Submission No. 245

Joint Standing Committee on Treaties report to the Commonwealth Parliament on the 1998 Statute for an International Criminal Court based on analysis of 231 submissions

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Terms of Reference

To inquire into and report to Parliament on whether it is in the national interest for Australia to be bound to the terms of the Statute for an International Criminal Court.

Conclusions and Recommendations

The International Criminal Court ('ICC') arguably represents the most important contribution to international humanitarian law since the 1977 Additional Protocols to the Geneva Conventions.

Arguments for and against Australia ratifying the Rome Statute raise concerns that frequently lead proponents of each position to speak past each other.[1] Supporters contend that Australia must do all it can to prevent mass atrocities and end the impunity of perpetrators. For opponents, this imperative is balanced against and ultimately outweighed by the need to protect Australian liberties, sovereignty and constitutional processes from any encroachment.

After due consideration of the concerns pertaining to the ICC, and careful analysis of the Rome Statute, the committee is confident that it is in Australia's national interest to be bound to the terms of the Statute for an ICC. Australia should be among the first 60 ratifiers, since this group chooses the Court's 18 judges, its prosecutor and deputy prosecutor.[2] If not included, Australia will be unable to vote. However as a signatory to the treaty, it may attend as an observer.

There are numerous logical and rational reasons for supporting the ICC but one compelling reason stands out – many heinous and egregious violations of human rights go unpunished. It is a rueful fact that "a person stands a better chance of being tried and judged for killing one human being than for killing 100,000".[3] Australia chairs the Likeminded Countries, a group of almost 70 States united to promote the Court's establishment.[4] That commitment should be continued with ratification of the Rome Statute.

Recommendation 1

The committee commends the Australian Government for its contribution to the development of the ICC and recommends that the Government ratify the Statute of Rome as soon as possible.

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[1] See Slaughter, A. 1999. 'Memorandum to the President' in Toward an International Criminal Court? ed. A. Frye. New York: Council on Foreign Relations: 9

[2] See submissions 7, 20, 24, 41, 190, 224.

[3] José Ayala Lasso, former United Nations High Commissioner for Human Rights. 1999. Rome Statute of the International Criminal Court: Overview. URL: <http://www.un.org/law/icc/general/overview.htm>

[4] See Joint Standing Committee on Foreign Affairs, Defence and Trade. 2001. Australia's Role in United Nations Reform. Canberra: The Parliament of the Commonwealth of Australia: 162

Recommendation 2

The committee recommends that the Australian Government pursues a clarification of the outstanding issues of concern with reluctant member States and uses its good offices to persuade member States to ratify the Statute of Rome.

Recommendation 3

Australia should not accept the provisions of Article 124 to 'opt out' of the Court's jurisdiction, and should exert appropriate diplomatic pressure on other nations to also not utilise this provision.

History says, Don't hope
On this side of the grave,
But then, once in a lifetime,
The longed for tidal wave
of justice can rise up
And hope and history rhyme.[5]

Background to the International Criminal Court

1.1 Armed conflict and serious violations of human rights have been an ignominious hallmark of the twentieth century.[6] Generally, the world community has done little for the millions of victims or their families. A culture of impunity appears to have prevailed, with few perpetrators having been brought to justice. This is particularly unfortunate since future conflicts are often rooted in the failure to repair past injury.[7] Unless the injuries suffered by victims are redressed, resentment remains and hostilities frequently re-erupt.

1.2 The need for an ICC reflects the global desire to replace such impunity with accountability.

1.3 Establishing a forum of international criminal justice gained momentum in 1990 when the UN General Assembly invited the International Law Commission to consider the issue.[8] As requested, the ILC delivered a revised Draft Statute in 1994. Encouraged by the favourable public response to the ad hoc tribunals for Yugoslavia and Rwanda, the Assembly set up a 'preparatory committee' in 1995 to discuss the document.[9] The Committee met for five gruelling sessions between 1996 and 1998.[10] This paved the way for a treaty conference.

1.4 The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court took place in Rome in 1998. The participants numbered 160 States, thirty-three intergovernmental organizations and a coalition of 236 NGOs. After weeks of acrimonious negotiations, the conference adopted the Rome Statute of the ICC by vote of 120 in favor, 7 against and 21 abstentions.[11]

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[5] Heaney, S. 1998. 'Chorus' in Opened Ground: Poems, 1966-1996. London: Faber & Faber: 217

[6] It is estimated that there have been some 250 international and regional armed conflicts since WWII which have produced an estimated 170 million casualties. See submission 34.

[7] See Lee, R. 1999. 'Introduction: The Rome Conference and its Contributions to International Law' in The International Criminal Court: the Making of the Rome Statute. ed. United Nations Institute for Training and Research. The Hague: Kluwer Law International: 1

[8] Resolution 45/41. See Beigbeder, Y. 1999. Judging War Criminals: the Politics of International Justice. New York: Macmillan Press: 188

[9] The Security Council established the International Criminal Tribunal for the Former Yugoslavia in 1993 (Resoltuion 827) and the International Criminal Tribunal for Rwanda in 1994 (Resolution 995). See Morton, J. 2000. The International Law Commission of the United Nations. Columbia: University of South Carolina Press: 54

[10] See Beigbeder, *op cit.*, 191

[11] See Arsanjani, M. 1999. 'Developments in International Criminal Law: The Rome Statute of the International Criminal Court' in American Journal of International Law. 93 A.J.I.L. 22: 22

1.5 The Court will come into existence once 60 States have ratified the treaty (Art. 126). As of 1/10/01, the ICC has 139 signatures and 38 parties.[12]

1.6 Crawford notes that the combination of three crucial elements has made such a court possible.[13] First, the large scale breakdown of state order in particular societies, leading to massive violations of human rights, such as occurred most dramatically in the former Yugoslavia and Rwanda. Second, the intensive and detailed media coverage of atrocities has demanded that international crimes be addressed. Third, support is now found for action in the Security Council associated with an unwillingness by any permanent member to veto such action.

1998 Rome Statute of the International Criminal Court

2.1 The Statute comprises a preamble and 128 articles across thirteen parts.

2.2 Part 1 (Articles 1-4) establishes the Court as a permanent institution (Art. 1) with headquarters in The Hague (Art. 3). It has international legal personality (Art. 4) and an open-ended relationship with the United Nations (Art. 2).

2.3 Jurisdiction, admissibility and applicable law are covered in Part 2 (Articles 5-21).

2.4 Part 3 (Articles 22-33) contains general principles of criminal law, such as non-retroactivity of criminal legislation, the age of responsibility, command responsibility and superior orders. The provisions of Part 4 (Articles 34-52) establish the ICC's composition and administration, which is composed of the Presidency, the Office of the Prosecutor, the Registry, the the Chambers.

