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Issues raised in evidence

Introduction

2.1 There were five main concerns raised in the evidence presented to the Committee:

- the potential impact of ratification of the ICC Statute on Australia's sovereignty;
- whether ratification would be unconstitutional;
- the 'vagueness' with which the Statute defines the crimes within its jurisdiction and their definition if the proposed implementing legislation;
- the role of the Prosecutor and the accountability of the Court; and
- the potential impact of ratification on the ability of the Australian Defence Force to participate in peacekeeping and other operations.

2.2 While the Committee took a considerable amount of evidence on the Statute it was unable to review the proposed implementing legislation until quite late in its scrutiny process. On 31 August 2001 the Attorney-General referred two bills to the Committee designed to implement the Statute into Australian law. As with the Statute these bills have generated a considerable degree of debate on their impact and content. The proposed legislation will be discussed later in the Chapter.

2.3 In addition, there was some debate in the evidence the Committee received about whether it is preferable for the international community to establish a permanent international criminal court or to continue the practice of appointing *ad hoc* tribunals as the need arises.

2.4 Each of these issues, and a number of other matters, are explored in greater detail below. The conclusions the Committee has drawn on each issue are described in Chapter 3.

Impact on national sovereignty

2.5 Much of the debate in evidence to the review centred on the importance and meaning of national sovereignty in a rapidly changing global environment.

2.6 Specifically, many submissions, particularly from individual members of the public, expressed grave concern that ratification of the ICC Statute would diminish the control that Australians exercise over their own affairs by ceding judicial authority to a foreign court, over which Australia's citizens and governments would have no control.

2.7 The position put in many submissions was that ratification of the Statute would:

> … licence an alien body to interfere directly and powerfully in Australia's domestic affairs, to the extent of being able to arrest, try and imprison Australian citizens for alleged crimes committed on Australian soil.[1]

2.8 The National Civic Council (WA), made a similar point, arguing that judicial power is a key aspect of national sovereignty and that:

> … a well-functioning, independent, sovereign democracy has no valid reason for surrendering its sovereignty …

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1 C J McCormack, *Submission No. 194*, p. 1 This view, and variations upon it, was also put in submissions from Jim Kennedy, Andrew Anderton, Carrie Barrick, Alan Barron, Dawn Brown, Klaus Clapinski, Stewart Coad, Patrick Healy, Allen Kingston, Anthony Grigor-Scott, Michael Kearney, Ken Lawson, Peter Murray, Marlene Norris, Valerie Staddon, National Civic Council (WA) and the Vigilance Committee. A similar sentiment was expressed by John Stone (see John Stone, *Transcript of Evidence*, 13 February 2001, p.TR87-90). June Beckett spoke in support of this view, citing correspondence she had received from a former Chief Justice of the High Court of Australia, Sir Harry Gibbs. Sir Harry is quoted as saying 'that if Australia ratifies the Treaty, the result will be that Australia would have surrendered part of its sovereignty.' (See June Beckett, *Transcript of Evidence*, 13 February 2001, p. TR76, and June Beckett, *Submission No. 11.2*, to which is attached two letters from Sir Harry Gibbs to Mrs Beckett (the first dated 19 January 2001 and the second 2 February 2001).) Professor George Winterton also referred to Sir Harry Gibbs in observing that while 'all treaties involve some surrender of 'sovereignty' (in the sense of national power to act autonomously) … the [ICC] Statute would do so to a greater degree than most' (see *Submission No. 231*, p. 1).

> In the judicial sphere Australia, as a functioning and free democratic nation, should be and is capable of exercising the judicial function without let or hindrance, and without assistance from any alien court.[2]

2.9 Some submitters described the ICC as a 'supranational' court, with universal jurisdiction, and claimed that:

> The process [leading to the establishment of the ICC] reeks of an agenda of globalism and a world dictatorship of which we should have no part.[3]

2.10 The National Civic Council (WA) encapsulated the concerns of many when they concluded that ratification of the ICC Statute would not only be 'unwarranted, unjustified, undemocratic and un-Australian'. They also said:

> It appears to border on treason by the Executive Government against the people of Australia.[4]

2.11 On the other hand, the Committee received submissions from those who argued that ratification of the ICC Statute would neither diminish the rights of Australian citizens nor infringe upon Australia's sovereignty.

