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ELEMENTS OF CRIMES AND RULES OF EVIDENCE AND PROCEDURE

SECTION A: ELEMENTS OF CRIMES

In the Human Rights Watch Commentary to the Second Preparatory Commission on the International Criminal Court, Elements of Crimes and Rules of Evidence and Procedure, July 1999, we set out recommendations on elements of many of the war crimes within the Court's jurisdiction. This Commentary focuses on selected aspects of the crimes against humanity provisions, followed by the outstanding issue of the weapons provisions from the war crimes section, which was not addressed at the last session.

CRIMES AGAINST HUMANITY

The detailed elaboration of elements for crimes against humanity is particularly unnecessary given the detailed definitions provided in Article 7 of the Statute itself. It may therefore suffice to rely on the statutory provision or to replicate its terms in the Elements document. Any elaboration beyond the statutory terms must be consistent with international law and practice, including the significant experience of the ad hoc tribunals for the former Yugoslavia and Rwanda in this area.
Article 7 of the ICC Statute sets out in considerable detail the scope of the Court's jurisdiction over crimes against humanity. Article 7(1) enumerates conduct that may constitute a crime against humanity if it meets the threshold of having been "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Article 7(2) goes on to specify in detail what constitutes an 'attack' for this purpose, and provides detailed definitions of the vast majority of the enumerated acts. As such, much of what would otherwise be contained in the 'elements' document is already contained in the Statute.

The international criminal tribunals for the former Yugoslavia and Rwanda ('ICTY' and 'ICTR') have developed extensive experience in the prosecution of crimes against humanity and have made a unique contribution to the development of international law in this field. The elements of crimes against humanity within the jurisdiction of the ICC purposes must be drawn up within the framework of existing international law, reflecting the jurisprudence of the international tribunals in particular while allowing the flexibility for the living body of law to develop in the future. Elements of that jurisprudence are set out below.

**The Chapeau**

**Widespread or systematic**
It is unnecessary for the Elements document to define 'widespread' or 'systematic'. The statutory requirement that crimes against humanity be committed as part of a widespread or systematic attack is based on long-established international law. These terms will be interpreted by the Court according to their plain meaning, in the light of relevant jurisprudence.

This jurisprudence demonstrates that while 'widespread' connotes the scale on which the conduct is carried out, 'systematic' relates to the level of planning or organization. While a systematic attack will generally involve large-scale offences, there is nothing in the plain meaning of the word or its interpretation by international tribunals to suggest that this must be so. Systematic has recently been defined by the tribunals as "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources". While a course of action that is "systematic" may often give rise to multiple offenses, this is not necessarily the case, and the U.S. proposal's suggestion that the term "excludes isolated offenses" should be resisted. Such a suggestion conflates the disjunctive 'widespread' and 'systematic' criteria, importing the element of scale required for the former into the latter.

In this respect it should be recalled that the restrictive statutory definition of 'attack' requires the "multiple commission of acts…pursuant to or in furtherance of a State or organizational policy." As such, the mere repetition of the statutory standard imports elements of both scale and policy, without the distortion of the term 'systematic' as established in international law.
The Policy Requirement

The definition of attack in the Statute imposes the requirement that there be a "State or organizational policy" to commit such an attack. There is no need for the policy requirement to be expanded upon in the Elements, and any additional qualifications as to the policy should be rejected. It should be noted, however, that there is no requirement in the Statute or elsewhere in international law of a formalized policy. Rather, as the ICTY has noted, "if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not."

Civilian Population

As stated above, we do not consider it necessary to define terms such as 'any civilian population' in the Elements document. However, delegates are reminded that the jurisprudence of the ad hoc tribunals provides valuable guidance as to the interpretation of these terms; if there is any attempt to provide definitions in the Elements it should be done in a manner consistent with that jurisprudence.

The ICTR has defined "members of the civilian population" as "people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed hors de combat by sickness, wounds, detention or any other cause." The ICTY has taken a similar approach and has clarified that the targeted population must be of a "predominantly civilian nature", not exclusively so. It has stated that "the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity." Finally, the phrase "any" civilian population clarifies that crimes against humanity can be
committed against civilians of the same nationality of the perpetrator or those who are stateless, as well as those of a different nationality.

**Individual Responsibility for Crimes against Humanity**

In drawing up elements of crimes that the prosecutor must establish in each case, it is critical to keep in focus the distinction between the nature of the 'attack' and the nature of the conduct that might give rise to individual criminal responsibility for a crime against humanity. Specifically, while the attack must be widespread or systematic, it must be recalled that a single act may be sufficient to invoke individual responsibility for crimes against humanity, provided it was part of such a widespread or systematic attack. The ICTY has explained the situation in the following terms:

Crimes against humanity must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of the specific context identified above.

