Submission to the Joint Standing Committee on Treaties: Australia's ratification of the International Criminal Court Statute

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Purpose of submission

This is a submission in support of Australia's ratification of the International Criminal Court treaty.

This submission addresses key features of the Court, and in particular responds to concerns about the ICC raised in JSCOT's meeting on 30 October 2000 and in recent news articles.

A thorough understanding of key provisions of the ICC treaty should dismiss these concerns and demonstrate why it is in Australia's national interest to join this treaty.

Why Australia should ratify the ICC treaty

Purpose of the ICC

The International Criminal Court is a criminal court which has been developed and negotiated over the past 6 years by over 160 countries in an effort to ensure that in the future there will be no impunity for the most serious crimes of concern to the international community. These crimes – defined in the ICC Statute and the Elements of Crimes paper - are **genocide**, **crimes against humanity** and **war crimes** (and **aggression**, once a suitably acceptable definition has been agreed upon.) The crimes and their definitions, adopted by consensus by over 160 negotiating States, are not "new" crimes. Rather, they reflect and codify customary and conventional international law developed over the past century.

The crimes within the ICC's jurisdiction are *international crimes* because when they occur, they breach universally accepted norms of behaviour which membership in the international community demands. Their occurrence may be said to "shock the conscience of humanity". The court will hold criminally accountable individuals who commit such crimes when countries have been found either unable or unwilling genuinely to bring them to justice. The ICC's jurisdiction will be prospective only. It will have no retrospective reach.

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Complementarity – the cornerstone of the treaty

> **The ICC will be a court of last resort. The principle of complementarity ensures that a case or situation will not be admissible if another country has already investigated or prosecuted (or is doing so), unless it is clearly shown that the latter is unable or unwilling genuinely to proceed.**

Discussion of the ICC must be predicated on a thorough understanding of the Court's central principle of *"complementarity"*. This means that a case or situation will not be admissible in the ICC if another country - usually the state of territoriality or nationality - has already investigated or prosecuted (or is in the process of doing so), unless it is clearly shown that the latter is unable or unwilling genuinely to proceed.[1]

"Unable" (to investigate or prosecute) means that through a total or substantial collapse there is no national judicial authority to handle the situation. The test is *"whether, due to a total or substantial collapse or unavailaibility of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings"*. [2] This is effectively a "collapsed State" situation.

"Unable" could also include a situation where a country is unable to mount investigations/prosecutions for crimes which adequately reflect the elements and seriousness of the crimes in question. This is effectively an "inactive" State.

In determining whether a State is *"unwilling"* to proceed the Court must consider, having regard to principles of due process, whether one of three conditions exist:

(i) the national proceedings or decision was taken or made for the purpose of shielding the person from criminal responsibility for crimes within the Court's jurisdiction; or

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[1] Article 17, paragraph 1 provides:

"… [T]he Court shall determine that a case is inadmissible where:

(a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3 [ie unless the proceedings in the other court were (a) for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice].

[2] article 17, paragraph 3

(ii) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person to justice; or

(iii) the national proceedings were not or are not being conducted independently or impartially, and were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person to justice.[3]

These are the substantive considerations. How does the Court make an informed assessment about a country's progress in its national proceedings?

> **Procedural provisions underpinning the complementarity principle strengthen the idea that States have - and will continue to have - the primary duty to address these crimes. If the country concerned is doing the job, the Court must defer to it. Only if a country is clearly shown to be remiss could the Court "kick in". The Court's real legacy may well be an increased diligence by national systems to deal with these crimes.**

A number of provisions in the Statute and the Rules of Procedure and Evidence will enable the Court and the country concerned to engage in constructive dialogue as to the progress of national proceedings. The Court can ask for and receive information about the progress of a country's national proceedings; monitor the situation; and keep it under review.[4] This is essential. It will prevent the Court from being misled or hamstrung by unsubstantiated claims that a country is taking action. On the other hand, it ensures that the relevant country has every opportunity to provide relevant information to the Court.