2.12 In summary, those who hold this view argued that:

- establishment of the Statute would represent the cooperative exercise of independent sovereign power, enabling States to achieve collectively what no individual sovereign State can achieve on its own;[5]
- the crimes proposed to be within the jurisdiction of the ICC are not new crimes and the potential of Australian citizens being tried by foreign courts for war crimes has existed since 1949 when the *Geneva Conventions* were established;[6]

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2 National Civic Council (WA), *Submission No. 1*, p. 3.

3 P J Keogh, *Submission No. 182*, p. 1. Similar views were expressed by Arthur Hartwig, Festival of Light, Howard Bates, W Mitchell, Julie Beare, Mr Peter McDonald, Bruce Mitchell, Gareth Kimberley and June Beckett.

4 National Civic Council (WA), *Submission No.1*, p. 3.

5 James Cockayne, *Submission No. 217*, pp. 1-2 and 5 See Sydney University Law School Amnesty Group, *Submission No. 224*, p. 1 for a similar view.

6 UNICEF Australia, *Submission No. 34*, pp. 1 and 8; the Hon Daryl Williams AM QC MP, *Speech to the Western Australian Division of the Australian Red Cross*, 21 April 2001, p. 4. The Attorney recently restated this point, saying: 'In the last 52 years I have never heard anyone who thinks that adhering to the Geneva Conventions is an impost on our national sovereignty!' (The Hon

- the ICC is a specialised form of international dispute settlement, albeit in relation to criminal matters, but not unlike the International Court of Justice and the dispute settlement system of the World Trade Organisation, neither of which have posed a threat to State sovereignty;[7]
- the ICC Statute recognises and respects national sovereignty by *obliging* State Parties to conduct their own investigations and prosecutions where it appears that their own nationals may have been involved in genocide, crimes against humanity or war crimes;[8]
- the principles underpinning the ICC Statute ensure that the Court will only ever be a 'court of last resort', whose jurisdiction is invoked only when a State Party is genuinely unable or unwilling to investigate and prosecute a crime;[9] and
- ratification of the ICC Statute (like ratification of any other international agreement) is an expression of national sovereignty that can be withdrawn at any time.[10]

2.13 Justice John Perry, from the South Australian Supreme Court, offered another perspective on this issue by suggesting that there is no loss of sovereignty in establishing a court of last resort to try a person who might otherwise not be brought to justice.

> If an act of genocide, a crime against humanity or a war crime, as defined in the statute, were to be committed by an Australian national abroad, it may be committed in circumstances in which Australian courts would exercise jurisdiction over that person, in which event our ability to do so would be completely unaffected by this statute. If on the other hand it was not justiciable in

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Daryl Williams AM QC MP, *Speech to the ACT Division of the Australian Red Cross*, 9 August 2001, p. 4).

7 The Hon Daryl Williams AM QC MP, 'The International Criminal Court – the Australian Experience', an address to the International Society for the Reform of Criminal Law, 30 August 2001, pp. 8-9.

8 World Vision, *Submission No. 104*, p 5 See also Chris Hodges (Ags) , *Transcript of Evidence*, 30 August 1999, p. TR5.

9 See also submissions from Elizabeth Bennett (on behalf of a group of 12 university students), Helen Brady, Human Rights Watch, Australian Lawyers for Human Rights and the New South Wales Bar Association.

10 Graham Riches (Legacy Coordinating Council), *Transcript of Evidence*, 14 March 2001, p. TR146 This point was also made in Department of Foreign Affairs and Trade, *Australia and International Treaty Making: Information Kit*, July 2000, p. 9.

> Australia … we have not lost any national sovereignty by countenancing a situation in which some other country, if it is committed on the soil of that country, might prosecute or if the International Criminal Court might.[11]

2.14 On a related point, James Cockayne submitted that every nation has the right, in accordance with its constitutional and legislative norms to transfer jurisdiction over an accused person to another jurisdiction. This type of jurisdictional transfer, known as extradition, is, it was argued, 'an entirely valid exercise of national sovereignty.'[12]

2.15 The Hon Justice John Dowd, President of the Australian Chapter of the International Commission of Jurists, referred to the international network of extradition agreements, agreements on mutual assistance in criminal matters and on the confiscation of assets as current examples of the type of arrangements proposed by the ICC Statute. Justice Dowd submitted that:

> The wheels have not fallen off Australia every time we have signed an extradition treaty or a mutual assistance treaty. These operated in our courts, before my court [that is, the NSW Supreme Court], all the time.[13]

2.16 The Attorney-General, on behalf of the Government, noted that all countries around the world are concerned to protect their national sovereignty and that the number of 'democratic nations that have committed themselves to the ICC should be of comfort to those concerned that the Court might interfere with national sovereignty.'