**The Mental Element**

To constitute a crime against humanity under the ICC Statute, the conduct in question must be committed as part of a widespread or
systematic attack, "with knowledge of the attack." This knowledge, or awareness of the relevant circumstances, may be actual or constructive. In other words, the mental element may be satisfied by an awareness of the existence of an attack, or it may also be satisfied by willful blindness as to the attack. In this respect the Rutaganda case at the ICTR is particularly illuminating. In setting out the requisite mental element for crimes against humanity, the Tribunal stated that "the accused was aware of or willfully blind to the fact that his act was committed in the context of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds."

The ICTY approach also supports the view that the requisite 'knowledge' may be "actual or constructive." Citing a Canadian Supreme Court decision, the Tribunal has stated that "[t]he mental element required to be proven to constitute a crime against humanity is that the accused was aware of or willfully blind to facts or circumstances which would bring his acts within crimes against humanity. However it would not be necessary to establish that the accused knew that his actions were inhumane."

It is important to note that, while the accused needs to be actually or constructively aware of the existence of an attack, he or she need not know the precise nature of it. In particular, there is no requirement of knowledge as to the policy underlying the attack. To require full knowledge of the policy behind an attack would effectively limit the class of individuals who can be responsible for crimes against humanity to a select group of policy makers. Delegates are urged to ensure that the elements do not impose a de facto ban on the conviction of lower ranking officials involved in atrocities who, despite lacking full knowledge, were aware that they were playing a part in a wider scheme.
Irrelevance of Motive

It should also be noted that a crime against humanity can be committed for purely personal motives, provided the conduct in question fits into a widespread or systematic attack and the necessary mental element is satisfied (the accused was aware of, or willfully blind to, the existence of the attack). The ICTY Appeals Chamber recently clarified that "under customary international law, 'purely personal motives' do not acquire any relevance for establishing whether or not a crime against humanity has been committed."

Persecution and Enforced Disappearances

The comments below focus on the crimes against humanity of persecution and enforced disappearance. Many of the comments on elements in relation to Article 8 of the Statute, presented in the Human Rights Watch Commentary to the second Preparatory Commission, apply in this context.

Persecution

Article 7(1) of the ICC Statute provides for the Court to have jurisdiction over 'persecution' against an identifiable group or collectivity on certain grounds, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court. Article 7(2) goes on to define persecution for the purpose of the ICC as "...the
intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."

The key elements of persecution for ICC purposes are therefore set out in the Statute itself. Delegates are encouraged against further delimitation. In particular, they are urged to reject any attempt to increase the threshold for the Court's jurisdiction over this crime against humanity, as, for example, the U.S. suggestion that the deprivation be of rights "universally recognized" under international law.

The Statute makes clear that the crime of persecution is dependent upon the commission of either an act referred to in article 7(1), or any other crime within the jurisdiction of the Court. Note that the persecution may be in connection with an 'act' referred to in the article, which does not necessarily constitute a 'crime'. Contrary to the proposal of the United States, there is no requirement that persecution must be committed in relation to another offense within the jurisdiction of the Court. This possibility was rejected in Rome on the basis that it would be out of line with established international law and it should not be allowed to slip in through the Elements.

Enforced Disappearances

The work of Human Rights Watch attests to the frequency with which "disappearances" have been carried out in recent decades and the profound gravity of the crime, both in terms of the impact on the victim directly and on the victim's family and society more broadly. Enforced disappearance has been recognized as a crime against humanity in international instruments as well as in national legislation.
Article 7(1)(i) of the Statute establishes "enforced disappearance of persons" as a crime against humanity within the jurisdiction of the Court. Article 7(2)(i) defines "enforced disappearance of persons" as "the arrest, detention or abduction of persons by or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." Such a detailed definition leaves little need for further elaboration of elements.

Delegates should however be vigilant to ensure that a more restrictive definition is not introduced through the Elements document. In particular, they should reject the requirement that 'enforced disappearance' must result in the victims being removed from the protection of the law for a prolonged period of time. The Statute requires that the victims are arrested, detained or abducted "with the intention of removing them from the protection of the law for a prolonged period of time" (emphasis added). The gravity of this crime stems not only from the fact of prolonged deprivation of rights, though this is often the pattern, but from the perpetrator's intention to produce such a result. There is nothing in the Statute that corresponds to the language in the U.S. proposal. It is suggested that confusion and inconsistency can be avoided by elements that adhere to the definitions that are set out in some detail in the Statute itself.

