The Chambers of the
Honourable Justice Perry
Supreme Court
Adelaide

22 November 2000

The Secretary
Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

My attention has been drawn to a recent public notice indicating that the Treaties Committee is considering "whether it is in the national interest to ratify the Statute for the International Criminal Court".

1 have a long-standing interest in the proposal to establish the court. I gave a paper on the topic at a conference in Italy last year. I enclose a copy of the paper in case it may be of interest to the Standing Committee. You will see that the paper includes a section on ratification by Australia.

1 would strongly urge the Treaties Committee to recommend ratification. Indeed, I am surprised that there should be any question about it, as public statements by both the Attorney-General and the Minister for Foreign Affairs have indicated that Australia proposes to ratify the Treaty. I enclose a copy of the letter from Mr Daryl Williams QC, Commonwealth Attorney-General to Mr Christopher Pyrie MP dated 22 February 2000, and a copy of a media release from the Minister for Foreign Affairs dated 12 December 1999 in which they both make a public commitment on behalf of the Government to ratify the Treaty.

1 understand from material on your website that there has been a further joint media release by the same Ministers dated 25 October 2000 indicating that legislation will be introduced by the end of this year to ratify the Rome Statute.

Australia was one of the first signatories, having signed the Treaty on 9 December 1998. There are, as of 24 October 2000, 115 signatures and 22 ratifications. The States which have ratified the Treaty include Canada, France, Italy, New Zealand and Spain.

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The 20'h century has seen a succession of some of the worst crimes against humanity, imaginable. The establishment of the International Criminal Court offers some hope that in the new millennium collective action by responsible nations of the world may curb violations and bring some of the perpetrators to justice.

Yours faithfully

THE HONOURABLE JUSTICE PERRY

1999 EUROPE-ASIA LEGAL CONFERENCE
held at Cernobbio, Lake Como, Italy
4 - 10 July 1999

THE INTERNATIONAL CRIMINAL COURT[1]

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Introduction

When I began to write this paper. NATO bombers were unloading their cargo of destruction over Yugoslavia. 1 was reminded of the fact, as all students of history well know. that 85 years ago it was a Serbian nationalist who murdered the Austrian Archduke Ferdinand at Sarajevo, an act which in 1914 plunged Europe and the allied nations into the horrors of the First World War.

That war occurred, despite the earnest deliberations of the International Peace Conference, held at the turn of the century, which gave rise to the fourteen Hague Conventions. As one commentator has observed,

[1] A paper delivered by the Honourable Justice Perry of the Supreme Court of South Australia. I acknowledge the invaluable assistance with research given by my associate, Ms Megan Brown. and the help which I received from Mr Mark Jennings, a principal legal officer in the International Branch of the Commonwealth Attorney-General's Department, Ms Katarina Grenfell of the South Australian State Crown Solicitor's Office and Dr Melissa Perry of Bar Chambers, Adelaide, who between them provided much historical material and many useful references.

the 1899 convention, "a Convention Respecting the Laws and Customs of War on Land',[2] -- did not inhibit war, but merely urged future combatants to kill themselves in a more humane manner".[3]

At the 1907 Hague Peace Conference there had been mention, and some little discussion, as to the possibility of establishing an international criminal court.

At the Versailles peace conference in 1919, the victors resolved to try the German Emperor, Kaiser Wilhelm, for crimes against humanity.[4] But he avoided trial by remaining in exile in the Netherlands, where his cousin was monarch. The so-called Leipzig trials of other German war criminals before the Reichsaericht[5] resulted in the conviction of only a handful of those whose prosecution was sought by the Allied Powers, and the imposition of derisory penalties.

Likewise, the early promise of the creation of an international forum for the trial of Turkish officials accused of the massacre of Armenians in 1915[6], disappeared in the political machinations which in 1923 resulted in the Treaty of Lausanne.[7]

The creation of an international criminal court was canvassed at various times during the proceedings of the League of Nations, but nothing came of the idea at that stage. The outbreak of the Second World War overcame attempts by the League to create such a court to try "individuals accused of the violation of the Convention for

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2 Hague Convention IV, Oct 18, 1907, 36 Stat 2277

3 Intentional Criminal Courts: The Legacy of N5remberg, Benjamin B. Ferencz, Pace International Law Review. Vol 10: 20 1.