> One can safely assume that ensuring that the ICC does not threaten national sovereignty is of as much concern to Canada, New Zealand, France, Germany, South Africa and Italy. Those

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11 Justice John Perry, *Transcript of Evidence*, 14 March 2001, p. TR161 Sydney Law School Amnesty Group made a similar point (see *Submission No. 224*, p. 1).

12 James Cockayne, *Submission No. 217*, p. 3. See also Sydney Law School Amnesty Group, *Submission No. 224*, p. 1.

13 The Hon Justice John Dowd (International Commission of Jurists), Transcript of Evidence, 13 February 2001, p. TR103-104. The Rt. Hon. Sir Ninian Stephen, a former judge of the Australian High Court, has stated that: 'if such a permanent international tribunal indeed comes into existence this will be a great step forward for the rule of Law internationally as regards war crimes and such other areas of international law as are placed within its jurisdiction. It will also necessarily involve to a degree some voluntary surrender, by nations who become parties to the convention, of exclusive criminal jurisdiction, a matter very much at the heart of sovereignty (Rt. Hon. Sir Ninian Stephen, 'Judging War Crimes', *Res Publice*, Vol. 7, No. 1, 1998, p. 5).

> countries are clearly satisfied on that front and have ratified the Statute.[14]

2.17 At the core of the debate about the impact of the ICC Statute on national sovereignty are differing views about the effectiveness of the complementarity principle.

Effectiveness of the complementarity principle

2.18 As noted in Chapter 1, the complementarity principle is fundamental to the operation of the ICC.[15]

2.19 Supporters of ratification argued that the complementarity principle would ensure the primacy of national systems of law and of national courts.

2.20 Helen Brady submitted that:

> Complementarity means that the country concerned … 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 [the country concerned] … fails to do so, or does so in a manner inconsistent with an intent to bring the person to justice or to shield the person from criminal responsibility.
>
> Australia will be – *and indeed already is* – responsible for investigating and prosecuting these crimes. If Australia becomes a party to the ICC 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 …
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> …
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> The Court could only assume jurisdiction where Australian … authorities or courts decided not to prosecute *for the purpose of* shielding the person from criminal responsibility or in a manner inconsistent with an intent to bring the person to justice.[16]

2.21 The Australian Red Cross (through its National Advisory Committee on International Humanitarian Law) took a similar view, claiming that:

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14 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross,* 21 April 2001, p. 4.

15 See paragraphs 1.27 to 1.36 of Chapter 1.

16 Helen Brady, *Submission No. 7,* pp. 4-5.

> As long as proper judicial proceedings are followed and appropriate sentences awarded in any such case tried in Australian courts, the principle of complementarity guarantees that the International Criminal Court does not usurp the administration of Australian Criminal Law.[17]

2.22 Moreover, according to Justice Perry, once a properly conducted prosecution is completed in Australia (either with a conviction or an acquittal) that would be the end of the matter: 'the ICC could not examine the authenticity of an acquittal or a conviction'. Justice Perry's view was that ratification of the ICC Statute would keep Australia's legal structure completely intact :

> All our courts will still be there … the High Court will still be our ultimate court of appeal. There could be no question of any case going from our High Court to the International Criminal Court.[18]

2.23 The Australian Government is also firmly of the view that the complementarity principle will secure the primacy of national courts. In a recent speech, the Attorney-General remarked that State Parties to the ICC Statute will have the primary opportunity and the primary obligation to prosecute war criminals within their jurisdiction.

> This has always been the case – it is critical to understand that the ICC will not take away the responsibility of countries to carry their own prosecutions. If a crime falls under national law and it is being or has been investigated or prosecuted under that law, the Court is conclusively prevented from pursuing it.
>
> The ICC will only act when a country is either unwilling or unable genuinely to act.
>
> The sovereignty of countries will in no way be challenged by the ICC.[19]

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17 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26*, p. 4. Similar submissions, endorsing the view that the ICC will neither replace, nor override national courts, have been received from the Law Council of Australia (International Law Section), Australian Lawyers for Human Rights and Sandy and Betty Reid.