WAR CRIMES

**Employing Poisons or Asphyxiating or Other Gases Poison: Article 8(2)(b)(xvii) and (xviii)**

**Definition of Poison**
Any elaboration on the meaning of poison or poisoned weapon must be consistent with international law and standards. As such, any attempt to restrict the Court's purview to those weapons that are "specifically designed to cause death" should be rejected.

The Court's jurisdiction over prohibited weapons and substances, as provided for in Article 8 of the Statute, is extremely limited. In the final stages of the Rome conference the categories of prohibited weapons falling within the Court's purview was cut considerably, and the weapons provision relating to crimes committed in non-international armed conflict excluded entirely. Care should be taken not to further limit the Court's jurisdiction through unjustifiably restrictive definitions or elements.

In the terminology section of the U.S. paper, poison is defined as "any substance specifically designed to cause death through the toxic properties of toxic chemicals or agents which would be released as a result of the employment of munitions or devices." To require that the substance be "specifically designed to cause death" only partially reflects existing international law. While certain early instruments prohibiting the use of these weapons provide no greater specificity than is contained in the Statute, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons 1993 defines "toxic chemicals" as "[a]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." These are banned by the Convention in their own right, as well as "[m]unitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals."

In this regard it should also be noted that &emdash; contrary to the exclusion in the U.S. paper &emdash; riot control agents designed to cause only temporary incapacitation do fall within the weapons banned by this Convention and should be included in the definition of poison or poisonous weapons.
Knowledge of the Weapon's Illegality

There should be no element requiring that the accused was aware of the weapon's prohibited status.

Ignorance as to whether conduct is a crime within the jurisdiction of the Court is not a permissible defense under the Statute. It should not be introduced as such through the elements of offenses, by allowing an accused to claim his or her lack of knowledge of the prohibited status of a particular weapon. As noted above, the list of weapons within the Court's purview is extremely limited and restricted only to weapons which have been prohibited by international instruments and customary international law for many years. It would be particularly unjustifiable to allow reliance on ignorance of long-established prohibitions to preclude the Court's jurisdiction.

SECTION B: RULES OF EVIDENCE AND PROCEDURE

PART TWO: JURISDICTION AND ADMISSIBILITY

The controversial nature of the issues in Part 2 of the ICC Statute, and the multitude of compromises that were made in this context during the negotiating process, has lead to an elaborate text in the Statute itself that enshrines many procedural rules. Only minimal further Rules of
Procedure should therefore be necessary, where they may facilitate the proper functioning of the statutory provisions.

Delegates should recall that Part 2 imposes many procedural obstacles that will have to be overcome before an ICC investigation can be initiated. They are urged to ensure that the Rules do not add to the burdens of the Prosecutor nor further limit the Court's jurisdiction.

Provision of 'information' by a State to the Court, Article 18(2)

The Rules should provide some specificity as to the information that a state must provide to the Court when it seeks to trigger deferral by the Court on complementarity grounds. The information must be sufficient to enable the Pre-Trial Chamber to assess whether the state is in fact "investigating or has investigated...with respect to acts that may constitute crimes referred to in article 5."

Article 18(2) provides that "a state may inform the Court that it is investigating or has investigated," and that "at the request of a state the prosecutor shall defer ...unless the Pre-Trial Chamber decides to authorize the investigation." The Rules should ensure that the information provided by the state is sufficient to enable the Pre-Trial Chamber to make its decision as to admissibility.

Under the Statute, when the Prosecutor so requests, the Pre-Trial Chamber must decide whether or not to authorize that an investigation proceed notwithstanding the state's assertion that it is investigating or has investigated. Yet it is the state, not the Prosecutor or Chamber, that possesses the relevant information as to the national proceedings which
makes such a determination possible. Therefore, in order for the Chamber to exercise its statutory function, the state seeking the deferral must provide the Chamber with sufficient information as to the nature and scope of the investigation in question and answer promptly and fully any requests for further information that the Chamber may make. This does not impose new obligations or create new powers for the Court, rather, it is the necessary corollary of the Court's statutory functions.

**Article 18(5)**

In the event the prosecutor defers to a national investigation or prosecution and requests the State for periodic information on such proceedings under article 18(5), the State shall provide information that is sufficient to enable the Court to determine whether there has been "a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigations."

**Victims and Part Two of the Statute**

In the Human Rights Watch Commentary to the Preparatory Commission on the International Criminal Court, Elements of Crimes and Rules of Evidence and Procedure, July 1999, we set out detailed recommendations on the participation of victims in ICC proceedings, victim protection and reparations. This Commentary addresses only those questions which are outstanding from the second Preparatory Commission: the definition of victim and victim participation in pre-trial stage proceedings under articles 15 and 19. Delegates should note that recommendations on Part 2 are followed by other relevant
recommendations on the role of the Victim and Witness Unit in respect of victim participation and protection, under Part 4 of the Statute.