2.5 Part 5 (Articles 53-61) governs procedures in the investigation and prosecution stage, while Part 6 (Articles 62-76) provides for the trial process. Part 7 (Articles 77-80) deals with penalties, including the determination of sentence, the applicable penalties and the creation of a trust fund for the benefit of victims. Appeal and revision procedures are addressed in Part 8 (Articles 81-85).

2.6 International cooperation, judicial assistance and enforcement of Court decisions are outlined in Parts 9 (Articles 86-102) and 10 (Articles 103-111).

2.7 Assembly of States Parties, which will provide management oversight to the Court, are covered in Part 11 (Article 112). Financing is addressed in Part 12 (Articles 113-118), followed by the Statute's final clauses in Part 13 (Articles 119-128).

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[12] United Nations. 2001. Rome Statute of the International Criminal Court: Ratification Status. URL: <http://www.un.org/law/icc/statute/status.htm>

[13] Cited in Morton, *op cit.*, 54

Submissions to the Joint Standing Committee on Treaties

3.1 Under the committee's terms of reference, anyone with an interest in the ICC was invited to make a written submission to the inquiry.

3.2 Of the 231 submissions made to the committee, 223 form the basis of this report.[14]

3.3 183 submissions, or 82%, argued it is not in Australia's national interest to ratify the Statute of the ICC. The vast majority of these opposing submissions came from individuals, with only 10 (5%) on behalf of organisations. These groups against ratification were: National Civic Council (x 2), Endeavour Forum, Council for the National Interest, Festival of Light, Pioneer Branch of the National Party, Youth Concerned, Saltshakers, Social Justice Committee of Our Lady of the Rosary Parish, and the Presbytery of Benalla.

3.4 36 submissions, or 16%, argued it is in Australia's national interest to ratify the Statute of the ICC. In contrast to the opposing side, the majority (56%) of those supporting ratification were organisations. These 20 included submissions from such notable groups as Amnesty International Australia, International Commission of Jurists, Australian Red Cross (x 2), Law Council of Australia, and World Vision Australia.[15]

3.5 Four submissions, or 2%, contained general information on the Statute of the ICC, without endorsing or opposing ratification.

3.6 Prima facie, there appears to be a strong majority opposing ratification. However, the committee believes such a conclusion cannot readily be reached. Although there is numerical weight against the Statute, this belies the major disparity in NGO support. For instance, the submission from the Coalition for an International Criminal Court was written on behalf of over 1000 members.[16] Further, the 'individual' designation is somewhat misleading. Submission 204, for example, was counted as a single individual's submission despite being from 12 university students.[17]

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[14] Eight submissions were either confidential or missing from JSCOT's website: 40, 42, 73, 103, 129, 146, 185, 209.

[15] The other NGOs suppporting ratification were: Coalition for an International Criminal Court, NSW Bar Association, Australiasian Lawyers for Human Rights, Human Rights Watch, United Nations Association of Australia, Legacy Coordinating Council, UNICEF Australia, Refugee Council of Australia, Deir Yassin Remembered, Australia Defence Association, Australian Council of Trade Unions, Australian Bahai Society, International Commission of Jurists (Queensland Branch), and the Sydney University Law School Amnesty Group.

[16] See submission 17.

[17] Such categorisation was necessary for consistency.

Arguments Supporting and Opposing Ratification

4.1 The fundamental motivation for those supporting the ICC is the need to hold accountable those individuals who commit genocide, crimes against humanity and war crimes. Those who perpetrate 'the most serious crimes of concern to the international community' should not escape justice. This epistemological foundation received, at least implicitly, unanimous support from the submissions. Becoming a party to the ICC would demonstrate Australia's resounding commitment to human rights issues and the rule of law.[18] Further, the relationship between territorial aggression and other crimes against humanitarian law is clear.[19] Ratification would not only respond to the suffering of millions, but arguably enhance international peace and security.[20]

4.2 Most perpetrators of atrocities have believed that their acts would go unpunished.[21] Amnesty Intenational's experience indicates that the impunity of perpetrators is the single most important factor leading to continued human rights abuses.[22] A significant aim of the ICC is accordingly to deter those in a position to conduct such crimes. This goal is explicitly stated by the Attorney-General and Minister for Foreign Affairs:

> One of the Court's prime roles is deterrence: it is designed to deter individuals from committing these kinds of crimes.
>
> . . .
>
> The Court's most powerful deterrence will be through the pressure it places on States themselves to investigate, prosecute and punish genuinely such crimes when committed on their territory or by their nationals abroad.[23]

The ICC's possible deterrent effect has been attacked for its lack of empirical evidence.[24] However, even if the Court prevents only a fraction of future atrocities, the savings in financial terms would be enormous, while the impact for human beings would be immeasurable.[25]

4.3 Neither crimes against humanity nor genocide are criminalised under Australian law.[26] Although domestic legislation is an option, such a response could merely deter crimes in the region. Achieving the requisite degree of deterrence for the ICC to make a difference to international security requires a

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[18] See submissions 2, 7, 13, 16, 17, 22, 23, 24, 26, 29, 33, 34, 35, 83, 96, 104, 152, 170, 189, 190, 202, 204, 212, 217, 219, 224, 231.

[19] See submission 16.

[20] For instance, crimes against humanity are among the principle causes of large-scale movements of people, which in turn places pressure on neighbouring countries. Similarly, war crimes exacerbate conflict by increasing the scale of violence and reducing the prospect of a negotiated solution. See submission 41.

[21] In spite of the two recent ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda, most war criminals of the twentieth century have not been tried for their acts. See United Nations, 1999, *op cit.*

[22] See submission 104.

[23] Submission 41.

[24] See Bolton, J. 1999. 'Reject and Oppose the International Criminal Court' in ~~Toward an International~~ Criminal Court? ed. A. Frye. New York: Council on Foreign Relations: 45

[25] See submission 17.

[26] See submission 26.

globally coordinated effort.[27] The ICC's universal coverage would make the Court a far more powerful tool for removing impunity in a world in which Australian's live, work and travel.

4.4 One anxiety is that failure to ratify would send an unacceptible message that Australia is unwilling to bring to justice the perpetrators of atrocities.[28] Mr Scales posits that it:

> would justify other countries ignoring any comment Australia may wish to make in relation to human rights issues and, further, may indicate that Australia is not concerned as to what the rest of the world thinks about how Australia deals with human rights issues generally.[29]

While the committee believes this is overstated, Australia's views on international criminal law are more likely to hold greater weight if this country is a party to the ICC.