4 Treaty of Peace between the Allied and Associated Powers and Germany (the Treaty of Versailles) concluded at Versailles 28 June 1919. The trial was to be before an ad hoc international criminal tribunal. vide Article 227 of the Treaty. which reads in part:

> Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused .... In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality".

5 The Supreme Court of Germany

6 Arrangements for the surrender and trial of alleged perpetrators of the massacre are to be found in the Treaty of Peace between the Allied Powers and Turkey, August 10, 1920 (Treaty of Sevres). The Treaty was never implemented.

7 Treaty of Peace with Turkey, July 24, 1923

the Prevention and Repression of' Terrorism"[8] and a proposed Convention for the court's establishment lapsed.[9]

The Declaration of St James[10] provided for the establishment of the United Nations War Crimes Commission which collected evidence of war crimes committed in the European theatre of the war. After the war. to prosecute and punish the worst offenders serving in the defeated forces, the International Military Tribunals of Nuremberg[11], 11 and Tokyo[12] were established.

In 1948 the General Assembly of the United Nations charged its International Law Commission (the ILC) with the task of investigating "the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organisation by international conventions".[13]

Initial progress was slow. The Soviet Union expressed its opposition, arguing that an international criminal court would be an unwarranted intrusion upon its sovereignty.Its view effectively blocked the issue in the Security Council. Subsequently a long drawn out and inconclusive debate took place over the definition of "aggression".

A draft statute was put forward in 195 1, and revised in 1953. But in 1957, under the shadow of the Cold, War, the issue was postponed indefinitely.

In 1974 the United Nations resolved to accept a definition of aggression put forward after no less than four special committees had been considering the matter since 1952.[14] But further progress towards an international criminal court was still a long way off.

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8 Geneva Convention on Terrorism, Part 1, Article 1

9 Geneva Convention for the Creation of an International Criminal Court, 16 November 1937. The Convention was ratified by one State only.

10 The Inter-Allied Declaration, January 13, 1942 signed at St James' Palace. London.

11 Created by the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Avis,* August 8, 1945 82 UNTS 279. The crimes within the jurisdiction of the tribunal were crimes against peace, war crimes and crimes against humanity, as defined in Article 6.

12 The Far Eastern Commission, established in December 1945, by all accounts an otherwise ineffectual body, was responsible for the creation of the International Military Tribunal for the Far East, which came into being as a result of an order proclaiming its charter, made in Tokyo by General MacArthur on 19 January 1946 TIAS No 1589 at 3.

13 GARes260B(111)UNDocA/810atl77(1948).

14 G A Res 33 14 (XXIX) UN GAOR 29 Sess Supp No 31 at 142-43 UN Doe A/9631 (1974).

The issue was revived as a result of activity from an unexpected quarter. Prompted by concerns expressed by Trinidad and Tobago over international drug trafficking, the General Assembly sought a report from the ILC on means by which persons engaged in that trade might be brought to justice.[15] The ILC seized the opportunity to argue the case for a more broadly based international criminal court, and persuaded the General Assembly to request it to prepare a draft statute for such a court.

After the ILC had come forward with a draft report, it was commissioned to prepare a final draft statute by 1994, which it did.[16]

On its receipt of the draft statute in 1994, the General Assembly created the Ad Hoc Committee on the Establishment of an International Criminal Court (the CC)[17], and a year later the Preparatory Committee for the Court's establishment.'[18]

It was the Preparatory Committee's report[19] which in 1996 provided the basis for the General Assembly resolution which, in the same year, set a date for a Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court to be held in Rome between June and July 1998. For the consideration of that conference. the Preparatory Committee prepared a draft consolidated text of the ILC statute.[20]

The five-week conference, held between 15 June and 17 July 1998, was attended by representatives of 160 countries. The deliberations of the conference were marked by intensive negotiations and many compromises.

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15 GARes4-',/164UNGAOR43dSessSuppNo49at2SOUNDocA/43/49(1988).

