome Conference. A major compromise was eventually reached and the definition in Article 8(1) was adopted.<sup>40</sup> This Article is a curiously drafted compromise indeed. The only victory for those advocating the necessity of a threshold is the inclusion of the phrase “*in particular* when committed as a part of a plan or policy or as part of a large-scale commission of such crimes” (emphasis added). The term ‘in particular’ serves no useful function in defining a threshold. It does not exclude an isolated occurrence of a war crime. Article 8(1) appears to be a hollow victory for the advocates of a threshold. Unlike the crimes against humanity chapeau, it is ineffective.

## 2. Article 8(2): the Structure

Article 8(2) of the Rome Statute defines what constitutes a war crime. The term is defined over four paragraphs, each of which concerns war crimes of a different category. Article 8(2)(a) provides for “[g]rave breaches of the [four] Geneva Conventions of 12 August 1949”. Incorporated into Article 8(2)(b) are “[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law”. Article 8(2)(c) provides that “serious violations of [A]rticle 3 common to the four Geneva Conventions” are within the jurisdiction of the Court. Finally, Article 8(2)(e) provides that “other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law” constitute war crimes within the jurisdiction of the Court.

The key issue with Article 8(2) was the inclusion of war crimes committed in internal armed conflicts, as enumerated in sub-paragraphs (c) and (e). Potentially, state sovereignty may be significantly eroded if internal war crimes can be prosecuted. A number of delegations fiercely opposed the inclusion of such crimes.<sup>41</sup> However, this position would

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<sup>38</sup> Hall, “The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court” (1998) 92 Am J Int’l L 331, 332.

<sup>39</sup> Ibid.

<sup>40</sup> See Arsanjani, *supra* note 17, 33.

<sup>41</sup> Kirsch and Holmes, “The Rome Conference on an International Criminal Court: The Negotiating Process” (1999) 93 Am J Int’l L 2, 7.

appear to be inconsistent with the development of international customary law on this issue. In *Prosecutor v Tadic*, the ICTY reasoned that many customary international law rules that govern international armed conflicts should now be read as applying to internal armed conflicts.<sup>42</sup>

As with so many other issues at the Rome Conference, a compromise was reached.<sup>43</sup> Internal armed conflict was included but two qualifying paragraphs were also incorporated. Article 8(2)(d) provides:

Paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

Article 8(2)(f), qualifying Article 8(2)(e), adds the following phrase to the above definition:

[Paragraph (2)(e)] applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

These provisions ensure that the internal conflict in question must be a major conflict, especially in the context of the crimes enumerated in Article 8(2)(e). The additional limitation in Article 8(2)(f) undoubtedly reflects the fact that the inclusion of sub-paragraph (e) was more controversial than the inclusion of sub-paragraph (c), which is based on the widely accepted Article 3, common to the four Geneva Conventions.<sup>44</sup> Article 8(3) further clarifies the bounds of permissible state activity:

Nothing in paragraphs 2 (c) and (d) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Again, this reinforces the idea that States are responsible for law and order within their territory and may use force to maintain or restore it. This provision ensures that state sovereignty is not excessively eroded by the inclusion of internal war crimes.

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<sup>42</sup> Supra note 24, paras 96-137.

<sup>43</sup> See Arsanjani, supra note 17, 35.

<sup>44</sup> Kirsch and Holmes, supra note 41, nn 17-18.

### 3. *The Acts*

Sub-paragraphs 8(2)(a), (b), (c) and (e) of the Rome Statute each contain long lists of the acts that qualify as war crimes. Many of these are uncontroversial. Of note is the inclusion of the crime of environmental damage in Article 8(2)(b)(iv), although the scope of damage must cross a high threshold before it qualifies as a crime. Also of note is the list of prohibited weapons, which is highly contentious. Currently, nuclear weapons, land mines and blinding laser weapons are not included as prohibited weapons, but chemical and biological weapons are.<sup>45</sup> By virtue of Articles 121 and 123 of the Rome Statute, this list may be amended seven years after the Rome Statute enters into force.<sup>46</sup>

### **Punishment**

A person who commits genocide, a crime against humanity or a war crime in New Zealand or elsewhere is liable to the same penalty as for murder if the offence involves the wilful killing of another person, or for life imprisonment or a lesser term in any other case.<sup>47</sup>

### **Conclusion**

The International Crimes and International Criminal Court Act 2000 is an important domestic acknowledgement of the growing international intolerance of human rights abuses. When interpreting the definitions of the crimes of genocide, crimes against humanity and war crimes in the Act it is necessary to refer to the corresponding definitions in the Rome Statute. Each of those definitions contains a threshold that must be met in order for the crime to be considered of international concern. An examination of the negotiations prior to and throughout the Rome Conference reveals that the concern of some states with the issue of sovereignty was the key driving force behind the majority of compromises in the definitions contained in the Rome Statute. The definitions of the crimes will be effective in prosecuting the vast majority of international crimes and their inclusion in New Zealand's statute books confirms that New Zealand is a genuinely committed to the fight against international human rights abuses.

*James Hartley BA, LLB(Hons)*

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<sup>45</sup> Supra note 2, Arts 8(2)(b)(xvii), 8(2)(b)(xviii), and 8(2)(b)(xx).

<sup>46</sup> Note 2.

<sup>47</sup> Sections 9(3), 10(3), and 11(3). But see s 8(3).