4.5 Although welcoming the ideals behind the ICC, several submissions claimed there is no need for such a Court.[30] A permenant international criminal tribunal is viewed as "unjustified and not warranted",[31] because its purpose is adequately performed at present by either the International Military Tribunal,[32] our judicial system,[33] Interpol[34] or the Constitution.[35] The committee finds no basis for these claims. The establishment of tribunals in the former Yugoslavia and Rwanda, to some, undermines the necessity for a permenant international court:

> I believe that separate temporary courts set up for specific investigations are more appropriate and pose a lesser threat to nations and their sovereignty.[36]

Further, it has been argued that the approach of the ICC – which operates through vindication, punishment and retribution – is not always appropriate, as evidenced by the Truth and Reconciliation Commission established in South Africa.[37]

4.6 Those supporting the ICC responded fervently by highlighting the drawbacks of ad hoc tribunals.[38] First, such bodies provide selective justice, with critics questioning why tribunals have not been established for Iraq, Cambodia, Libya, Haiti, East Timor and elsewhere.[39] The major reason, labelled 'tribunal fatigue', is that establishing ad hoc courts is politically exhausting for

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[27] See submission 41.
[28] See submissions 2, 17, 231.
[29] Submission 2.
[30] See submissions 36, 65, 97, 111, 138, 175.
[31] Submission 175.
[32] See submission 36.
[33] See submission 65.
[34] See submission 97.
[35] See submission 111.
[36] Submission 138.
[37] See Bolton, *op cit.*, 47-50
[38] See submissions 7, 16, 24, 29, 35, 41, 104, 204, 219, 224.
[39] See Morton, *op cit.*, 65

members of the Security Council.[40] Second, it is extremely time consuming to build each new country-specific tribunal from scratch.[41] It can take years to formulate its mandate and terms, appoint people with necessary expertise and develop it into an effective and credible institution.[42] Not only are victims forced to wait longer for justice, but the risk increases that evidence may be destroyed, witnesses may no longer be traceable, or perpetrators have disappeared.[43] In contrast, a permenant ICC can act quickly. Third, courts set up to deal solely with specific conflicts of specific regimes are open to a charge of lacking impartiality or 'victors justice'.[44] This point was elaborated on by Kofi Annan at a ceremony adopting to Rome Statute in 1998:

> Until now, when powerful men committed crimes against humanity, they knew that as long as they remained powerful, no earthly court could judge them. Even when they were judged – as happily some of the worst criminals were in 1945 – they could claim that this was only happening because others have proved more powerful, and so are able to sit in judgement over them. Verdicts intended to uphold the rights of the weak and helpless can be impuhned as 'victor's justice'. Such accusations can also be made, however unjustly, when courts are set up only *ad hoc*, like the tribunals in The Hague and in Arusha[45]

Finally, the fact that ad hoc tribunals are only retrospectively created for some atrocities restricts any deterrent effect they may have.[46]

4.7 A related concern is the pecuniary expense to Australia if it becomes a party to the Rome Statute. Articles 115 and 117 require States Parties to make a contribution to the Court's expenses in accordance with an agreed scale of assessment. Australia's contribution is estimated at approximately $A10 million per annum.[47] Arguably, this could be better spent, with one submission suggesting "defence, education, health, transport or saving our environment".[48]

4.8 Conversely, other submissions argue it is in Australia's financial interest to ratify. The ICC would remove the unforeseen cost of ad hoc tribunals and, if it is successful in deterring crimes, Australia will save on the expense of reconstruction, reconciliation or peacekeeping measures in the aftermath of conflict.[49]

4.9 The committee notes that for FY 1999-2000, Australia contributed $A2.069 million to the International Criminal Tribunal for the former Yugoslavia, and $A1.852 million to the International Criminal Tribunal for Rwanda.[50] Whether another $A10 million is, or should be, available annually for a permenant

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[40] See United Nations, 1999, *op cit.*
[41] See Bolton, *op cit.*, 19; Wedgwood, R. 1999. 'Improve the International Criminal Court' in Toward an International Criminal Court? ed. A. Frye. New York: Council on Foreign Relations: 59
[42] See submission 7.
[43] See submission 41; United Nations, 1999, *op cit.*
[44] See submission 16.
[45] Joint Standing Committee on Foreign Affairs, Defence and Trade, *op cit.*, 168
[46] See submission 104.
[47] See submission 11.
[48] Submission 36.
[49] See submissions 29, 104.
[50] See Joint Standing Committee on Foreign Affairs, Defence and Trade, *op cit.*, 210

Court is a political decision. However, if the ICC is likely to fulfill its role, the committee agrees that "this is a small price to pay to help achieve greater peace and security across the world".[51]

4.10 A range of concerns about the Rome Statute itself have been brought before the committee. One of the most reiterated is that the crime definitions are vague and ambiguous.[52] Article 6 defines genocide in terms identical to Article II of the Convention on the Prevention and Punishment of the Crime of Genocide.[53] Although the least controversial crime discussed at the Rome Conference, there are worries about its breadth:

> the loose definition of genocide, for example, would give rise to many vexatious or frivolous actions that would not be in the wider interest of the Australian community.[54]

In particular, submissions express concern over its possible application to birth control measures[55] or the treatment of Aborigines,[56] and the inclusion of 'serious . . . mental harm to members of the group'.[57]

4.11 The committee notes that birth control, even when imposed by law, can only count as genocide if it is imposed by discriminatory measures motivated not for health or population control, but as a means for extinguishing a recognised group.[58] Concerns that past Aboriginal policies may be brought before the ICC as 'genocidal' ignore that the Court's jurisdiction is non-retrospective. Finally, the committee believes that anxiety about 'serious mental harm' overlooks that it must be accompanied by an intent to destroy the group.

4.12 Similarly, some fear that crimes against humanity "are so loosely defined as to be capable of unlimited expansion".[59] Article 7(1)(h) – the offence of persecution – has attracted particular attention.[60] The committee rejects these interpretations. Generally, the articles on crimes against humanity are credible, up to date and strictly, rather than broadly, defined.[61] Given the 'widespread or systematic' test, the requirement for discriminatory intent and the necessity of

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[51] Submission 104.

[52] See submissions 1, 3, 4, 11, 19, 30, 49, 50, 108, 124, 151, 159, 168, 174, 176, 177, 180, 183, 184, 186, 188, 192, 203, 210, 211, 216, 222, 225, 227, 228, 229, 231.

[53] Only the words 'For the purpose of this Statute' were added, in order to bring the structure of the article in line with the other articles containing definitions of crimes. See Hebel, H. & Robinson, D. 1999. 'Crimes within the Jurisdiction of the Court' in The International Criminal Court: the Making of the Rome Statute. ed. United Nations Institute for Training and Research. The Hague: Kluwer Law International: 90

[54] Submission 183.

[55] See submissions 174, 203.

[56] Particular mention was made of *Nulyarimma & Ors v Thompson*, in which the claimants argued they had suffered extreme mental stress and as a result had been subjected to 'genocide' at the hands of the Prime Minister and Federal Parliament. See submissions 1, 11, 30, 108, 159, 168, 192, 227, 229.

[57] See submissions 19, 50, 151.

[58] See Robertson, G. 1999. Crimes Against Humanity: the Struggle for Global Justice. London: Allen Lane: 210

[59] Submission 228.