18 Justice John Perry, *Transcript of Evidence*, 14 March 2001, p. TR161. A similar position was advanced by representatives of the NSW Bar Association – see Tim Game (NSW Bar Association), *Transcript of Evidence*, 13 February 2001, p. TR37.

19 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 3.

2.24 In a written submission the Attorney-General and the Minister for Foreign Affairs noted that the ICC would not consider a State to be 'unable' unless its system of justice had 'collapsed.' In relation to determining whether a State is 'unwilling' to act, the Ministers submitted that:

> … if a State's national investigation and prosecution is carried out in good faith, expeditiously, in accordance with internationally accepted standards of due process, and recognising the seriousness of the offence then it is most unlikely that the ICC would seek to act itself. It is considered that Australian processes clearly meet these standards. On this basis there is very little scope for the ICC to act in a case being dealt with by Australia.[20]

2.25 Some other submitters suggested that not only is it 'highly unlikely' that crimes of genocide, crimes against humanity and war crimes would ever be committed in Australia, or by an Australian national, but that it is 'inconceivable' that the ICC would not recognise that Australia's judicial system functions well and with integrity.[21]

2.26 The Australian Red Cross argued that:

> Given Australia's independent and well-functioning investigative, prosecutorial and judicial agencies and processes, any trial conducted according to our criminal justice system will always satisfy the inadmissibility tests in Article 17 of the Rome Statute precluding the ICC from overriding Australian jurisdictional competence. Similarly, a proper trial under Australian criminal law would preclude the ICC from dealing with the same case on the basis of the *ne bis in idem* [double jeopardy] protection for the accused in Article 20 of the Statute.[22]

2.27 Moreover, the question has been put by some that if Australian society breaks down to the point where our judicial system seeks to 'deliberately

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20 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, pp. 8-9. In a recent speech the Attorney-General emphasised the limited scope for the ICC to intervene by saying: 'It is true that the ICC would be able to act if Australia were shielding a war criminal from trial. But Australia has never – and will never – be in the business of protecting war criminals, so such a situation is not going to happen' (The Hon Daryl Williams AM QC MP, *Speech to the ACT Division of the Australian Red Cross*, 9 August 2001, p. 4).

21 See submissions from Elizabeth Bennett, Helen Brady, NSW Bar Association, Human Rights Watch, Australian Red Cross (National Advisory Committee on International Humanitarian Law) and Australian Lawyers for Human Rights.

22 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.2*, p. 2.

shield a national from criminal responsibility then why, it may be asked, should international justice not intervene.'[23]

2.28 The proposed legislation to implement Australia's responsibilities under the Statute is intended to establish a significant degree of parity between Australia's criminal law and the ICC Statute crimes, thereby affirming the primary role of Australian courts in trying ICC crimes.[24] This legislation will be discussed in more detail below.

2.29 Those opposed to ratification of the ICC Statute drew no comfort from the complementarity principle, suggesting that it is 'naïve and unduly optimistic' to expect that the principle will operate to protect Australia's sovereign interests.[25]

2.30 Dr Ian Spry QC argued that the 'alleged protection [afforded by the principle] is largely illusory, since it is the ICC itself which would determine whether a State is unwilling or unable genuinely to carry out an investigation or prosecution.'

> If the ICC on some slight or tenuous ground – such as the adoption of a local procedure which might in some respect differ from its own – held that Australian proceedings were not 'genuinely' carried out there would be no remedy for Australia. Australia would be required to arrest and extradite its own nationals.[26]

2.31 Emeritus Professor Geoffrey Walker was similarly sceptical about the operation of the complementarity principle submitting that:

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23 Amnesty International, *Exhibit No. 58*, p. 2, provided to the inquiry into Australia's relationship with the United Nations conducted by the Joint Standing Committee on Foreign Affairs, Defence and Trade. See also submissions from Human Rights Watch, New South Wales Bar Association and Helen Brady, for similar comments. The Australian Red Cross' National Advisory Committee on International Humanitarian Law remarked that if an Australian Government ever sought to shield an alleged war criminal the ICC should step in: 'the Australian public would rightly demand that those responsible for such an atrocity be brought to account' (see Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.2*, p. 3).