16 Report of the International Law Commission UN GAOR 491h Sess Supp No 10, UN Doc A/49/10 (1994).

17 UNGA Res 49/53 (1993). The committee reported to the General Assembly in 1995, see UN Doc A/50/22. 6 September 1995

18 G A Res -50/46 UN GAOR 501h Sess UN Doc AIRE/50/46 (1995). The resolution provided that the next General Assembly meeting would "... decide on * the convening of an international conference of plenipotentiaries to finalise and adopt a convention on the establishment of an international criminal court

19 Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc A/51/22. 5 1 " Sess (GA).

20 See the Addendum to the Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF 18312/Add. 1, 14 April 1998.

A vote was taken on the very last day, 17 July 1998. The Statute was there and then adopted by an overwhelming majority comprising 120 countries, which included Australia, against seven opposing,[21] 21 countries abstaining.

The ICC will come into being after the Statute has been ratified by 60 countries.[22] At the date of writing, the latest available figures indicated that 82 countries have *signed.*[23] Hopefully, *ratification* by the requisite number of States is not far off.

The Rome Statute

The Statute is a lengthy document comprising some 128 articles. Amongst other things, it deals comprehensively with the establishment of the Court; its jurisdiction and applicable law; provisions relating to investigation and prosecution, other pre-trial procedures; the trial itself; penalties and their enforcement.

The proposed court is to be distinguished from the International Court of Justice (the 1Q in that the ICJ deals with causes arising, between States, whereas the ICC will deal with natural persons charged with crimes.[24] In the words of one commentator, "It will put real people in real jails.[25]

Composition and Function of the Court

The seat of the Court is to be established at the Hague.[26]

The Statute provides that there be 18 full-time judges of the Court.[27] No two judges may be nationals of the same State.[28] The judges are to be "chosen from among persons of high moral character, impartiality and integrity who possess the

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21 As the vote was taken by secret ballot, it is not possible to identify with confidence those who opposed the statute's adoption. However, it is almost certain that the USA, China. India and Israel were amongst those who voted against adoption.

22 Article 126.

23 This is the number recorded in the United Nations official web-site as of 23 April 1999, see http://www.un.org/law/icc/statutelstatus.htm.

24 Proposals that corporations be brought within the purview of the ICC were debated at the Rome Conference but did not find favour with the majority of delegates.

25 Wexier and Carden, A First Look at the 1998 Roine Statute, Washington School of Law Working Paper Series No 98-10- 1, October 1998.

26 Article 3. The article envisages that the Court may sit elsewhere "as provided" in the Statute. As to sittings outside of the Hague, see Article 62 which provides that the place of trial shall be the seat of the Court "unless otherwise decided- and see Article 93, paras 1(b) and (g). which oblige State Parties to allow the taking of evidence and the examination of places and sites within their territory.

27 Article 35, para 1, and Article 36, para 1

qualifications required in their respective States for appointment to the highest judicial offices".[29]

Not less than six judges are to serve in a Pre-Trial Division, not less than six in a Trial Division and the President and four other judges in an Appeals Division.[30]

The office of the Prosecutor is to be a separate organ of the Court. He or she is responsible for the initial stage of any prosecution, and must analyse "the seriousness of the information received" as to any situation referred to him or her.[31]

If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she submits the matter to the Pre-Trial Chamber which may authorise the commencement of the investigation.

The close supervision by the Pre-Trial Chamber of any investigation by the Prosecutor is obviously designed to allay concerns expressed by the States that an independent Prosecutor, unconfined by some such mechanism, and otherwise unaccountable, might be prompted to act out of political rather than objective legal considerations.