[60] See, for instance, submissions 1, 19, 30.

[61] In fact, the definition was criticised by NGOs at the Rome Conference for being too narrow. See Robertson, *op cit.*, 211

mens rea, it is very unlikely the Article 7(1)(h) could be expanded beyond its intended coverage.

4.13 Another common criticism of the Rome Statute is that, by allowing voluntary contribution of funds (Art. 116) or gratis personnel (Art. 44(4)) from NGOs, the Court will not remain unbiased.[62] The Council for the National Interest spoke of the dangers of the latter:

> it is not difficult to imagine that many of these 'gratis personnel' will be supplied by well funded international NGOs who are hostile to traditional values. An independent prosecutor's office free from any real government control is dangerous enough. An independent prosecutor's office staffed by NGOs with ideological axes to grind is positively frightening.[63]

4.14 This attack on the Court is innately linked to another, namely that the ICC is liable to politicisation or social engineering agendas.[64] Submissions expressed the view that the ICC would be used for politically motivated prosecutions, with citizens of certain countries being inequitably targetted for investigation. Ironically, it is the prosecutor's lack of political accountability that gives rise to social engineering concerns. There are fears that the ICC's neutrality may be hijacked by indigineous groups, homosexuals, or abortionists, while others "are concerned about the feminist bias and ideology that would pervade the Court".[65]

4.15 Additionally, claims are made that the Statute lacks procedural fairness. Submissions protest that an accused is denied the right to a trial by jury, the right of a trial to be public so that justice may be seen, and the right to cross-examine all witnesses for the prosecution.[66] Finally, the penalties imposed by the Court are described as "excessive, draconian and tyrannical".[67]

4.16 The committee rejects these criticisms. Numerous measures assure the Court will not operate in a political manner, nor be motivated by social agendas. Primarily, the high standards of qualification for appointment as judge or Prosecutor (Articles 36, 42), combined with the international scrutiny permitted by the Court's public proceedings, will minimise the possibility of political appointments. The chief prosecutors of the Yugoslavia and Rwanda War Crimes Tribunals have exemplified the integrity and professionalism expected. Even if these measures were insufficient, other safeguards exist. For example, the prosecutor cannot even begin a prosecution without the approval of two separate panels of judges and the possibility of appeal to a third (Art. 61). Moreover, two-thirds of the governments that join the court can remove a judge for misconduct, and a simple majority can remove the chief or deputy

[62] See submissions 1, 5, 19, 30, 138, 148, 151, 156, 159, 163, 171, 180, 227.
[63] Submission 19.
[64] See submissions 4, 21, 29, 30, 122, 138, 158, 159, 164, 184, 191, 200, 203, 206, 208, 211, 222, 225, 227.
[65] Submission 4. Also see submissions 30, 184.
[66] See, for instance, submissions 30, 200.
[67] Submission 124. Also see submissions 159, 164, 166, 181, 210.

chief prosecutor (Art. 46). The ICC is far from the unaccountable and ideological institution that some critics have decried.[68]

4.17 The committee is also satisfied that the ICC upholds the highest standards of procedural fairness.[69] The accused's rights are comprehensive and extensive, including a presumption of innocence (Art. 66), proof required beyond reasonable doubt, a right to know the charges against them, a right to be tried without undue delay, a right to counsel, a right to present evidence, and a right to silence (Art. 67). In fact, the NSW Bar Association is satisfied that

> the combination of the Statute and its draft rules provide probably the most sophisticated and comprehensive codified right to a fair trial of any court system in the world.[70]

Article 77 provides that for the worst offences life imprisonment should be imposed, while in other cases, sentences may be up to 30 years. Given that the ICC deals with 'the most serious crimes of concern to the international community', the committee believes such penalties are not excessive, but fitting.[71]

4.18 Other criticisms of the Statute include the inability of Australia to 'opt out' of ICC jurisdiction,[72] and a concern that there

> are no apparent safeguards which would prevent the jurisdiction of the ICC being expanded over time without the acceptance of Australia so as to exceed the proposed ambit.[73]

The committee finds neither argument persuasive. Notwithsanding no reasonably foreseeable circumstance in which Australia would wish to exclude jurisdiction, Art. 124 of the Statute allows a seven year opt out period for war crimes. Further, in the event that the Statute was amended contrary to our national interest, Australia may withdraw from the ICC with immediate effect by giving notice no later than one year after the entry into force of such amendment (Art. 121).

4.19 Irrespective of concerns specific to the Rome Statute, many submissions were against the ICC because of the nature of its interaction with Australia.

4.20 Some argue that becoming a party to the ICC would violate Chapter III of Australia's Constitution.[74] The Commonwealth Parliament has power to implement the Statute pursuant to its 'external affairs' power, s 51(xxix), which is 'subject to this Constitution', including, of course, Chapter III thereof. The committee sought the advice of George Winterton, Professor of

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[68] See Roth, K. 1999. 'Endorse the International Criminal Court' in ~~Toward an International Criminal~~ Court? ed. A. Frye. New York: Council on Foreign Relations: 29

[69] See submissions 20, 22, 23, 24, 26, 31, 41, 202, 217, 224.

[70] Submission 20.

[71] Given the Statute's humanitarian foundation, its eschewment of the dealth penalty is appropriate.

[72] See submission 153. The absence of an 'opt out' provision is one of the primary objections of the United States to the Rome Statute. See Wedgwood, *op cit.*, 75

[73] Submission 203.

[74] See submissions 1, 30, 51, 56, 82, 90, 120, 138, 163, 175, 198, 199, 227, 228, 229, 231.

Law at the University of New South Wales, on whether the ICC would face constitutional impediment:

> To my knowledge, the only judicial consideration of an international tribunal's compatibility with Ch. III is that of Deane J in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 627 in which his Honour remarked (*obiter*) that Ch. III would not apply to such a tribunal because it would be exercising the judicial power of the international community, not that of the Commonwealth.[75]

Although Professor Winterton opines that "it is quite possible that the High Court would differ from Deane J on this issue", the committee believes his Honour's interpretation is convincing. The ICC is totally independent of Chapter III of the Constitution and does not affect the delivery of justice in Australia.[76]

4.21 Anxiety that the ICC would abrogate Australian sovereignty was the most frequent issue brought before the committee.[77] D Obrien typified this view with his belief that "the only law we want in Australia is our own Australian law – drawn up by Australians for Australians, in Australia".[78] For many, it was their sole concern – for instance, a submission reproduced in full:

> Dear Sir,
> I oppose the signing of the treaty to ratify the 1998 Statute for the International Criminal Court by Australia.
> This would be the surrender of national sovereignty of Australia.
> Yours sincerely,
> Douglas Beaumont[79]

It has also been contended that the infringement of sovereignty may even lead to the ICC's invalidity under international law.[80] A fundamental rule of international law, enshrined in Art. 34 of the Vienna Convention on the Law of Treaties, is that a treaty does not create obligations or rights for a State without its consent.[81] With Art. 12 of the Rome Statute asserting jurisdiction over non-parties, it is argued the ICC may be in breach of international law and consequently void.