24 The joint media statement issued by the Attorney-General and the Minister for Foreign Affairs on 25 October 2000 stated that 'the Government has taken an approach which recognises that it would be desirable to have the offence provisions [in Australian law] framed consistently with the Statute crimes. This will enable us to ensure the benefit of complementarity in specific cases'.

25 See Dr I C Spry QC, *Transcript of Evidence*, 14 March 2001, p. TR152. See also John Stone, *Transcript of Evidence*, 13 February 2001, p. TR89 and Council for the National Interest (WA), *Submission No.19*, p. 3.

26 Dr I C Spry QC, *Submission No. 18.2*, p. 2.

> The ICC will have jurisdiction whenever it decides that the domestic institutions are not 'genuinely' prosecuting the accused. A no-bill based on insufficiency of evidence, or an acquittal or a light sentence in an Australian court, could easily be treated as showing ineffective domestic jurisdiction entitling the ICC to prosecute.[27]

2.32 The National Civic Council (WA) was likewise suspicious of a principle it saw as being 'uncertain' in application.[28]

2.33 The Council for the National Interest expressed similar concerns, stating that the principle is a 'beguiling falsehood' and suggesting that, as State Parties would be encouraged to ensure that their domestic legal regimes were consistent with the crimes described in the ICC Statute, the principle of complementarity would 'operate as an international supremacy clause instead of protecting national sovereignty.'[29]

2.34 The same argument was presented by the Festival of Light, which concluded that 'the notion of complementarity is a legal shadow' that would force State Parties to amend their national law so that it was consistent with the terms and conditions of the ICC Statute. By this process, complementarity 'instead of being a shield, becomes a sword.'[30]

Concerns about constitutionality

2.35 A number of those who expressed concern about the impact of ratification of the ICC Statute on Australia's sovereignty also argued that ratification would be unconstitutional.

2.36 A number of specific claims were made:

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27 Professor Geoffrey de Q Walker, *Submission No. 228*, p. 5.

28 National Civic Council (WA), *Submission No. 1*, pp. 2-3.

29 See Council for the National Interest (WA), *Transcript of Evidence*, 19 April 2001, p. TR188 and Council for the National Interest (WA), *Submission No.19*, p. 3. In making this point, the Council referred to a *Manual for the Ratification and Implementation of the Rome Statute*. The Manual is not an official document of the Court. It has been prepared by a non-government organisation, the International Centre for Criminal Law and Criminal Justice Policy in Vancouver, Canada.

30 Festival of Light, *Submission No. 30,* p. 4. The Festival of Light, the Council for the National Interest (WA) and others developed this argument further to claim that the ICC will become a tool for 'social engineering', supplanting the policy decisions of democratically elected governments.

- that the ICC Statute, by prohibiting 'official capacity' as a defence against an ICC crime,[31] is inconsistent with section 49 of the Constitution (which provides powers, privileges and immunities for members of Parliament);
- that ratification would be an improper use of section 51(xxix) of the Constitution (which empowers Parliament, subject to the Constitution, to make laws with respect to external affairs);
- that ratification would be inconsistent with Chapter III of the Constitution (which vests Commonwealth judicial power in the High Court of Australia and such other federal courts as Parliament creates and in such other courts as it invests with federal jurisdiction);
- that the ICC's rules of procedure and evidence are not consistent with the implied rights to due process that recent judgements of the High Court have derived from Chapter III;
- that the failure of the ICC Statute to provide trial by jury is inconsistent with section 80 (which provides that trial on indictment of any offence against any law of the Commonwealth shall be by jury); and
- that the ICC Statute, by allowing the ICC scope to interpret and develop the law it applies and the Assembly of States Parties to amend the Statute,[32] delegates legislative power to the ICC (in breach of section 1 which vests the Commonwealth's legislative power in the Parliament).

2.37 Charles Francis QC and Dr Ian Spry QC submitted the argument in relation to section 49 of the Constitution, in a joint opinion. They argued

31 Article 27 of the ICC Statute provides that it 'shall apply equally to all persons without any distinction based on official capacity' and that 'immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'.

32 Article 21 of the ICC Statute provides that 'the Court shall apply:

(a) in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) failing that, general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.