Definition of Victim

The definition of victim for the purposes of the ICC should accord with international standards. As such, it should cover all persons who have suffered harm, including physical or mental injury, emotional suffering, economic loss or impairment of their fundamental rights, as a result of crimes within the Court's jurisdiction. A victim may include the family of the victim or a dependant of the victim as well as persons who have suffered harm as a result of intervening to assist victims.

The ICC Statute endows the Court with an inherent control over its own proceedings and the flexibility to ensure that it can discharge its mandate efficiently. Concerns that the Court must not be overwhelmed, and that the efficiency and integrity of its proceedings must not be hampered by victim participation, are therefore addressed in the Statute, and can be further secured by a flexible mechanism for victim participation in the Rules. These concerns need not and should not result in a restrictive definition of 'victim'.

Rather, the Rules should be consistent with international standards. The recommendation set out above is based on the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law, and the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, UNGA Resolution 40/34, 1985 (The Victims' Declaration).
**Victim Participation at the Pre-Trial Stage**

Rules relating to victim participation throughout proceedings, in accordance with Article 68 of the statute, were established at the last session. They appear in Rule 6.30 of the Coordinator's Discussion Paper on part 6, to which delegates are referred. Many aspects of Rule 6.30 will have to be reflected in the rules relating to article 15 and 19, such as those relating to victim representation.

**ARTICLE 15**

**Confidentiality of Article 15 Communications**

Information provided to the Prosecutor by victims or others pursuant to Article 15 should be treated confidentially, subject to respect for the rights of the accused. The identity of the person providing information should not be disclosed, unless he or she becomes a witness at which point the applicable rules of evidence and disclosure take effect.

The risk to those who assist the Court by reporting the commission of egregious crimes is obvious. It is important that information can be provided in the knowledge that its source will remain confidential, unless the provider of the information decides to waive confidentiality. Like all Rules, this must however be consistent with the rights of the accused. While the principle expressed in Workshop 1, Rule A of the Paris report should be supported, it should be clarified to ensure that the
confidentiality does not affect the duty of the Prosecutor to disclose potentially exculpatory information to the accused sufficiently in advance of trial to prepare his or her defense.

Notification to Victims of the Opportunity to Participate in Article 15 and Article 19 Hearings

The Prosecutor's office, in consultation with the Victims and Witnesses Unit, should notify victims of the possibility of making representations to the Pre-Trial Chamber in the event that the Prosecutor seeks authorization to proceed with an investigation under Article 15(3) or in the event of a proceeding to determine jurisdiction or admissibility of a case under Article 19, unless the interests of justice or the protections of victims or witnesses preclude a general notification. Notification should provide victims with sufficient information to make their participation meaningful.

The Statute specifically provides that victims may "make representations...in accordance with the Rules of Procedure and Evidence" to the Pre-Trial Chamber in proceedings to authorize investigation and that they may "submit observations" in proceedings to determine jurisdiction or admissibility of a case. The Rules should establish procedures to give effect to these provisions.

Victims have an essential interest in seeing that investigations proceed and the Court is seized with the matters that produced their injuries. The Chamber's decision on investigation is one on which the satisfaction of all other victims' interest depends.

Likewise, the views of victims are likely to be particularly valuable to the Court in determining issues of jurisdiction and admissibility as
victims may possess crucial information as to the ability and willingness of relevant national authorities to genuinely investigate and prosecute. These matters, under the statutory framework, may be very difficult for the Court or the Prosecutor to ascertain independently.

There may be times, however, when the interests of justice or the need to protect victims and witnesses must override a general policy of wide notification to the entire class of victims. Particularly at the very preliminary stage, before an investigation has commenced, confidentiality may be crucial both to preserve the effectiveness of any investigation and to protect the security of potential witnesses. Article 15 hearings are not public but rather *ex parte* hearings. By the time the admissibility or jurisdiction of a case is at issue, the existence of the proceedings is not in itself likely to be as sensitive as at the stage of the Article 15 *ex parte* hearing. Nonetheless, the Rules should provide that where the public announcement or the provision of particular information would prejudice the integrity of investigations or the life or well-being of any person, these may be withheld by the Prosecutor, acting in consultation with the Victims and Witnesses Unit.

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**Manner of Participation/Intervention under Article 15 or 19**

The Rules should not seek to delimit the manner in which victims' representations or observations may be made to the Court, under either Article 15 or 19. Rather, they should use a flexible approach
that allows the Court to determine what form of intervention is appropriate in the particular case, consistent with the rights of the accused and the interests of justice.