4.22 Concerns that ratification would result in the erosion, surrender or abdication of Australia's national sovereignty are without basis, and predicated on an

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[75] Submission 231.
[76] It is worth noting that Australia has been a party to the International Court of Justice for over 50 years without constitutional challenge.
[77] See submissions 1, 3, 4, 6, 9, 11, 12, 14, 18, 19, 21, 30, 36, 38, 39, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 66, 67, 68, 69, 72, 74, 75, 76, 78, 79, 80, 81, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 98, 99, 101, 105, 106, 107, 109, 110, 111, 113, 115, 116, 117, 118, 120, 121, 122, 123, 124, 125, 126, 127, 128, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 148, 149, 150, 151, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 168, 169, 172, 173, 177, 178, 180, 181, 182, 183, 184, 186, 187, 188, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 203, 206, 208, 211, 214, 215, 216, 218, 220, 223, 225, 226, 227, 228, 229, 231.
[78] Submission 157.
[79] Submission 134.
[80] See submissions 3, 228.
[81] Professor Geoffrey Walker (sub. 228) contends this rule "is the whole basis for international relations" and "it is hard to think of a rule of international law that is more fundmental than this one".

inaccurate understanding of the ICC Statute.[82] The cornerstone of the ICC is the principle of 'complementarity'. The Court may only exercise jurisdiction when Australia – which always has *primary* jurisdiction – is either unwilling or unable to exercise its national criminal jurisdiction (Art. 17).[83] It is extremely difficult to envisage circumstances in which Australia would be unable or unwilling to prosecute under its domestic law war crimes, genocide and crimes against humanity committed in Australia or by its citizens. Moreover, the Court is not in violation of international law, for its crimes are subject to universal jurisdiction. Like antiterrorism and antihijacking treaties which are routinely extended to the citizens of States that have not ratified them, "there is no sovereign right to commit atrocities, particularly the vicious crimes on which the court would focus".[84]

4.23 Another prevalent objection is the perceived lack of consultation with the electorate.[85] Numerous submissions labelled the ICC 'undemocratic', while some called for a referendum:

> Our elected representatives are responsible for internal issues that affect their electors. But any issue that ties us to international agreements should be first agreed to, or rejected by, all citizens per medium of a referendum.[86]

It was further expressed that "the silent majority of Australians would vehemently oppose" the ICC.[87]

4.24 Claims the Government has failed to consult the Australian community are somewhat perplexing – one of the primary aims of JSCOT is precisely that purpose. For over a year the committee has sought public submissions and conducted numerous public hearings. Submitting the issue to referendum is inappropriate given the complex issues surrounding the ICC, the unworkable precedent such a referendum would create and the financial costs involved. Also, considering the Australian public's recurrent committment to human rights and the dignity of all, there is likely to be much support for the Court in the community.[88]

4.25 Finally, some are concerned that becoming a party to the ICC will negatively affect Australian Defence Force (ADF) personnel.[89] Major General Digger James is concerned the Court

> would expose Australian servicemen to great dangers of unfounded prosecutions and would hamstring our armed forces abroad.[90]

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[82] For an excellent discussion of the concept of state sovereignty, see Joint Standing Committee on Foreign Affairs, Defence and Trade, *op cit.*, 5-15

[83] See submissions 7, 16.1, 20, 22, 23, 24, 25, 26, 29, 33, 34, 41, 104, 202, 204, 212, 217, 224.

[84] Roth, *op cit.*, 29-30

[85] See submissions 3, 11, 14, 15, 19, 21, 36, *44*, *45*, *48*, *51*, *52*, *53*, *58*, *59*, *60*, *63*, *64*, *66*, *67*, *69*, 72, *74*, *75*, 76, *78*, *79*, *80*, 81, *86*, *87*, *88*, *89*, 93, 94, 97, *98*, 100, 101, 102, 107, 109, 110, 111, 116, 117, 120, 121, 137, 142, *144*, *145*, 149, 160, 163, 179, 196, 229. It is worth noting that almost half of those submissions that view the ICC as undemocratic are in the form of reproduced chain letters (italicised; 26 of 58; 45%).

[86] Submission 88.

[87] Submission 85. See submissions 46, 56, 154, 173, 203, 221.

[88] See submissions 25, 26, 35, 41, 104.

[89] See submissions 9, 140, 141, 198, 200, 205, 220, 222, 225, 228, 230.

4.26 The committee is of the view that the ICC would assist, rather than hinder, ADF operations.[91] The Court is designed to operate primarily in post-conflict situations where perpetrators may still be on the scene threatening to destabalise the situation. If ADF personnel are deployed in this environment, it is to Australia's advantage that these individuals be prosecuted. Further, by helping to deter perpetrators, the ICC will reduce the necessity for deploying Australian soldiers to prevent atrocities.[92] In the unlikely event that an ADF soldier did commit a war crime, the Australian public would expect the individual to be tried.[93] Moreover, Australian courts would be able to investigate first under the principle of complementarity. Attorney-General Daryl Williams has affirmed that the ADF have given their full support to the establishment of the ICC.[94]

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[90] Submission 9.
[91] See submissions 26, 41, 167, 170, 212.
[92] See Roth, *op cit.*, 24
[93] See submissions 170, 212.
[94] Williams, D. 2001. Presentation on the Establishment of the International Criminal Court. Delivered in the Main Committee Room, Parliament House, on Thursday 9 August. The Australia Defence Association also supports the Statute – see submission 167.

CLASSIFICATION OF 231 SUBMISSIONS

Submissions arguing it is **not** in Australia's national interest to ratify the Statute of the International Criminal Court:

1, 3, 4, 5, 6, 9, 11, 12, 14, 15, 18, 19, 21, 28, 30, 36, 38, 39, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 74, 75, 76, 77, 78, 79, 80, 81, 82, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 98, 99, 100, 101, 102, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 148, 149, 150, 151, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 168, 169, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 186, 187, 188, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 203, 205, 206, 207, 208, 210, 211, 213, 214, 215, 216, 218, 220, 221, 222, 223, 225, 226, 227, 228, 229, 230

Submissions arguing it **is** in Australia's national interest to ratify the Statute of the International Criminal Court:

2, 7, 8, 13, 16, 17, 20, 22, 23, 24, 25, 26, 29, 31, 32, 33, 34, 35, 37, 41, 83, 84, 96, 104, 147, 152, 167, 170, 189, 190, 202, 204, 212, 217, 219, 224

Submissions containing general information on the Statute of the International Criminal Court, without endorsing or opposing ratification:

10, 27, 70, 231

Submissions either confidential or missing from JSCOT's website:

