

Questions & Answers

ICC IMPLEMENTING LEGISLATION

Q: What is ICC implementing legislation?

A: In order for the International Criminal Court (“ICC” or “Court”) to be fully effective, it relies on its States Parties -- those countries to have ratified or acceded to the Rome Statute of the ICC -- to have adopted national legislation enabling cooperation with the Court. This legislative process is referred to as the “implementation” into national law of the cooperation provisions of the Rome Statute.

The purpose of ICC implementing legislation is two-fold: to place States Parties in position to cooperate with the Court; and to place them in position to exercise national jurisdiction in lieu of the Court (referred to as “complementarity” legislation).

Q: What are States Parties’ obligations with respect to implementing state cooperation provisions?

A: All States Parties are expected to implement relevant provisions of the Rome Statute into national law. As the Rome Statute impacts a wide range of national laws and contains very technical obligations for States Parties, even *monist* countries – or those which would normally only require ratification of a treaty to make it legally binding – must adopt implementing legislation.

Given that the Court has no police force or prison, it will rely heavily on state cooperation in this regard. Specifically, States must adopt legislation which provides for the following: the Court to sit in the territory of a State Party; the criminalization of offenses against the ICC’s administration of justice; the taking of evidence; the execution of searches and seizures; the arrest and surrender of persons; certain immunities for ICC officials; and provisions for penalties and enforcement.

Q: What are States Parties’ obligations to implement provisions of the Rome Statute that enable a State to try a case in lieu of the ICC?

A: The principle of complementarity grants primary jurisdiction over the crimes defined in the Rome Statute to the respective States Parties on whose territory, or by whose nationals, the alleged crimes are committed.

The principle of complementarity protects States Parties’ jurisdictional sovereignty and eases the burden of the ICC’s caseload. In allowing for complementarity through the implementation process, States Parties must address such issues as command responsibility; individual criminal responsibility; determination of sentences; immunity provisions; statutes of limitations; and, because the Rome Statute sets a minimum rather than a maximum standard that States Parties must meet, definitions of crimes and jurisdictional scope.

Q: In light of the principle of complementarity, when would the ICC try a case instead of a State Party?

A: The ICC will only have jurisdiction over an alleged case in certain circumstances. These circumstances include a State’s acceptance of ICC jurisdiction, a case referral by the UN Security Council, and the instance of a State Party being genuinely *unwilling* or *unable* to exercise its national jurisdiction. For this reason, the ICC is sometimes referred to as “a court of last resort.”

A State is deemed *unwilling* to prosecute where the Court finds that the proceedings, or a decision not to prosecute, are aimed at shielding a person from justice. Similarly, if the proceedings have been subject to unjustified delay or have not been independent or impartial, the Court may consider the State unwilling to carry out genuinely the investigation or prosecution. A State is considered *unable* to prosecute where there has been a total or substantial collapse or unavailability of the national justice system, resulting in an inability to carry out proceedings.

The Coalition for the International Criminal Court is a global network of over 2,000 civil society organizations supporting a fair, effective and independent International Criminal Court.

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Q: What obligations do States Parties have to arrest and surrender persons to the ICC?

A: The ICC may submit requests to any State for the arrest and surrender of a person found in the State's territory. Under Article 89(1), State Parties are obliged to comply with such requests transmitted by the Court. Such cooperation must be executed in accordance with the provisions of the Statute and the State's national laws. It should be noted that surrender differs from extradition in that the former applies to the transfer between a State and the ICC, while the latter describes a transfer between two States.

Should competing requests for arrest and extradition/surrender be made to a State Party by a State and the Court, the Court's request takes priority if the case has been found admissible and if the requesting State is also a State Party. If the requesting State is not a State Party, the Court shall retain priority if it finds the case admissible, unless the State to whom the request is made is under international obligation to extradite a person to the requesting State.

Q: May a State Party recognize immunities or a statute of limitation for crimes over which the ICC may have jurisdiction?

A: A State is obliged to comply with a request for arrest and surrender even if the person in question enjoys official capacity, including as Head of State. Similarly, the fact that a person is a national of a State, or the possibility that the accused might receive a penalty of life in prison by order of the Court where such a penalty does not exist at national law, are not grounds for non-cooperation.

Crimes within the jurisdiction of the Court are not subject to any statute of limitations, according to Article 29 of the Rome Statute. If statute of limitations were to exist, it would lead to a finding that a State Party was unwilling to prosecute; jurisdiction would then fall to the Court.

Q: What role can civil society play in the implementation process?

A: While there is no single best methodology for drafting implementing legislation, any implementation process should be transparent and inclusive. Prior successful efforts have involved the use of government interministerial committees and included close consultation with civil society.

Even more so than with ICC ratification efforts, implementation efforts must take place at least in part at the grass-roots level. National and local groups must have ownership in the implementation process, as the process itself is dependent upon country-specific legal and political circumstances that nationals will best understand. Even where direct involvement in drafting is not possible, these groups' advocacy efforts will be instrumental to the passage of strong and effective legislation. Moreover, the groups must *understand* the legislation so that they can play a role in its application should cases arise in their respective countries under one of the ICC crimes, or should the Court make a cooperation request.