The Statute establishes the key principle of victim participation at these critical stages of proceedings. Detailed and restrictive rules as to the manner of that participation are unnecessary, and will serve neither the interests of victims, nor those of the efficient administration of justice. If victim participation is not to be burdensome for the Court and result in delays to the administration of justice, it is critical that the Court retain control over its own proceedings. Moreover, the factors that the Court must take into account, including the interests of victims, will be each unique to each case. Human Rights Watch therefore urges that the Rules leave the flexibility for the Court to balance competing factors in the particular case.

Notification of a Decision Not to Investigate or Prosecute

When the Prosecutor decides not to go forward with an investigation, or not to proceed with a prosecution, the victims or others who provided information to the prosecutor, should be so informed. They should similarly be informed when the Prosecutor decides not to investigate or prosecute significant aspects of the conduct forming the basis of complaint.

If the Prosecutor decides not to investigate allegations made by victims it is essential that they be so informed. Workshop 1, Rule C of the Paris report, as reflected in Rule 5.3 of the Coordinators Discussion Paper on Part 5, should therefore be supported. This Rule should also apply when the Prosecutor decides to investigate certain allegations and not others. Similar rules should be established when he or she decides, having
investigated the matter, not to pursue a prosecution, or to prosecute certain crimes and not others.

In both the *Akayesu* and *Musema* cases before the ICTR, the Prosecutor failed to indict for rape despite strong evidence. In both cases, the indictment was amended after the trial had begun, a burden both for the defendant and for the victims. If the Prosecutor had informed the victims of the intention not to proceed, the opportunity to present additional information or arguments would have arisen at an earlier stage. While we recognize that the Prosecutor should not have to provide a detailed explanation of the reasons behind his or her strategic prosecutorial decisions, it is important that there be some basic accounting for failure to pursue an investigation in any significant aspect of the conduct that is the basis of complaint.

**VICTIMS AND PART FOUR OF THE STATUTE**

**The Victims and Witnesses Unit**
The Rules should provide a mechanism to implement the statutory provision for institutional victim support through the Victims and Witnesses Unit. The Rules should not seek to set out exhaustively the Unit's many functions, nor to limit the sort of assistance that may be appropriate in any particular case. They may however indicate the scope of the services that may be required of the Unit, covering the support and protection of witnesses as well as the facilitation of their participation in proceedings. The inclusion of any minimal list of functions in the rules must be clearly illustrative and not exhaustive, to allow the necessary flexibility to respond to the particular situation and the interests, needs or personal circumstances of the victims, witnesses or other individuals involved.

**The Role of the Victims and Witnesses Unit and Participation**

The Victims and Witnesses Unit will have a critical role in facilitating the participation of victims in ICC proceedings. Assisting victims to coordinate their representation will be particularly important where there are multiple victims, as will often be the case given the nature of many of the crimes within the jurisdiction of the ICC. As the Paris draft reflects, victims may also need very practical assistance with the application process. We believe that Workshop 2, Rule X of the Paris report provides a workable basis for a non-exhaustive description of the Unit's functions in respect of participation. In this Commentary we focus on one aspect of those functions that has until now been neglected in the Rules: notification to victims.

**Initial Notice**
The Victims and Witnesses Unit should be charged with ensuring that victims are made aware, as early as possible in proceedings, of the full range of possibilities for their access and intervention under the Statute and Rules. Victims should be informed at the outset of the services that the Victims and Witnesses Unit may provide. As at other stages, notification should be carried out in consultation with the Prosecutor's Office, taking into account possible jeopardy to investigations.

If the principle of victim participation enshrined in the Statute is to be meaningful, victims must know about ICC proceedings and the possibilities that exist for their involvement. In principle, this should be done as early as possible, as the interests of victims may be affected from the earliest stage and delay could be seriously prejudicial to those interests. However, the potential dangers of revealing information that would jeopardize on-going investigations must also be recognized. The Prosecutor should therefore enjoy a degree of discretion to control the timing of notification and the extent of it, but this function should be exercised in consultation with the Victims and Witnesses Unit.

**Manner of Notice**

The outreach or notice must be done in an effective and sensitive manner. The methods and procedures of outreach or notice should be determined by the Prosecutor's Office and the Victims and Witnesses Unit and not the Rules.

The organs of the ICC should seek at all times to reach all victims, and not only those educationally or financially advantaged in their access to information and the Court. Ideally, notice should be conveyed not only
by print media but by broadcast media and other means, as dictated by
the social circumstances of the particular country or communities in
question.

The staff of the Court should be sensitive to the risks to which
involvement or perceived involvement with the Court may expose
victims, from direct threats to their security to the dangers of
stigmatization, particularly in cases of sexual violence.