Given the importance of this aspect, it is worth looking at in more detail. For State party referrals and matters in which the Prosecutor proceeds on his or her own motion (two of the three ways in which matters can be referred to the Court), the Prosecutor must inform States which would normally exercise jurisdiction over the crimes. A State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction and ask the Prosecutor to defer to it. The Prosecutor must defer to this request, unless he or she asks the Pre-Trial Chamber to authorise an investigation. The Pre-Trial Chamber examines the issue, applying the substantive tests on complementarity outlined above. Both the State and the Prosecutor can appeal the Pre-Trial Chamber's decision. [5]

If the Prosecutor defers at this initial stage, he or she may request the State to periodically provide updates on the progress of its investigations and any subsequent prosecutions. And the matter does not rest there. The Prosecutor can review the matter 6 months after deferral or at any time there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation. Once again, the Prosecutor can ask the Pre-Trial Chamber to

[3] article 17, paragraph 2. Rule 51 of the Rules of Procedure and Evidence sets out some further matters the Court may consider, including information the State may bring to the Court's attention showing that its Courts meet internationally recognised norms and standards for the independent and impartial prosecution of similar conduct, or that the State has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted.
[4] article 18, and rules 51-56, 58 of the Rules of Procedure and Evidence.
[5] article 18

authorise the Prosecutor to commence an investigation and both the State and the Prosecutor can appeal the Pre-Trial Chamber's decision.

This means that the Court will not necessarily accept "on trust" a country's word that it is dealing, or has dealt, with the matter appropriately. On the other hand, these preliminary "complementarity-driven" procedural steps are weighted in favour of States. States are the first port of call. They can request deferral. The Prosecutor must defer unless the Pre-Trial Chamber (or the Appeals Chamber) orders otherwise.

States also have later opportunities to bring challenges on admissibility or jurisdiction.[6]

The Court will need to assess - at some level - the particular national investigations or prosecutions. National authorities will need to demonstrate that through their own national investigations or prosecutions, they are able and willing to bring alleged perpetrators of international crimes to justice. Because if they do not, the Court may step in and exercise its complementary jurisdiction.

A question that frequently arises is - how should proceedings be conducted at the national level – if a State and its national justice system – and not the ICC – is to exercise and maintain jurisdiction over the criminal conduct in question? A formulaic answer to this question is not possible. The most general answer is that if a State's national investigations and prosecutions are carried out in good faith, expeditiously (in the circumstances), in accordance with the scope of the offences and the general principles of criminal responsibility under the Statute, and in accordance with internationally accepted standards of due process, this should insulate them from the ICC's reach.[7] The gap between the national proceedings and the ICC's standards would have to be quite significant before the Court could step in.

Practical implications of complementarity for a sovereign state like Australia

> **Being a party to the ICC treaty presents no significant incursion of Australia's sovereign right, responsibility or ability to handle these crimes. Complementarity means that the country concerned - usually the country where the crimes allegedly occurred or the country whose nationals allegedly committed the crimes – will continue to have the primary duty to investigate alleged crimes (and prosecute, if the evidence supports charges). The ICC can only "step in" if it fails to do so, or does so in a manner inconsistent with an intent to bring the person/s to justice or to shield the person/s from criminal responsibility.**

[6] article 19

[7] The most certain way for a country to equip its national authorities with the ability to properly handle these crimes is to incorporate the full ICC Statute definitions of crimes, with the same general principles and defences. But this is not to imply that the national laws must be a "mirror image" of the ICC crimes. The important point is that there should be a *significant degree of parity* between the national proceedings and those contemplated under the ICC Statute.