After completing the investigation, if the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the accused person has committed the crime alleged, on the application of the Prosecutor it may then either issue a warrant for the arrest of the person or a summons for the person to appear before the Court.[32]

Trigger Mechanisms

A central feature of the Statute, and one which occasioned much debate during the councils which preceded its adoption, are the procedures by which a prosecution may be initiated. The Statute provides three separate procedures by which the jurisdiction of the Court may be invoked:

* A State party may refer to the Prosecutor "a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed" with

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[29] Article 36, para 7.
[30] Article 36, para 3(a).
[31] Articles 34 and 39.
[32] Article 15, para 2

a request that the Prosecutor investigate the situation "for the purpose of determining whether one or more specific persons should be charged'[33]

* A reference to the Prosecutor by the Security Council of the United Nations acting under Chapter VII of the Charter of the United Nations, where it appears to the Security Council that a crime within the jurisdiction of the Court has been committed.[34]

* Following an investigation by the Prosecutor of his or her own initiative.[35]

The Statute draws a distinction between references by a State Party and investigations by the Prosecutor on the one hand, and referrals by the Security Council on the other. As to the former category, the Court will only have jurisdiction if the State on the territory of which the conduct in question occurs[36] or the State of which the defendant is a national[37] are participating States, or have accepted the jurisdiction of the Court.[38]

However, that pre-condition does not apply in the case of referrals by the Security Council. It follows that such referrals may be made even if the State on whose territory the alleged crime has occurred is not a participating State and does not submit to the jurisdiction of the Court. This means that it will no longer be necessary for the Security Council to consider the appointment of ad hoc tribunals, as in the case of the former Yugoslavia and Rwanda, but it may treat the ICC as an ongoing forum for the adjudication of alleged crimes in this category.

Crimes within the Jurisdiction of the Court

Definition of the crimes within the jurisdiction of the Court was both the most challenging, and one of the most important of the questions to be addressed by the Rome Conference.

In its 1994 draft the ILC took the view that it was not appropriate either to de or codify crimes under general international law.

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[33] Article 14. para 1 and Article 13(a).
[34] Article 13(b).
[35] Article 13 and Article 15, para 1.
[36] Article 12 para 2(a).
[37] Article 12 para 2(b).
[38] The procedure for acceptance of the jurisdiction of the Court in a particular case involves the lodging of an appropriate declaration in the terms required by Article 12, para 3.

Political and other considerations of a divisive kind bore down heavily on the discussion of this aspect of the matter at the Rome Conference. The consensus on the definitions which appear in the Statute must be regarded as a most significant achievement. The need to work quickly to produce a definition of crimes which so far had not been clearly defined in international law had the potential to de-rail the deliberations of the conference and frustrate the achievement of its ultimate goal.

Article 5 provides that the Court has jurisdiction with respect to:

a). The crime of genocide;
b). Crimes against humanity;
c). (c) War crimes;
d). (d) The crime of aggression.

Although the Statute then goes on to define the first three of those crimes, as to the fourth, the crime of aggression, not wishing to threaten the acceptability of the Statute as a whole, and given the widely differing views of the participating States at the Conference as to this topic, the conference adopted a compromise position which neatly side-stepped the immediate problem of securing a unified approach.

Effectively, the Statute provides that the Court's jurisdiction over the crime of aggression may not be exercised until a provision defining the crime is adopted by the Assembly of States Parties by way of an amendment to the Statute. The procedural mechanism which may be invoked so as to secure an amendment dealing with the matter may not be activated before the expiration of seven years from the entry into force of the Statute.[39]

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[39] 19 See Article 5:

> "2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations"

Pursuant to Article 121, any State Party may propose amendments to an Assembly of States Parties. The Assembly may in turn either deal with the proposal directly, or convene a review conference pursuant to Article 123.

In the result, while the outcome may not satisfy everyone, drawing heavily on historical texts, it goes on to set out what promises to be a workable definition of "the most serious crimes of concern to the international community"[40]

In construing the definitions which appear in the Statute, one must bear in mind that the definition of each crime is prefaced by the words "for the purpose of this Statute".[41] Those words circumscribe the potential application of the definitions in other international law contexts. How ever, if the Statute is ratified by a significant number of States, it will no doubt be argued that the definition should be regarded as part of customary international law.

Be that as it may, the Statute is not to be regarded as inhibiting the development of rules of international law for purposes extrinsic to the Statute. Article 10 is apposite:

> "Nothing in this part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

The Statute draws a distinction between the definition of the justiciable crimes per se and the definition of the elements of the crimes. The Statute envisages that the Assembly of States Parties will consider and adopt specific elements of the crimes, subject to the important reservation that any such elements will be "consistent" with the provisions of the Statute.[42]

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[40] This is the phrase used in the preamble to the Rome Statute, which identifies the objective of creating a jurisdiction over such crimes as the central rationale for the establishment of the Court. The phrase is repeated in Article 1.