Article 121 of the Statute provides that amendments, including amendments to the Statute crimes, may be made after 7 years of operation. This article also allows State Parties not to accept any amendments in relation to crimes committed by their nationals or on their territory and to withdraw from the Statute following any amendment (see Articles 121(5) and (6)).

that the ICC Statute is 'clearly inconsistent' with section 49, which is intended to:

> … prevent legislators from being sued or prosecuted for carrying out their functions. Therefore ratification of the ICC's attempted negation of this Constitutional protection is prevented by the Constitution.[33]

2.38 Francis and Spry also submitted that 'it is at least very doubtful' that the external affairs power in section 51(xxix) could be relied upon to support ratification of the ICC Statute.

> The range of the external affairs power has varied greatly according to changes in attitude amongst various High Court justices. Sir Garfield Barwick CJ, for example, accorded that power an extremely wide ambit, and his views have been followed generally by many other members of the Court. However, first, there have been a number of recent changes in the composition of the High Court, and it may well be that some of the new appointees do not favour the broader construction of the external affairs power, and, secondly, the ICC Statute represents a more extreme case than any comparable treaties that have been considered by the High Court.[34]

2.39 The Festival of Light likewise argued that section 51(xxix) has been interpreted 'so broadly in a series of judgements by the High Court that it has allowed Commonwealth legislation to override State legislation on matters otherwise outside Commonwealth power'. They called for the Constitution to be amended to restrict the capacity of the Parliament to make laws under the external affairs power.[35]

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33 Charles Francis QC and Dr I C Spry QC, *Submission No 18.2*, p. 1.

34 Charles Francis QC and Dr I C Spry QC, *Submission No. 18.2*, p. 2.

35 Festival of Light, *Submission No.30*, p. 4. The submission supports the proposal put by Dr Colin Howard (in Colin Howard, 'Amending the External Affairs Power' Ch1 in *Upholding the Australian Constitution*, Proceedings of the Fifth Conference of the Samuel Griffiths Society, Vol 5, April 1995, p. 3) that the following be added after the words 'external affairs' in the Constitution:

'provided that no such law shall apply within the territory of a State unless:

(a) the Parliament has power to make that law otherwise than under this sub-section; or

(b) the law is made at the request or with the consent of the State; or

(c) the law relates to the diplomatic representation of the Commonwealth in other countries or the diplomatic representation of other countries in Australia'.

2.40 A number of other submitters were sympathetic with this view, asserting that the enactment of legislation to give domestic effect to the ICC would be 'another example' of the Commonwealth Parliament abusing the external affairs power. Many of those who put this view also said that the ICC Statute should not be ratified until after it had been submitted to a referendum.[36]

2.41 Concern that ratification of the ICC Statute would be in conflict with Chapter III was raised by a number of witnesses, including Geoffrey Walker, who submitted, among other points that:

> Criminal jurisdiction over Australian territory pre-eminently forms part of the judicial power of the Commonwealth: Huddart Parker & Co. v Moorehead (1909) 8CLR 353, 366. That judicial power may only be invested in courts established under Chapter III of the Constitution: Re Wakim: ex parte McNally (1999) 198 CLR 511, 542, 556, 558, 575. The proposed International Criminal Court fails to meet that standard because its judges would not satisfy the requirements of s.72 of the Constitution in relation to manner of appointment, tenure and removal …
>
> Further, the ICC would not be a 'court' at all in the sense understood by the Constitution or the Australian people. It would have a full time staff of about 600 and would in fact exercise the powers of prosecutor, judge and jury. It would even determine appeals against its own decisions. …
>
> As there would be no separation of powers except at a bureaucratic level, the judges' exercise of their functions would inevitably be affected by their close links with the investigation and prosecution roles of the ICC. …
>
> The requirements of s.72 and of the separation of powers would be fatal to the validity of any legislation purporting to give the ICC jurisdiction over Australian territory.[37]

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36 These views were put, in whole or in part, in submissions from Woolcroft Christian Centre, A & L Barron, Andrew Anderson, Nadim Soukhadar, Michael Kearney, David Mira-Batemen, Marlene Norris, Annette Burke, Stewart Coad, Nic Faulkner, Malcolm Cliff, Joseph Bryant, Valeria Staddon, Michael Sweeney and Ken Lawson. It was also suggested in some submissions that Australia's treaty making power should be amended to require that all treaties be approved by a 75% majority of the Senate and by the Council of Australian Governments before ratification (see, for example, submissions from the Council for the National Interest (WA) and Gareth Kimberley).