> **Australia will be - *and indeed already is* - responsible for investigating and prosecuting these crimes. If Australia becomes a party to the ICC treaty and if crimes of genocide, crimes against humanity or war crimes were in the future committed on Australian soil or by an Australian national, the Court will be *obliged* to defer to Australian national criminal proceedings, with the proviso that it could ask Australia to periodically up-date it about these national investigations and prosecutions. The Court could only assume jurisdiction if it was clearly shown - after hearing from Australia - that it did not do, or is not doing, as it said.**

In the (unlikely) event that crimes of this magnitude and seriousness occurred on Australian territory or by an Australian national, the first "port of call" would be the Australian criminal justice system. The Court could only assume jurisdiction where Australian investigative or prosecution authorities or courts decided not to investigate or prosecute *for the purpose of* shielding the person/s from criminal responsibility or in a manner inconsistent with an intent to bring the person/s to justice.

Benefits over ad hoc tribunals

The Security Council established the ICTY and ICTR as *ad hoc* tribunals pursuant to its powers under Chapter VII of the UN Charter to maintain and restore international peace and security. The experience of these two tribunals demonstrates that the process of establishing *ad hoc* tribunals is a time-consuming one. Not only does it require the political will of the international community, but it is predicated on the vote of the Security Council. This in essence means that one of the Permanent 5 members of the Security Council must not exercise its veto power against a resolution to establish an *ad hoc* tribunal.

In addition, once an *ad hoc* tribunal is established, it can take years to formulate its mandate and terms; populate it with people with necessary expertise; and develop it into an effective and credible institution.

> **In contrast, the ICC will be a permanent mechanism, standing ready to take action where necessary when allegations arise about the commission of "the most serious crimes of concern to the international community" *and* these crimes have not been investigated or prosecuted by another country.**

The very existence of a permanent tribunal such as the ICC should act as a deterrent to those who seek to carry out the sorts of atrocities witnessed this century.

Having a permanent Court will not lead to an "artificial" generation of work

> **The creation of a permanent Court is unlikely to lead to an "artificial" generation of work in an attempt to fill the Court's docket. Several key features prevent its playing host to frivolous, abusive, insignificant or unsubstantiated cases. This includes the way matters are referred to the Court; the preconditions for jurisdiction; the tight complementary regime; the standard of proof at various stages in the Court's proceedings, the nature of crimes before the Court; and significant institutional and other procedural**

safeguards. Costs and resources should also provide a pragmatic limit on its frivolous or abusive use.

- The ***nature of the crimes themselves*** (the ICC's subject matter jurisdiction) provide an important "constraint" on the ICC. The Court has jurisdiction over persons above the age of 18 years responsible *"for the most serious crimes of international concern"*.[8] The crimes of genocide and crimes against humanity – by their very definitions - require the occurrence of widespread or systematic crimes against a civilian population. For war crimes, the Court is mandated to have jurisdiction *in particular* when committed as part of a plan or policy or as part of a large scale commission of such crimes.[9]

- Several ***procedural safeguards*** at the commencement of an investigation stage proscribe its potential for misuse. If the Prosecutor wishes to initiate an investigation *ex officio* on the basis of information received from a credible source (one of the ways crimes can be referred to the Court), the three judge Pre-Trial Chamber must authorise the investigation.[10] The Pre-Trial Chamber can only do so if it believes there is a reasonable basis to proceed with the investigation and the case appears to fall within the Court's jurisdiction.[11]

  After that - and this next stage also applies to situations referred by State parties (a second way matters can be referred to the Court) - the Court must inform countries that would normally exercise jurisdiction.[12] If a country informs the Court that it is investigating, or has investigated, its nationals or others within its jurisdiction for criminal acts which may constitute crimes in the Court's jurisdiction, the Prosecutor *must defer* to that country's national proceedings, unless the Pre-Trial Chamber authorises the Prosecutor to commence the investigation on the basis that the country is unable or unwilling genuinely to proceed.[13] The State (and the Prosecutor) may appeal this decision.[14] The deferral is open to review by the Prosecutor (who may submit it to the Pre-Trial Chamber for authorisation) 6 months after the deferral or at any time there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.[15] The State (and the Prosecutor) may appeal this decision.[16] States also have later opportunities to challenge the admissibility or jurisdiction of a case.[17]

  In the case of Security Council referrals (the third way matters can be referred to the Court) a resolution by the Security Council is required for the Prosecutor to commence an investigation.