40, 42, 73, 103, 129, 146, 185, 209

ARGUMENTS AGAINST RATIFICATION

abrogation of Australian sovereignty	1, 3, 4, 6, 9, 11, 12, 14, 18, 19, 21, 30, 36, 38, 39, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 66, 67, 68, 69, 72, 74, 75, 76, 78, 79, 80, 81, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 98, 99, 101, 105, 106, 107, 109, 110, 111, 113, 115, 116, 117, 118, 120, 121, 122, 123, 124, 125, 126, 127, 128, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 148, 149, 150, 151, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 168, 169, 172, 173, 177, 178, 180, 181, 182, 183, 184, 186, 187, 188, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 203, 206, 208, 211, 214, 215, 216, 218, 220, 223, 225, 226, 227, 228, 229, 231
undemocratic (should be referendum)	3, 11, 14, 15, 19, 21, 36, 44, 45, 48, 51, 52, 53, 58, 59, 60, 63, 64, 66, 67, 69, 72, 74, 75, 76, 78, 79, 80, 81, 86, 87, 88, 89, 93, 94, 97, 98, 100, 101, 102, 107, 109, 110, 111, 116, 117, 120, 121, 137, 142, 144, 145, 149, 160, 163, 179, 196, 229
crime definitions vague and ambiguous	1, 3, 4, 11, 19, 30, 49, 50, 108, 124, 151, 159, 168, 174, 176, 177, 180, 183, 184, 186, 188, 192, 203, 210, 211, 216, 222, 225, 227, 228, 229, 231
lack of procedural fairness, social engineering or politisation concerns	4, 21, 29, 30, 122, 138, 158, 159, 164, 184, 191, 200, 203, 206, 208, 211, 222, 225, 227
violates Australia's Constitution	1, 30, 51, 56, 82, 90, 120, 138, 163, 175, 198, 199, 227, 228, 229, 231
Australian citizens will be prosecuted	21, 36, 43, 85, 108, 112, 122, 148, 171, 183, 184, 188, 210, 214, 222
undue influence from NGOs	1, 5, 19, 30, 138, 148, 151, 156, 159, 163, 171, 180, 227
affect ADF personnel	9, 140, 141, 198, 200, 205, 220, 222, 225, 228, 230
inconsistent with Australia's legal tradition	3, 14, 30, 58, 68, 112, 155, 163, 177, 197

Australian public against ratification	46, 56, 85, 154, 173, 203, 221
excessive penalties are proposed	124, 159, 164, 166, 181, 210
ad hoc tribunals preferrable (no need for ICC)	36, 65, 97, 111, 138, 175
pecuniary expense	11, 36
in conflict with Article 2 of the UN Charter	3, 228
absence of a broad 'opt out' provision	153
no safeguards against jurisdiction expansion	203
no mention of the Seven Universal Noahide Laws	28

ARGUMENTS SUPPORTING RATIFICATION

demonstrates Australia's commitment to the prosecution of human rights' violations	2, 7, 13, 16, 17, 22, 23, 24, 26, 29, 33, 34, 35, 83, 96, 104, 152, 170, 189, 190, 202, 204, 212, 217, 219, 224, 231
no infringement of national sovereignty	7, 16.1, 20, 22, 23, 24, 25, 26, 29, 33, 34, 41, 104, 202, 204, 212, 217, 224
good, procedurally fair, court (e.g. fair trial, non-retrospective)	20, 22, 23, 24, 26, 31, 41, 202, 217, 224
permanent Court preferable to ad hoc tribunals	7, 16, 24, 29, 35, 41, 104, 204, 219, 224
deterrent effect	17, 24, 34, 37, 41, 104, 170, 204, 224
advantage of first 60 States to ratify	7, 20, 24, 41, 190, 224
support, not hinder, ADF operations	26, 41, 167, 170, 212
Australian public/values support ICC	25, 26, 35, 41, 104
ICC wont be used politically or frivolously	7, 29, 41, 224
diminished importance of Australian views if don't ratify	2, 17, 231
domestic legislation inadequate	16, 26, 41
lower net pecuniary costs for Australia	29, 104
contribute to regional stability	41, 204

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This report is based on the 213 submissions to the Joint Standing Committee on Treaties. These can be downloaded in pdf format from the Committee's website:

http://www.aph.gov.au/house/committee/jsct/ICC/subsICC.htm

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19 March 2002

Mr Robert Morris
Secretary
Joint Standing Committee on Treaties
Parliament House
Canberra ACT 2600

Dear Bob,

Australian Red Cross National Advisory Committee Submission to JSCOT on the Proposed Legislation to Implement Obligations Arising Under the *Rome Statute* for the International Criminal Court

I am happy to attach the abovementioned submission for the consideration of the Joint Standing Committee in relation to its deliberations on the Draft Bills to implement Australia's obligations under the *Rome Statute* should Australia decide to ratify its signature of the Statute.

The submission has been prepared by members of the National Advisory Committee on International Humanitarian Law – particularly Rev Professor Michael Tate AO, Dr Helen Durham and myself. We are happy to provide any additional assistance if called upon to do so.

Please pass on our thanks for the opportunity, once again, to provide a written submission to the Committee on a topic to which we attach the utmost importance.

Yours sincerely,

Professor Tim McCormack
Chair
National Advisory Committee on International Humanitarian Law

Australian Red Cross

Submission No. 244

SUBMISSION TO THE JOINT STANDING COMMITTEE ON TREATIES IN RELATION TO IMPLEMENTING LEGISLATION FOR THE *ROME STATUTE* OF THE INTERNATIONAL CRIMINAL COURT

The Australian Red Cross (ARC) National Advisory Committee on International Humanitarian Law thanks the Joint Standing Committee on Treaties (JSCOT) for the opportunity to express its views in relation to the draft Bills for legislative implementation of the *Rome Statute* of the International Criminal Court (ICC).

It is the general view of ARC that the Bills as drafted comprehensively provide for the national implementation of Australia's relationship with the new International Criminal Court if and when Australia chooses to ratify the *Rome Statute*. The Australian approach of detailing the requisite elements of every individual crime is unique – even amongst those Common Law nations with whom we share the closest legal traditions.[1] While the draft legislation may have a cumbersome appearance, particularly relative to the implementing legislation of other nations, there are some distinct advantages in this particular approach. First, the approach will create certainty amongst all those involved in future trial processes because the elements of each specific offence are spelt out explicitly. Prosecutors and defence counsel will know exactly what must be proved for a conviction to be recorded. Secondly, the approach facilitates the statutory identification of penalties for each specific offence – again reducing the possibilities of uncertainty and ambiguity in the trial process. ARC welcomes the overall approach of the legislation and takes this opportunity to congratulate those responsible for its preparation. The approach taken in relation to the draft Bills is consistent with other amendments to the *Criminal Code Act 1995*.