Notification in Advance of Key Decisions

Timely notification to victims is one of the most essential functions
which the Unit must fulfil. Unless countervailing interests demand
otherwise, victims should be notified in a timely manner- before the
decision that may impinge upon their interests takes effect.
Moreover, the notification should relay an adequate degree of
information to enable victims to understand the nature of
proceedings, the impact proceedings may have on their interests and
to allow victims to assess their potential contribution to
such proceedings.

Notification is an essential part of the procedural framework for victim
participation to be meaningful. Decisions which may offset victims' interests may arise at any stage in proceedings, beyond those stages where there are specific rules on victim participation in the Statute and Rules. A system of routine notification will ensure that they have the opportunity to avail themselves of the statutory provisions on participation and seek to have their views presented, before any potential damage to the interests they seek to protect.
The Unit, The Prosecutor's Office and Notification

The Rules should specify that the Unit's functions are without prejudice to the responsibility of the prosecutor to ensure that victims are appropriately notified, consistent with respect for the rights of the accused and the integrity of investigations. Decisions regarding notification should be taken in consultation with the Unit. The Rules should establish the principle of regular consultation between the Prosecutor's Office and the Victims and Witnesses Unit for the purpose of facilitating notification and the participation of victims. They should, however, recognize the confidentiality of dealings between victims and the Unit.

The central role of the Victims and Witnesses Unit in respect of victim participation should not undermine the responsibility of the Prosecutor's office. The Prosecutor's office will, in general, be the organ of the Court with the greatest knowledge of how any given case is proceeding. As such, it will have the greatest understanding of when issues arise that may affect victims' interests, and the dangers to the integrity of the investigation of untimely or inappropriate revelations. The Prosecutor's office must therefore assume principle responsibility for ensuring that victims are notified and provided with the information on which their meaningful participation depends. It may do so through the mechanism of the Victims and Witnesses Unit.

Given that there may be situations in which the interests of victims will diverge from the interests of the Prosecutor, it is important that there is another organ of the Court involved in decisions regarding notification. To safeguard the victims' interests, and ensure some check on the exercise of prosecutorial discretion, the Rules should ensure that decisions of the Prosecutor regarding notification should be taken in consultation with the Unit.
While the Rules should reflect that the discharge of the Unit's mandate and the effectiveness of the system of victim participation and protection require close coordination with the Prosecutor's Office, it should be clear, particularly in the event of any conflict of interest, that the Unit serves the interests of victims and witnesses independently of the Prosecutor's Office. Victims must be assured that their dealings with the Unit are confidential and the Rules should specify this.

**The Role of the Victims and Witnesses Unit and Protection**

The Victims and Witnesses Unit should be empowered to take measures for the protection of the integrity, privacy, and physical and psychological well-being of all victims and witnesses, consistent with the rights of the accused. While the Rules should not enumerate an exclusive list of functions or powers of the Unit, they should ensure that basic support services be provided by the Unit. These services should include, for example: confidential trauma counseling by appropriately qualified staff, including those experienced in dealing with victims of sexual abuse; medical care; arranging logistical support, such as transportation to the seat of the Court; legal counseling for trial preparation; and assistance with relocation of victims, witnesses, and their families, if they so desire. As noted above, the Rules should assure that victims' dealings with the Unit are confidential.

**Role of the Registry in Public Outreach and Education**
The Registry should list among its functions public education and outreach, particularly in the places where the crimes under the Court's jurisdiction have occurred, with a view to enhancing transparency and public understanding of the work of the Court.

Dissemination of information concerning the Court's work is key not only to facilitate information gathering and victim participation, but also to ensure that broader categories of victims than those who wish to participate, as well as perpetrators, affected societies and national authorities, understand the work of the Court.

The Court's proceedings—the investigation, public acknowledgment of atrocities and punishment of those responsible; can themselves constitute a critical form of redress for victims and the societies of which they form part, if they feel able to participate in the process and are kept sufficiently informed of it. The ICC is not a truth commission and its prime responsibility is establishing accountability for individual perpetrators of atrocious crimes. However, the important contribution that ICC proceedings can make toward redress for victims, as a natural by-product of its work, should not be ignored.

Moreover, broadly disseminated information is essential to the transparency of the institution, its credibility and ultimately its effectiveness. The void created where information is lacking provides fertile breeding ground for suspicion and for misinformation to be disseminated by those whose ends it may serve to discredit the Court. If not countered effectively, this could result in the reluctance of individuals, or of national authorities, to cooperate with the Court and could seriously impede the Court's ability to function.