[41] See the introductory words of Article 6 (genocide), Article 7 (crimes against humanity) and Article 8 (war crimes).

[42] See Article 9 which provides:

> "1. Elements of Crimes shall assist the Court in the interpretation and application of Articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties."
>
> "2. Amendments to the Elements of Crimes may be proposed by:
>
> (a) Any State Party;
> (b) The judges acting by an absolute majority;
> (C) The Prosecutor.
>
> Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
> 3. The Elements of Crimes and amendments thereto shall be consistent with Statute."

The other important observation to make is that the Court's jurisdiction is limited to crimes committed after the coming into force of the Statute.[43]

1 deal separately with each of the defined crimes.

Genocide

Article 6 of the Statute reproduces without alteration the definition of genocide contained in article 2 of the Geneva Convention.[44] The definition is as follows:

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

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group."

Insofar as Article 6 proscribes killing. or causing serious harm to members of a national ethnical, racial or religious group, it is clear from the definition that the crime must include an intention to destroy the group "as such". The words "in whole or in part" make it clear that the intention need not extend to the destruction of an entire group. But presumably the intention must extend to the destruction of more than a small number of members of the group.

Wisely, the Conference decided against the addition of social and political groups to the groups specifically named in the Geneva Convention.

Crimes against Humanity

There is no generally accepted definition of crimes against humanity, although a number of international law instruments have incorporated specific definitions.[45] In

43 Article 11.

44 Convention on the Prevention and Punishment of the Crime of Genocide (1948) 78 UNTS 277, Human Rights and the Administration of Justice. International Instruments (Ed Game and Mackarel) (Kluwe Law International) 555.

45 See the N5rember. Tribunal Charter (Article 6(5)), the Tokyo Tribunal Charter (Article 5(c)), the Statute for the Yugoslav Tribunal, (Article 5), and the Statute for the Rwanda Tribunal (Article 3). See also Draft Code of Crimes against the Peace and Security of Mankind, G,VRes/48/12, 1996, Article 18.

most international law settings, the concept of' crimes against humanity has generally been confined to such crimes committed at a time of armed conflict. Eventually, however, the conference accepted the view expressed by many delegates that the definition of such crimes in the Statute should not be so confined.

In the result, while any of the catalogue of crimes against humanity listed in Article 7 may be committed either at a time of peace or during armed conflict, the circumstances in which they may be prosecuted are heavily conditioned by the introductory words of the article, namely:

1. For the purpose of this Statute, 'crimes against humanity' means any of the following acts when committed as part of a widespread of systematic attack directed against any civilian population[46] with knowledge of the attack: ...."[47]

The proscribed acts include murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty "in violation of fundamental rules of international law", torture and apartheid.

A series of sexually related offences are "rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity".[48]

The crime of "persecution" is defined to mean-

"persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender .... or other grounds that are universally recognised as impermissible under international law in *connection with* any act referred to in this paragraph or any crime within the jurisdiction of the Court". (emphasis added)

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[46] "Attack directed against any civilian population", and a number of the words and phrases which appear in the list of specific crimes within the rubric of crimes against humanity are further defined in para 2 of Article 7.

[47] The requirement for "knowledge of the attack- must be read in conjunction with Article 30. 48 Article 7 para 1 ~d).

[48] Article 7 para 1(d)

This latter definition means that to secure a conviction for a trial of persecution, the prosecution must presumably prove the commission of another crime, then demonstrate that it is against any identifiable group or collectivity" (whatever the latter expression may mean), and as well prove that the ground upon which the persecution was based was either political, racial, et cetera. A daunting task!

The specific crimes tabulated in article 7 conclude with a more general catch-all proscription:

"Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[49]

War Crimes

The jurisdiction in respect of war crimes applies "in particular" (which I assume means in all cases) "when committed as a part of a plan or policy or as part of a large-scale commission of such crimes".[50] Article 8 tabulates eight specific acts covered by the Geneva Conventions of 12 August 1949 as being within the Statute if they amount to "grave breaches" of those Conventions. The acts so proscribed include wilful killing, torture, unlawful deportation and taking of hostages.