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[8] article 1
[9] see articles 6, 7 and 8
[10] Article 15, paragraphs 3
[11] Article 15, paragraph 4
[12] article 18, paragraph 1.
[13] Article 18, paragraph 2 and article 17
[14] article 18, paragraph 4 and article 82, paragraph 1(a)
[15] article 18, paragraph 3
[16] article 18, paragraph 3 and 4, and article 82, paragraph 1(a).
[17] article 19, paragraphs 2 and 4.

These features will make it almost impossible for the Prosecutor to even *begin* an investigation or prosecution that is not without great merit.[18]

- The ***standard of proof*** in relation to the crimes is high – at all stages of the proceedings. In deciding whether to initiate an investigation or prosecution the Prosecutor must consider whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; the case is or would be admissible (ie complementarity does not stand in the way); and interests of justice factors do not militate against proceeding.[19] To issue an arrest warrant the Court must be satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.[20]

- The ***confirmation proceedings*** are a further filter. The Pre-Trial Chamber must determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.[21] If it is so satisfied, the charge or charges are sent to trial. At ***trial***, the onus is on the Prosecutor to prove the guilt of the accused. To convict, the Court must be convinced of the accused's guilt beyond reasonable doubt.[22] Both the Prosecutor and an accused can ***appeal*** against a decision of conviction or acquittal, and against any sentence imposed.[23] The judges of the Trial Chamber sit as a bench of 3 judges; those of the Appeals Chamber sit as a bench of 5 judges. Verdicts are by majority.

- Finally, numerous ***institutional safeguards*** ensure that the Prosecutor and the judges are persons of the highest standing who act independently and responsibly. Provisions for removal exist in the event that such a person is found to have committed serious misconduct or a serious breach of his or her duties.[24]

Why it is important for Australia to be among the first 60 ratifiers

The ICC treaty will enter into force 60 days after the 60th ratification. Soon afterwards the Assembly of State Parties – which will manage the Court - will hold its first meeting. Each State party will have one representative on the Assembly (who can be accompanied by alternates and advisers). States who have signed the Statute (or the Final Act of the Diplomatic Conference) may be observers at the Assembly. Only State parties are entitled to vote at the Assembly.

The 18 judges, the Prosecutor and the Deputy Prosecutor will be elected by State representatives at the Assembly's first meeting. Each State party may put forward one candidate for any given election. The judges, the Prosecutor and the Deputy Prosecutor may hold office for 9 years.

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[18] Important checks on the Prosecutor's decision *not* to commence an investigation or prosecution also exist: article 53, paragraph 3 (a) and (b) and rules 105 – 110 of the Rules of Procedure and Evidence.
[19] article 53, paragraphs 1 and 2
[20] article 58, paragraph 1
[21] article 61, paragraph 7
[22] article 66
[23] For all stages – the investigation, confirmation proceedings, the trial, sentence proceedings, reparations proceedings and appeal proceedings –clear procedures in accordance with the highest international standards of fair trial and due process exist.
[24] Part 4 of the Statute and Chapter 2 of the Rules of Procedure and Evidence.

As a State party at the first meeting of the Assembly of States Parties, Australia will be able to nominate a candidate for judge or Prosecutor, and will be able to vote on all of the judges and the Prosecutor. As a State party, Australian citizens will be able to work at the ICC in a variety of roles (as investigators, lawyers, psychologists and counsellors, administrators, interpreters etc). These will be important ways to ensure a high standard of staff. Australians have served with great distinction in the present *ad hoc* tribunals.