The experience of the ICTY underscores the importance of broad and effective outreach. A recent ICTY "Outreach Program Proposal" identified a gap between international justice and "its beneficiaries—victims of the conflict…" The document
recognizes that "many feel that the International Tribunal is remote and disconnected from the population and that there is little information available about it. Such views are exploited by authorities that do not recognize or cooperate with the International Tribunal, thereby damaging efforts to foster reconciliation and impeding the work of the Office of the Prosecutor." The document notes that "[i]t is therefore critical to the success of the International Tribunal that the populations of the region are informed about the work of the International Tribunal and understand its significance."

While the Rules need not elaborate detailed provisions on public outreach and education, the underlying principle and the responsibility of the Registry should be reflected.

PART SIX: THE TRIAL

Human Rights Watch set out extensive recommendations on Part Six in our Commentary to the second Preparatory Commission. The only one of these issues which was not fully addressed at that session was evidence in cases of sexual violence.

Evidence In Cases of Sexual Violence

Consent
Before any evidence of consent in cases of sexual violence is admitted, the Trial Chamber must be satisfied by the defense, *in camera*, that the evidence is relevant and credible.

Given the prospect for harassment and intimidation of witnesses, a higher threshold should apply to the admissibility of evidence of "consent" than to other evidence. The Court should therefore be satisfied that the evidence is both relevant and credible. The Rules should ensure that the Court make the prior determination of admissibility of such evidence *in camera*.

It should be noted that Rule 6(5)(a) sets out coercive circumstances where consent cannot exist. In such circumstances, the Court may determine that evidence as to consent is therefore irrelevant and inadmissible. Human Rights Watch supports the view that coercive circumstances should be reflected in the Elements document.

**Prior Sexual Conduct**

Evidence relating to the prior sexual conduct of the victim should not be admissible save in the most exceptional circumstances where the Trial Chamber, sitting *in camera*, so decides. In no circumstances should evidence of prior sexual conduct be admitted where it is presented for the sole purpose of attacking the character and credibility of the victim. Before admitting evidence, the Chamber should be satisfied that the evidence is highly relevant and credible, and is essential for a fair trial.

The ICC rules of evidence relating to rape and other crimes of sexual violence should categorically reject sexual stereotyping and discrimination associated with the public disclosure of victims' sexual history and the introduction of sexual innuendo into the fact finding process. It is essential to specify evidentiary rules for gender-based
crimes that ensure the effective adjudication of such crimes that safeguard the privacy of victims against undue invasions and that insulate proceedings from invidious notions that women's mode of dress or lifestyle implies consent to sexual relations or is relevant to the determination of her credibility. It also essential that the ICC ensure that the accused's right to prepare a defense is unequivocally protected.

Prior sexual conduct will almost never be relevant to the defense case. Such evidence has often been used to intimidate and stigmatize victims of sexual violence. There should therefore be a general presumption that evidence as to prior sexual conduct is inadmissible. The Court should, however, have the power to admit such evidence in specific exceptional circumstances, where it is highly relevant, credible, essential to the accused's defense, and is not being submitted for the purpose of attacking the character of the victim.

For example, the narrow circumstances where evidence of prior sexual conduct may be potentially admissible include (i) specific instances of sexual conduct by the victim, essential to prove that a person other than the accused was the source of semen, injury or other physical evidence, or (ii) where evidence of consent is relevant, specific instances of sexual conduct with the accused, closely related in time to the alleged offence, offered by the accused to support a defense of consent or mistake of fact as to consent.

With regard to (ii) above, it should be recalled that the existence of prior consensual relations does not itself prove the existence of consent on later occasions, nor does it justify the presumption by the accused as to consent by the victim on the later occasion. However, where the Court considers that prior sexual relations between the victim and accused is an essential element of proof that, in light of all the facts of the particular case, is relevant to establishing consent or mistake of fact as to consent, it should have the power to admit the evidence on an exceptional basis. It should be noted that evidence of prior sexual conduct with persons other than the accused is entirely irrelevant to the question of consent.
The added safeguard that the defense must satisfy the Court in camera before any evidence is admitted provides protection for the victim from potential re-traumatization or emotional distress while safeguarding the accused's right to present an effective defense.

Finally, it should be noted that even in circumstances where such evidence is deemed admissible, the Court should hear the evidence in camera and order that the record of proceedings not be made public.

PART NINE: STATE COOPERATION

The full cooperation of states at every stage of the criminal process is critical to the effectiveness of the International Criminal Court. The Court will depend on states to carry out the majority of its investigative functions, to arrest suspects and bring them before the Court. Solid rules on state cooperation therefore have an important role in ensuring that the Court's work is not rendered meaningless by delay, artificial obstructions, inefficiency or the lack of adequate implementing legislation. As in other areas, the Rules should be informed by the practice of state cooperation with international bodies, in particular the ad hoc international criminal tribunals for former Yugoslavia and Rwanda.