Apart from the Geneva Convention war crimes, the Statute defines as war crimes "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law", including various direct attacks upon the civilian population, and specifically, but not limited to, attacks against personnel or infrastructure involved in peace-keeping or the supply of humanitarian assistance.[51]

But the definition does not rest with such acts committed in the course of *international* armed conflict. Article 8 also brings within the scope of the definition of war crimes a number of violations of a kind identified in the four Geneva Conventions committed in the course of armed conflict *not of an international character,*[52] and

[49] Article 7 para 1(k)
[50] Article 8 para 1.
[51] Article 8, para 2(b).
[52] Article 8, para 2ke).

apart from the Geneva Convention based crimes "other serious violations of the laws and customs applicable in armed conflicts not of an international character".[53]

Some Matters of General Principle

The Statute contains a number of provisions of general application to prosecutions.

The presumption of innocence and the onus of proof beyond reasonable doubt defined in the traditional terms of the common law are specifically incorporated.[54] There is no criminal responsibility for acts committed before the entry into force of the Statute.[55] Jurisdiction may be exercised with respect to natural persons over the age of 18 years at the time of the alleged commission of a crime,[56] without distinction based on official status. Not even a Head of State is immune from prosecution.[57]

Military commanders are criminally responsible for acts otherwise attracting criminal liability under the Statute, committed by forces with respect to which they exercise "effective command and control or effective authority and control" in the circumstances postulated by Article 28.

No statute of limitations applies.[58] Article 30 provides that, generally speaking. criminal responsibility does not arise unless the relevant acts are committed "with intent and knowledge".[59]

The Act excludes any defence of superior orders with respect to genocide or crimes against humanity,[60] but the defence will apply if the person was under a legal obligation to obey an order which he or she did not know was unlawful and which did not involve the commission of genocide or crimes against humanity.

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53 Article 8, para 2(e).

54 Article 66.

55 Article 24. And see Article 11, para 1:
"The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute."

56 Article 26.

57 Article 27.

58 Article 29.

59 The requisite -knowledge" is defined in a way which includes a substantial element of objectivity, in that "knowledge" means awareness that a circumstance exists or a consequence will occur *in the ordinary the course of events*".

60 Article 33, paras 1 and 2.

The Principle of Complementarity

The boundary struck between the investigation and prosecution of offences by a State Party within its own system of domestic law and the role of the ICC is both a central feature of the Statute, and a provision which has the potentiality seriously to inhibit its effective operation.

The preamble emphasises that the ICC "shall be complementary to national criminal jurisdictions".[61] The matter is further developed in article 17. Pursuant to article 17, the Court *shall* determine a case to be inadmissible[62] 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;

(d) The case is not of sufficient gravity to justify further action by the Court." (emphasis added)

In considering, the question of *unwillingness* in a particular case, the Court must consider whether or not the State concerned is attempting to shield the accused from criminal responsibility under the Statute, whether there has been unjustifiable delay, or whether proceedings in the State have been conducted in a manner "inconsistent with an intent to bring, the person concerned to justice".[63]

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61 Preamble, para 10, and see Article 1

62 The Article and some other parts of the Statute speak of "admissibility". This seems to be a concept different from jurisdiction. The difference seems to be drawn between matters otherwise within the jurisdiction of the court but as to which, for one reason or another, the Court may decline to exercise its jurisdiction, and matters not within the jurisdiction of the Court in the first place.

63 Article 17. para 2

As for the question of inability, the Court must consider whether the State is unable effectively to proceed against the accused due to a "total or substantial collapse or unavailability of its national judicial System.[64]

Despite the saving provisions, the potential for sham investigations or prosecutions designed to deflect liability under the Statute is manifest. Only time will tell whether or not this provision poses a serious threat to the workings of the Statute.