At the date of this submission, 115 countries have signed the ICC Statute and 22 have ratified it. Significant in themselves, these figures belie the intensive activity in countries around the world to ratify the ICC Statute and implement legislation for it. The current projection that 60 ratifications – the number necessary for the Court to enter into force – will be obtained by mid 2002 seems more than likely.

By being one of "the first 60", Australia will not have the benefit of seeing the Court in operation. However, Australia has been closely involved in negotiating and drafting all the underlying documents. Australia has played a leading role in the final outcomes on the ICC Statute, the Rules of Procedure and Evidence and the Elements of Crimes paper. Australian principles and ideals on due process and justice are directly incorporated in those documents. In addition Australia chairs the Like Minded Group of countries (over 65 countries) advocating for a strong and effective International Criminal Court.

The relationship between the ICC and the UN

The ICC has been negotiated by over 160 member States of the UN. However, it is not a UN body and will not be a subsidiary organ of the UN. It will be an independent permanent organisation with international legal personality.

However, it will have a relationship with the UN system. This relationship is set out in the Statute, and will be further defined in the Relationship Agreement between the UN and the ICC.[25]

The Statute sets out the basic ground rules of this relationship. One important aspect is that the Court will not be managed by the Security Council or the General Assembly but by the "Assembly of States Parties", comprised of representatives of the State parties to the treaty.[26] Financing of the ICC will be through assessed contributions from State parties and funds provided by the UN and voluntary contributions.[27]

The ***UN and its organs*** will be obliged to cooperate with the Court (within the terms of the UN Charter) in the pre-investigation, investigation, prosecution and other

[25] The Relationship Agreement is under consideration at the 6th session of the Preparatory Commission (27 November – 8 December 2000).
[26] article 112
[27] articles 115, 116, 117.

stages.[28] This may include providing information or evidence, assisting in execution of requests, and other related tasks. This may be especially necessary when the Court proceeds on war crimes involving UN personnel or property.[29]

The ***Security Council*** has the following important roles *vis-a-vis* the Court:

1. the Security Council can refer situations in which one or more crimes appear to have been committed to the Prosecutor acting under its Chapter VII powers[30];

2. The Security Council can adopt a resolution under Chapter VII requesting the Court not to commence or proceed with an investigation or prosecution for (renewable) 12 month periods[31];

3. If State parties fail to cooperate with the Court in accordance with their obligations under the Statute in matters referred by the Security Council to the Court, the Court can refer a finding of "non-compliance" to the Security Council[32];

4. The Security Council can provide views and observations on questions of jurisdiction to the Court in matters which the Security Council referred to the Court[33].

5. The Security Council can ask the Pre-Trial Chamber to review a decision by the Prosecutor not to initiate an investigation or not to prosecute when it referred the situation to the Prosecutor.[34]

In terms of the ***International Court of Justice's*** role *vis-à-vis* the Court - the Assembly of States Parties may refer disputes between two or more State Parties relating to the interpretation or application of the Statute to the ICJ.[35]

Non-State parties and the ICC

Matters will be referred to the ICC by one of three "triggers". For one of these trigger mechanisms – *situations referred by the Security Council following resolution under Chapter VII* - there are no geographic or nationality limitations. In effect the Court will be a permanent way of replacing the current method of establishing *ad hoc* international criminal tribunals. To refer a situation to the ICC, the Security Council must pass a resolution in accordance with its Chapter VII powers to maintain and restore international peace and security.

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[28] See, for example, article 15, paragraph 2; article 54, paragraph 3 (c) and article 87, paragraph 6.
[29] Such as the war crimes set out in article 8, paragraph 2 (b) (iii) & (vii) and paragraph 2 (e) (iii).
[30] article 13 (b)
[31] article 16
[32] article 87, paragraph 7
[33] article 19, paragraph 3
[34] article 53, paragraph 3(a).
[35] article 119, paragraph 2

This means that if crimes occur on the *territory of a non-State party* or by *a national of a non-State party* the Security Council could refer the situation to the ICC. This is notwithstanding the country is not a party to the ICC treaty.