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[1] For reference to relevant legislation in common law countries see
Crimes Against Humanity and War Crimes Act 2000, c.24 (Canada):www.canlii.org/ca/sta/c-45.9/

International Criminal Court Act 2001, c 17 (UK): www.hmso.gov.uk/acts/acts2001/20010017.htm

International Crimes and International Criminal Court Act 2000(N.Z.): rangi.knowledge-basket.co.nz/gpacts/public/text/2000/an/026.html

The South African approach, substantially similar to New Zealand's, can be seen at 'International Criminal Court Bill 2001 (Draft)': www.parliament.gov.za/bills/2001/b42-01.pdf

ARC wishes to draw JSCOT's attention to a number of relatively small issues of concern, with a view to possible amendment to the draft legislation. ARC will focus the majority of its comments upon the *International Criminal Court (Consequential Amendments) Bill* because it believes its expertise lies primarily in the definition of specific offences. This submission will be limited to dealing with the following issues: the use of the term 'primary' in referring to Australia's national jurisdictional competence; the repealing of Part II of the *Geneva Conventions Act 1957;* the definition of crimes of a sexual nature; and the repetition of certain war crimes found in subdivision H.

Primacy of Australia's National Jurisdictional Competence

International Criminal Court Bill (clause 3) and *International Criminal Court (Consequential Amendments) Bill* (Schedule 1, clause 268.1(2))

Clause 3 of the *International Criminal Court Bill* (the Bill) acknowledges the fundamental rejection in the *Rome Statute* of the model of interaction between the International Criminal Tribunals for the Former Yugoslavia and Rwanda and their respective relevant national criminal jurisdictions. Both international tribunals have 'primacy' over the exercise of national jurisdiction. In contrast, the ICC *must* refuse to exercise its jurisdiction where a State wishes to exercise its national criminal jurisdiction and has the capacity and integrity to do so (combined effect of Articles 1 and 17(1) of the *Rome Statute).*

Clause 3(2) does not convey this mandatory pre-eminence of national criminal jurisdiction as strongly as it might. In our view the word 'primacy' should be used instead of the word 'primary' to reflect the significance the Australian Parliament attaches to our national criminal jurisdiction beyond any mere chronological priority. This choice of terminology would also make more explicit the rejection of the model of the two international criminal tribunals. Thus, Clause 3(2) could read:

> "Accordingly, this Act does not affect the primacy of Australia's right to exercise its national criminal jurisdiction with respect to crimes within the jurisdiction of the ICC."

Clause 268.1(2) of Schedule 1 of the *International Criminal Court (Consequential Amendments) Bill* currently only reiterates the intention of Parliament referred to in Clause 3(1) of the *International Criminal Court Bill* and is silent in respect of the clarification of that intention in Clause 3(2). There is no reason in principle why the clarification ought not also appear in Clause 268.1(2) of Schedule 1 of the consequential amendments and, in our view, the suggested amended words above ought to be added to this provision.

The Second Reading Speech should make clear the intention of the Parliament that such primacy *will* be presumed in any case where the accused was, at the time of the alleged offence, a member of the Australian Defence Force or an Australian citizen or person ordinarily resident

in Australia engaged in an authorized operation being a peace-keeping, peace-enforcing or combat operation authorized by the Australian Government.

Of course, it should be made clear in the Second Reading Speech that this is not an exhaustive list of the cases where national criminal jurisdiction will be exercised to the exclusion of the ICC. However, the presumption of the exercise of national jurisdiction would satisfy a considerable concern in the Australian community.

Schedule 3 – Amendment of the *Geneva Conventions Act 1957*

Part II of the *Geneva Conventions Act 1957* (the Act) criminalises grave breaches of the Geneva Conventions of 1949 and of Additional Protocol I of 1977 perpetrated in the context of international armed conflict. These offences are also a separate and distinct category of war crimes within the subject matter jurisdiction of the *Rome Statute*. ARC understands and agrees with the rationale for the proposed repeal of Part II of the Act – namely, that all crimes of international concern within the jurisdictional competence of the International Criminal Court should be grouped together in the Commonwealth *Criminal Code Act 1995*. The benefit of a single Act dealing with all such crimes is obvious.

ARC has, however, major concern about the repeal of Part II of the Act which may have consequences entirely unintended in the drafting of Schedule 3 of the *International Criminal Court (Consequential Amendments) Bill* and which, we believe, justifies an alternative approach to that proposed in Schedule 3.

The *International Criminal Court (Consequential Amendments) Bill* will only take effect after the commencement of the legislation and will have no retrospective effect. Consequently, while the new legislation will cover grave breaches of the Geneva Conventions and of Additional Protocol I allegedly committed after commencement, the new legislation will not apply to the same offences committed between 1957 (the date of commencement of the *Geneva Conventions Act 1957*) and the date of commencement of the new legislation. If the *Geneva Conventions Act 1957* is repealed as proposed, the temporal window of jurisdictional competence currently open to Australian courts may be lost. This is surely not what the legislative drafters intended in their approach to Schedule 3.

Our strong preference would see Schedule 3 explicitly obviate the operation of Part II of the *Geneva Conventions Act 1957* once the enactment of the *International Criminal Court (Consequential Amendments) Bill* commences but without the repeal of Part II in respect of the interim years between 1957 and commencement of the new legislation. The application of Section 8(b) of the *Acts Interpretation Act 1901* entitled 'Effect of Repeal' would presumably have this effect. That sub-section states that:

> Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not affect the previous operation of any Act so repealed, or anything duly done or suffered under any Act so repealed...

The effect of this provision seems to be that the jurisdictional competence of Australian Courts in respect of grave breaches of the Geneva Conventions will continue in respect of the period from 1957 until the enactment of the *International Criminal Court (Consequential Amendments) Bill* and subsequent repeal of Part II of the *Geneva Conventions Act 1957.* If this interpretation is correct, we recommend that the *Explanatory Memorandum* to accompany the legislation explicitly indicate this interpretation of Section 8(b) of the *Acts Interpretation Act 1901.*

The Definition of War Crimes of a Sexual Nature

The *International Criminal Court (Consequential Amendments) Bill* (Schedule 1) provides elements of the relevant crimes. As previously noted, ARC acknowledges the benefit inherent in providing details of the elements of the crimes in the domestic legislation. The *International Criminal Court (Consequential Amendments) Bill* provides a detailed articulation of the elements of the crimes and, in general, reflects the Preparatory Commission for the International Criminal Court Draft Elements of Crimes (Elements), thus encouraging international legal consistency.

The inclusion of a broad range of crimes of a sexual nature in the ICC Statute was seen by ARC as necessary to reflect the reality of armed conflict. ARC acknowledges the constructive role played by the Australian delegation at the Rome Conference in relation to ensuring the full gambit of crimes of a sexual nature were included in the Court's jurisdiction. It is in the area of the definition of these crimes in the Australian legislation that ARC would like to raise a number of issues.