37 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, pp. 2-3.

2.42 Francis and Spry also concluded that 'Chapter III does not permit ratification of the ICC Statute', asserting that:

> There are clearly substantial arguments that Chapter III (and especially section 71) merely enables the Commonwealth Parliament to confer jurisdiction upon Australian or at least that it does not enable the Commonwealth Parliament to confer upon foreign courts such as the proposed ICC extensive jurisdiction over Australian nationals and extensive powers to over-ride Australian courts.[38]

2.43 Professor George Winterton also expressed the view that any Commonwealth legislation seeking to implement the ICC Statute 'may contravene Chapter III'. The main themes in his argument were that:

- the power to try a person for a criminal offence is an exercise of judicial power (see *Chu Kheng Lim v Commonwealth* (1992) 176 CLR 1, 27);
- if the ICC's power to try offences under the ICC Statute is an exercise of the judicial power of the Commonwealth for the purposes of Australian law, it would contravene Chapter III because the ICC is neither a State court nor a federal court constituted in compliance with section 72 of the Constitution (see *Brandy v HREOC* (1995 183 CLR 245);
- when the ICC tries a person charged with having committed an offence in Australia, it is arguably exercising 'judicial functions within the Commonwealth' because it is exercising judicial functions in respect of acts which occurred in Australia (see *Commonwealth v Queensland* (1975) 134 CLR 298, 328);
- while the argument advanced by Deane J (in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 627) that Chapter III would not apply to an international tribunal because it exercises the judicial power of the international community rather than the Commonwealth is 'a plausible opinion which might commend itself to some current justices of the High Court', it is:

  > … surely arguable that the ICC would exercise *both* the judicial power of the international community *and*, insofar as it applies to

38 Charles Francis QC and Dr I C Spry QC, *Submission No 18.2*, p. 2. Similar views are put in National Civic Council (WA), *Submission No. 1*, pp. 1-2; Richard Egan (National Civic Council (WA), *Transcript of Evidence*, 19 April 2001, p. TR177; Dr I C Spry QC, *Transcript of Evidence*, 14 March 2001, p. TR155; and in submissions from Robert Downey, Catherine O'Connor and Davydd Williams.

> offences committed in Australia, as a matter of Australian domestic law, the judicial power of the Commonwealth. Insofar as Australian law is concerned, the ICC would be exercising jurisdiction conferred by Commonwealth legislation implementing the Statute, just as would an Australian court trying a defendant for a crime specified in art. 5 of the Statute … It would seem anomalous for two tribunals exercising the same jurisdiction pursuant to the same legislation to be regarded as exercising the judicial power of different polities *for the purposes of Australian domestic law*;

- in the event that the ICC exercises its jurisdiction where a person has been acquitted of the same or a similar offence by an Australian court, any action by the Executive to arrest and surrender the person to the ICC may contravene the separation of judicial power which requires executive compliance with lawful decisions of courts exercising the judicial power of the Commonwealth.

> It would seem to be a contravention of Ch. III of the Constitution for the executive to arrest a person acquitted by a Ch. III court and surrender him or her for further trial by another court exercising authority derived from Commonwealth law (insofar as Australian law is concerned) for essentially the same offence.[39]

2.44 In submitting these views, Winterton admits to two caveats: first that the legal position will depend upon the specific terms of the legislation; and, second, that there is little or no direct legal authority in support of these arguments and that his observations are 'necessarily somewhat speculative'.[40]

2.45 Geoffrey Walker submits, as a separate claim, that one of the strongest trends in Australian constitutional law in recent years has been for the High Court to conclude that certain basic principles of justice and due process are entrenched within Chapter III and that the ICC's rules of procedure and evidence are inconsistent with these principles.

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39 Professor George Winterton, *Submission No. 231*, pp. 2-3. Nevertheless, Professor Winterton supported Australia's ratification of the ICC Statute, believing that 'international justice requires an International Criminal Court'. He was of the view that: 'since it is extremely unlikely under foreseeable circumstances that the ICC would be called upon to exercise its jurisdiction in respect of an art. 5 crime committed in Australia, the Committee may well conclude that the risk that Ch. III would be successfully invoked is minimal' (see *Submission No. 231*, p. 3).