**Time Limits**
Time limits will need to be set for a State Party's cooperation with the Court. The preferable solution would be for the Court to set the limits when it issues specific requests for cooperation. The Court has the inherent power to impose deadlines for compliance. Thus, an express provision in the Rules that the Court shall establish reasonable time limits for compliance is important to avoid confusion or obstruction with the operation of the Court on this critical issue.

Protecting legitimate interests: justice, states and suspects

Timely cooperation is essential to ensuring speedy and efficient justice. In the context of criminal prosecutions where testimonial or other evidence may be destroyed, lost, or diminished in value over time, delay may entirely defeat justice. The ICC's effectiveness in bringing justice for the worst international crimes will be vitiated if states are given license to deny compliance with its requests through delaying tactics. Rules on timely cooperation will ensure that they are not given such license.

The interests of States Parties will also be served by dispelling doubt as to the time frame within which it is expected to comply with requests. If the limits imposed by the Court or in the Rules are unreasonable in the particular case, a state will be in a position to explain the difficulty and request an extension.

A procedural rule establishing, or preferably leaving the Court to establish time limits will also encourage States Parties to establish national procedures to ensure expeditious processing of cooperation requests.

Clear rules on timely cooperation are also critical for safeguarding the rights of suspects. Undue delay in States Parties' cooperation with the
Court might also delay or prejudice the investigation and prosecution of crimes. Delay might, for example, directly impact on the length of pre-trial detention and ultimately prejudice the right to be tried without undue delay, or result in the loss of critical exculpatory evidence.

**Limits imposed in the Rules or by the Court**

The Rules may themselves establish provisional time limits. They may provide for the State Party to cooperate as soon as possible, and in any event within a short but reasonable specified period, absent an extension from the Court. This approach can be found in certain international instruments which establish time limits for cooperation in the instrument themselves, thereby providing greater precision as to the nature of the States Parties obligations. If the time limits are established in the Rules, they should be short and flexible. The Court should be able to tighten or expand the time frame in exceptional circumstances where the interests of justice so require.

Human Rights Watch suggests that an appropriate alternative to codification of time limits would be to provide that the Court should establish the limits upon making a request in any case. This would facilitate maximal flexibility. It would allow the Court to accommodate the particular exigencies of the case, and allow for exchanges between the state and the Court, aimed at resolving problems related to cooperation, as anticipated in the Statute. This approach corresponds with the practice of other international judicial bodies and, most significantly, the *ad hoc* tribunals for Former Yugoslavia and Rwanda. In the context of the issuance of binding orders for documents, the ICTY has held that it has the inherent power to set "reasonable and workable" deadlines for compliance. The Tribunal's experience testifies to the
importance of flexibility in the imposition of time limits in the area of state cooperation.

Inherent powers of the Court

In this respect, it is important to note that the power of the ICC to set time limits is also inherent in its power to make requests and to specify the manner in which requests should be executed (Article 99(1)). The obligation of States Parties to respect them is part of their duty to "cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court" (emphasis added). While the power to issue binding time limits is not dependent on explicit inclusion in the Rules, the Statute's lack of specificity as to standards of timeliness does make this an appropriate and necessary area for clarification.

COOPERATION CONTINGENT ON STATE CONSENT OR WAIVER OF IMMUNITY

Article 98

The Rules should establish a procedure that provides for the Court to determine the applicability of article 98 in any particular case. To this end, States seeking to rely upon article 98 should seek a determination of the Court immediately.

Article 98 gives rise to complex issues of interpretation relating to the duties of States Parties to waive immunities and to provide consent in
order to facilitate cooperation with the Court. This recommendation does not address those interpretive issues. It simply seeks to clarify that if any potential conflict arises concerning the international obligations referred to in Article 98 and the obligations under the Statute, a procedure is in place to resolve the matter. In the event of any such issue arising, the requested state should bring the issue to the Court's attention immediately. It must be clear that the matter would then fall to the Court to determine whether a conflict exists and whether the waiver or consent referred to in Article 98 is necessary in any particular case.

The mandate of the Rules is to provide a procedural framework for the operation of the statutory provisions. The power of the Court to determine the applicability of Article 98 emanates not from the Rules but from its inherent functions as the authoritative interpreter of the Statute, and of States Parties' obligations under it. In this capacity, it must be the Court that determines the extent of a state's obligations in the light of a potential conflict with other obligations referred to in Article 98. The ICC, as an international court charged with the application of international law, is well placed to make such determinations so far as they affect the obligations of States Parties to the Court. If Article 98 is not to constitute an escape clause that can be invoked unilaterally to avoid compliance, the Rules must establish a procedure for the Court to make the necessary determinations as to the applicability of Article 98 in the particular circumstances.