One particular area in which the draft Bill departs from the approach in the Elements of Crimes is in relation to the definition of rape (both as a war crime and as a crime against humanity). The proposed Sections 268.13 (crime against humanity of rape); 268.58 (war crime of rape in an international armed conflict); and 268.81 (war crime of rape in a non-international armed conflict), for example, restrict sexual penetration for the purposes of the definition of rape to certain specified body parts of the victim – namely the genitalia, anus or mouth. In contrast, the Elements of Crimes defines rape to include '...penetration, however slight, of any part of the body of the victim *or of the perpetrator* with a sexual organ...' (Article 7(1)(g)-1; Article 8(2)(b) (xxii)-1; and Article 8(2)(e)(vi) – 1). This definition in the Elements of Crimes envisages the possibility that the victim might be forced against their will to engage in the sexual penetration of another person – whether or not that other person is consenting to the penetration. The proposed Australian definition of rape simply does not include that possibility.

The proposed Australian definition of rape also departs from the approach in the Elements of Crimes in relation to the victim's lack of consent. The proposed Australian definition of rape requires the sexual penetration to occur without the consent of the victim but does not clarify the circumstances in which freedom of choice on the part of the victim is impossible. In contrast, the Elements of Crimes emphasizes the coercive nature of rape and does not necessarily require the Prosecution to prove a lack of consent as an element of the crime. The common provision for each of the three crimes of rape in the Elements (referred to above) specifies that the sexual penetration be:

> 'committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power ... or by taking advantage of a coercive environment, or ... committed against a person incapable of giving genuine consent'.

The approach of the Elements allows for the prosecution to prove the elements of rape in situations where the victim is a 'consensual' participant in the act but only out of fear for their own or others' wellbeing if they indicate their lack of consent. Unfortunately, the proposed Australian legislation does not reflect this approach. In relation to other crimes of a sexual nature which involve coercion (enforced prostitution, forced pregnancy, enforced sterilization and sexual violence), the proposed legislation does follow the approach of the Elements of Crimes and places the emphasis on the coercive environment rather than on the presence or lack of the victim's consent. It is regrettable that the proposed legislation does not also follow this approach in relation to the three separate crimes of rape.

Repetition of Some War Crimes

As noted previously, the *International Criminal Court (Consequential Amendments) Bill* in most instances faithfully replicates both the specific war crimes offences and their particular elements as found in the Elements. However in the section dealing with war crimes there is an addition - a proposed Subdivision H covering 15 extra 'War Crimes That are Grave Breaches of Protocol I to the Geneva Conventions'.

ARC understands that the rationale for this additional Subdivision is to bring all war crimes under Australian Law into one legislative location – the new Division 268 of the *Criminal Code Act 1995*. As a State Party to the Four Geneva Conventions of 1949 and the Two 1977 Protocols Additional to the Conventions, Australia is obligated to provide criminal sanctions for grave breaches of the Conventions and of Additional Protocol I. Until now, those penal sanctions have been provided in the *Geneva Conventions Act 1957*. The intention of the *International Criminal Court (Consequential Amendments) Bill* is to amend the *Geneva Conventions Act 1957* by repealing the operative part of the legislation criminalizing grave breaches on the basis that all grave breaches will henceforth be covered by the *Criminal Code Act 1995*. Because Subdivision D of the draft Bill explicitly covers grave breaches of the Four Geneva Conventions (reflecting Article 8(2)(a) of the *Rome Statute*) it was not necessary to

draft an additional subdivision for those offences. However, the *Rome Statute* does not include an equivalent sub-article explicitly dealing with grave breaches of Additional Protocol I. There is no question that some of the provisions in Article 8(2)(b) of the *Rome Statute* do cover certain grave breaches of Additional Protocol I. However, the ongoing lack of consensus about the customary law status of the Protocol precluded the Rome Conference from comprehensively listing all grave breaches of the instrument in Article 8(2)(b) of the *Statute.* The draft Bill intends a more comprehensive approach and this intention is admirable.

However, one of the potential disadvantages of this attempt to be comprehensive is that some of the specific offences in proposed Subdivision H are, in fact, repeats of offences in either Subdivision D or E. The mere fact of repetition may not necessarily cause problems in and of itself except that the specific elements of the repeated offences are, on occasion, disparate. The inconsistency in specifying elements could easily cause problems as future defendants would justifiably raise objections if they were charged with a specific war crime appearing twice in the legislation with the prosecution choosing the specific offence with the less onerous elements.

Some examples will illustrate the potential problem. Proposed Section 268.96, the war crime of 'medical or scientific experiments' repeats the same offence as proposed Section 268.47 (in Subdivision E). Both Sections 268.96 and 268.47 enumerate 5 similar elements of the specific offence but those elements are not identical. For example, Section 268.96(1)(c) incorporates an objective test for evaluating the perpetrator's conduct such that the conduct is not 'consistent with generally accepted medical standards that would be applied under similar medical circumstances to persons who are nationals of the perpetrator ...'. Since Section 268.47 contains no such explicit reference to an objective standard of conduct, it is arguable that the prosecution may be required to prove a subjective standard – that is, that the accused themselves knew that their conduct was unjustified by the medical condition of the victim. Such a subjective standard may be more difficult to prove beyond reasonable doubt in some circumstances than an objective test of 'generally accepted medical standards'. Disparity in the specific elements of the same crime referred to in two different Subdivisions of the draft legislation cannot be helpful.

Other war crimes covered by Subdivision H which are not repeated anywhere else in the draft legislation include, for example, the war crimes of 'mutilation', 'removal of blood, tissue or organs for transplantation', 'attacks against works and installations containing dangerous forces resulting in excessive loss of life, injury to civilians or damage to civilian objects', 'unjustifiable delay in repatriation', 'apartheid', and 'inhuman and degrading practices involving outrages upon personal dignity'.

Conclusion

We reiterate our support for the basic approach of the Draft Bills and for the overwhelming bulk of the provisions contained within them. In particular, ARC appreciates the commitment

to universal jurisdiction in respect of the substantive crimes reflected in the proposed legislation. This commitment reaffirms the fundamental importance of national jurisdictional competence as a complement to the new International Criminal Court. ARC eagerly anticipates the Australian Government's future contribution to the enforcement of International Criminal Law.

Following the outstanding leadership role the Australian Delegation played in the negotiations of the *Rome Statute* (in the lead-up to the Rome Conference, during the Conference itself and in the post-Rome negotiations in New York), ARC finds it difficult to contemplate the establishment of the new International Criminal Court without Australian participation. We urge the Joint Standing Committee on Treaties to undertake its deliberations on the proposed implementing legislation as expeditiously as possible in the hope that Australia might still be in a position to ratify its signature of the *Rome Statute* in time to participate in the establishment of the new Court.

ARC remains committed to and available to assist in any appropriate way with JSCOT deliberations and processes.

March 20, 2002