Arrest

The Statute provides that State Parties must co-operate fully with the Court in its investigation and prosecution of crimes.[65] Specific requests by the Court for co-operation may be transmitted through diplomatic or other appropriate channels.[66] The request for co-operation may extend to the arrest and surrender to the Court of the person against whom a charge is to be brought,[67] or a person already convicted.[68]

Protection of Victims and Witnesses

The Statute contains elaborate provisions designed to protect the safety and well being of victims and witnesses.[69] These include the ability to conduct hearings in camera or with evidence presented by electronic or other means.[70] The Registrar must set up a Victims and Witnesses Unit within the Registry of the Court.[71] The Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance.[72] Where the disclosure of evidence or information may lead to the "grave endangerment" of the security of a witness or of his or her family, the Prosecutor may withhold the evidence or information, and submit a summary of it.[73]

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64 Article 17 para 3.
65 Article 86
66 Article 87 para 1.
67 In which event the request must be accompanied by such "documents, statements or information as may be necessary to meet the requirements for a surrender process in the requested State", provided that the requirements are no more than those applicable to a request for extradition: Article 91, para 2(c).
68 Article 91 para 3.
69 Article 68.
70 Article 68 para 2.
71 Article 43 para 6.
72 Article 68 para 4.
73 Article 68 para 5.

Penalty

The Statute does not countenance capital punishment, but it provides that the Court may impose a sentence of imprisonment, in ordinary cases for a specified number of years not exceeding a maximum of 30 years, or life imprisonment "when justified by the extreme gravity of the crime and individual circumstances of the convicted person".[74]

In addition to imprisonment, the Court may order a fine and may direct forfeiture of any property derived directly and indirectly from the crime,[75] and may make an order for the convicted person to make reparation, which may take the form of restitution, compensation or rehabilitation.[76]

Any sentence of imprisonment is to be served in a State "designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons".[77]

Ratification by Australia

The question of ratification of the Statute of Rome in the various jurisdictions represented by the attesting parties is important, given the stipulation that the Statute will enter into force only after ratification by sixty participating States.[78]

The legal requirements for ratification of treaties, and the legal consequences of ratification, vary between nation States. In Australia, both the entry into a treaty and its ratification are matters for the executive rather than the legislative arm of government. Entry into a treaty by Australia creates at the most a legitimate expectation that the provisions of the treaty will be taken into account in the process of administrative decision making, but does not otherwise operate to create substantive rights or obligations which may be recognised in State or Federal domestic law[79]

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74 Article 77. para 1(b).
75 Article 77, para 2(b).
76 Article 75, para 2.
77 Article 103, para 1(a).
78 The relevant provision in the Statute is Article 126 which provides that it "shall enter into force on the first day of the month after the 60"' day following the date of the deposit of the 60 h instrument of ratification, acceptance, approval or accession with the Secretary -General of the United Nations".
79 See Minister for Immigration and Ethnic. Affairs v Teoh (1995) 183 CLR 273, and Perry, At the Intersection - Australian and International Law (1997) 7 1 ALJ 84 1.

A question arises whether in order to give efficacy to the implementation of treaties in Australia, legislation is necessary. The answer to that question depends upon the nature of the treaty. The international obligations assumed by the entry into a treaty may be capable of fulfilment without the need for legislative intervention.

On the other hand, Australia's participation in some treaties may be ineffective without complementary legislation.[80]

The Rome Statute is, from the point of view of Australian law, in the category where legislation will be necessary if Australia's participation in the creation and operation of the ICC is to be effective.

Quite apart from other considerations, legislation will be necessary in order to sanction the arrest and extradition of persons suspected of crimes within the jurisdiction of the Court, who may be within the territorial limits of Australia.

The Statute includes a number of provisions designed to ensure an appropriate level of co-operation on the part of States Parties. Part 9, headed *International Co-operation and Judicial Assistance,* includes Article 88, which obliges States Parties to ensure that there are procedures available under their national law for all of the forms of co-operation" specified in that part. The necessary co-operation includes responding effectively to requests transmitted by the Court "for the arrest and surrender of a person",[81] and for the provision of information and assistance.[82] Outside Part 9, Article 109 obliges States Parties to "give effect to fines or forfeitures".