However the other two trigger mechanisms – State Party referrals and the Prosecutor proceeding on his or her own motion (on the basis of credible information and after authorisation by the three judge Pre-Trial Chamber) – require, as a minimum precondition, that the crimes in question were committed on the *territory of a State party* (or on the territory of a non-State party who accepts the jurisdiction of the Court) or by a *national of a State party* (or by a national of a non-State party who accepts the jurisdiction of the Court).

This means that the Court could exercise jurisdiction over crimes occurring on the *territory of a non-State party* or by a *national of a non-State party* if the relevant non-State party accepts the Court's jurisdiction *over the situation*.[36] By doing so, the State will have exactly the same obligations to cooperate with the Court *vis-à-vis* investigations/ prosecutions as State parties have under the Statute.[37]

Assuming that the Security Council does not refer the situation to the Court and that a non-State party does not accept the Court's jurisdiction, the Court may exercise jurisdiction over crimes where either of the following are Parties to the Statute or have accepted the jurisdiction of the Court: the *State on the territory of which the conduct in question occurred* or the *State of which the person accused of the crime is a national*.

This means that the Court could exercise jurisdiction if the *nationals of a non-State party* are alleged to have committed crimes on the *territory of a State party*, or conversely, if the *nationals of a State party* are alleged to have committed crimes on *the territory of a State party or a non-State party*.

The Court may invite a non-State party to assist or cooperate according to an *ad hoc* arrangement or other agreement. (Unlike State parties, a non-State party is not automatically obliged to assist the Court with its requests for cooperation – unless it has made a declaration to accept the Court's jurisdiction). However, if a non-State party enters into an agreement with the Court and fails to cooperate with requests pursuant to that agreement, the Court can inform the Assembly of State Parties (or the Security Council where the Security Council has referred the situation.)[38]

The Elements of Crimes and Rules of Procedure and Evidence.

The ICC Statute is the primary constitutive document. The Rules of Procedure and Evidence and the Elements of Crimes paper are also important. The Rules of Procedure and Evidence, which are subordinate to the Statute, set out the basic ground

[36] The State would do this by making a declaration under article 12, paragraph 3 to accept the jurisdiction of the Court. By doing so the State accepts the Court's jurisdiction with respect to crimes of relevance to the situation (rule 44). This means that the non-State party *cannot* "pick and choose" those crimes for which it accepts jurisdiction and those crimes for which it does not accept jurisdiction (eg such as accepting jurisdiction over crimes on one side of a conflict but not another).
[37] article 12, paragraph 3, rule 44
[38] article 87, paragraph 5

rules as to how investigations, confirmation proceedings, trials, appeals, sentences and other proceedings will take place before the Court. They also provide further details on the composition and administration of the Court, the cooperation regime, and the enforcement of sentences. The Rules were negotiated by the 160 countries participating in the Preparatory Commission over thousands of hours. They provide a solid architecture for the future Court's proceedings.

The Elements of Crimes paper sets out each of the crimes and their elements. They are designed to assist and guide the Court. The elements of the various crimes reflect customary and conventional international law. The extensive definitions of the crimes ensure that both the Prosecutor and the defence will be clearly aware of the exact elements of the crimes. This will help avoid criticisms of retroactivity which have in the past been directed at prosecutions for international crimes. Defences available to accused persons; general principles of criminal law; and penalties which may be imposed upon conviction are also clearly set out in the Statute.

Conclusion

Australia plays a leading role in the world in the promotion and protection of human rights and fundamental freedoms. Australia's membership in the ICC will cause no major incursion of our sovereignty. At the same time it will reinforce our commitment to a peaceful and just world for all people. It will add our voice to those who demand that in the future the perpetrators of genocide, crimes against humanity and war crimes are brought to book for their appalling crimes rather than enjoying the impunity which has all too often been the case.

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Date **Signature**