These provisions make it clear that it will be necessary for the Commonwealth of Australia to pass legislation not only approving Australia's ratification of the treaty, but at the same time providing for such measures which, as a matter of domestic law,

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80 For a discussion of the relevant principles and for examples of treaties which have been implemented by Commonwealth legislation, see *International Law and Australian Federalism,* edited by Opeskin and Rothwell (1997), more particularly the chapter authored by Campbell, *The Implementation of Treaties in Australia.* See also *Trick or Treaty? Commonwealth Power to Make and Implement Treaties,* Report by the Senate Le-al and Constitutional References Committee *(1995).*

81 Article 89, para 1. Obviously, a person the subject of any such request will need to be able to have access to an appropriate jurisdiction in Australia to challenge the request, as to which see Article *89,* para 2.

82 Article 871. para 6.

it will be necessary to enact in order to enable Australia to carry out its role as a participating State.

Australia has been active in its support for the establishment of the International Criminal Court. For example, both the Minister for Foreign Affairs[83] and the Federal Attorney-General[84] have spoken publicly in favour of its establishment. Neither raised concerns of any moment with the model eventually adopted by the Rome Conference. Australia is already a signatory. There is, therefore, every expectation that Australia will ratify the Treaty of Rome and enact such legislation as may be necessary to enable Australia to be fully engaged in its operations as a participating State.[85]

It is important to note that ratification by legislation does not mean that Australia would necessarily incorporate the crimes justiciable by the ICC into the domestic law of Australia, in the sense that they would become crimes which might be prosecuted in this country.[86] On the contrary, it is at least arguable that such an approach would be undesirable, in that if Australia supports the ICC, it is best that that Court be regarded as the appropriate forum for the prosecution of such crimes, rather than a court within Australia.[87]

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83 Alexander Downer MP, in an address to the Rome Conference, 15 June 1998 http://www.un.org/icc/speeches/615aul.htm.

84 The Hon. Daryl Williams AM QC MP in an address to a dinner hosted by the Queensland Branch of Amnesty International, 26 August 1998.

85 There has been a not inconsiderable support by Australians to the deliberations leading to the Rome Statute, and its aftermath. A leading Australian jurist, Professor James Crawford, as a member of the International Law Commission, made a substantial contribution to the Commission's work in preparing the Draft Statute. He has, as well, written extensively in support of the International Criminal Court, over many years. (See, for example, his article in the American Journal of International Law (1995) Vol 89, page 494 *The ILC adopts a Statute for an International Criminal Court,* and see his speech to the Rome Conference, 15 June 1998, reported at http:/lwww.un.org/lcc/speeches/615cra.htm.) The ongoing role of Australia in the implementation of the Rome Statute includes the participation of the International Branch of the Attorney-General's Department in the preparation of a draft text of Rules of Procedure and Evidence.

86 "For example, the Convention on the Prevention and Punishment of the Crime of Genocide was ratified by Australia on 8 July 1949 and entered into force on 12 January 195 1. The *Genocide Convention Act* 1949 (Cth) gave parliamentary approval to the ratification but d id not *implement* the Convention, with the result that it does not form part of the domestic law of Australia. See *Kruger and Ors v The Commonwealth of Australia* (1996-1997) 190 CLR 1 per Dawson J at 70 et seq, Toohey J at 87 and Gummow at 159, ad *Re Thompson, ex parte Wadjularbitna Nulyarimma and Ors,* (unreported) 18 December 1998, Crispin J, [1998] ACTSC 136.

87 Although the Foreign Minister, the Hon. Alexander Downer, in his speech noted at footnote 81 said:

"Australia strongly supports the view that national jurisdiction should take precedence over the jurisdiction of the Court where that natural jurisdiction is able and willing to deal effectively with alleged crimes. *Primary' responsibility for investigations and prosecution should remain with the State."* **(emphasis added)**

Conclusions

My prediction is that the judgement of history will see the passing of the Statute of Rome on 17 July 1998 as a development no less significant to the international community than the creation of the United Nations itself. As we approach the end of this century, the possible establishment of the ICC represents a flicker of light over an historical landscape, pock-marked by some of the bloodiest violations of international humanitarian law ever experienced.

Only time will tell whether the Statute of Rome will, in the course of the next century, fulfil the lofty aspirations of those who have contributed to its formulation.

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May 1999