40 Professor George Winterton, *Submission No. 231*, p. 3.

> … procedural due process is a fundamental right protected by the Constitution, which mandates certain principles of open justice that all courts must follow …
>
> This constitutional guarantee raises further doubts about whether the Parliament could validly confer jurisdiction on the ICC.[41]

2.46 Walker, Francis and Spry raised the further possibility that the absence of trial by jury from the ICC's procedures could infringe against the safeguard of trial by jury provided for in section 80 of the Constitution.[42]

2.47 Other constitutional issues raised by Geoffrey Walker concern the law-making capacity of the ICC and the Assembly of States Parties. Walker submitted that the provisions of the ICC Statute which allow the Court to apply general principles of law and 'principles as interpreted in its previous decisions' (see footnote 34 above) confer on the Court 'vast new fields of discretionary law making'.

> This wholesale delegation of law-making authority to a (putative) court encounters serious objections stemming from the separation of powers. … They are exemplified in the Native Title Act Case, in which the High Court struck down a provision of the NTA that purported to bestow on the common law of native title the status of a law of the Commonwealth … [in this decision the majority concluded that] 'Under the Constitution … the Parliament cannot delegate to the Courts the power to make law involving, as the power does, a discretion or, at least, a choice as to what the law should be' (Western Australia v Cth (1995) 183 CLR 373, 485-87).[43]

2.48 Walker also expressed concern about the capacity of the Assembly of States Parties to amend the Statute crimes after a period of 7 years[44]. In his assessment, to give effect to this mechanism the Parliament would need to:

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41 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, pp. 6-7.

42 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, pp. 7-8 and Charles Francis QC and Dr I C Spry QC, *Submission 18.2*, p. 3. In his submission Professor Walker noted that the prevailing High Court opinion on section 80 is to limit the trial by jury guarantee to 'trial on indictment', a procedure which strictly speaking does not exist in Australia.

43 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, pp. 9-10.

44 Article 121 allows for amendments to be made by the Assembly of States parties or at a special review conference after 7 years. Adoption of amendments requires a two-thirds majority of States parties. If a State does not agree with the amendment the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory. Under Article 121(6) if an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from the Statute with immediate effect.

> … delegate to the Assembly the power to make laws operating in Australian territory. That it cannot do: Parliament 'is not competent to abdicate its powers of legislation' or to create a separate legislature and endow it with Parliament's own capacity: Victorian Stevedoring and General Contracting Co. v Dignan (1931) 46 CLR 73, 121; Capital Duplicators Pty Ltd v ACT (no 1) (1992) 177 CLR 248; Re Initiative and Referendum Act (1919) AC 935, 945. This is because 'the only power to make Commonwealth law is vested in the parliament (Native Title Act case p 487).[45]

2.49 The Attorney-General has rejected the claims that ratification of the ICC Statute would violate Chapter III of the Constitution, describing them as false and misleading.[46]

> The ICC will exist totally independently of Chapter III of Constitution, it will not have power over any Australian Court and will not in any way affect the delivery of justice in Australia.
>
> Australia has been subject to the International Court of Justice for over 50 years and this has not violated our constitutional or judicial independence. The ICC will not have any effect on our constitution or interfere in any way with the independence of our judiciary.[47]

2.50 At the Committee's request, the Attorney-General's Department sought advice from the Office of General Counsel of the Australian Government Solicitor on a number of the constitutional concerns raised in submissions to our inquiry. The advice, issued with the authority of the acting Chief General Counsel, was as follows:

> The ICC will not exercise the judicial power of the Commonwealth when it exercises its jurisdiction, even when that jurisdiction relates to acts committed on Australian territory by Australian citizens. Ratification of the Statute will not involve a conferral of the judicial power of the Commonwealth on the ICC. Nor would enactment by the Parliament of the draft ICC legislation involve such a conferral.

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45 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, p. 10. Walker noted that the Government's proposed implementing legislation might seek to address this issue (see *Submission No. 228*, p. 10).

46 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 5.

47 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 5.

> … The judicial power of the Commonwealth cannot be vested in a body that is not a Chapter III court. However, the draft ICC legislation does not purport to confer Commonwealth judicial powers or functions on the ICC. The legislation has been drafted on the basis that the powers and functions of the ICC have been conferred on it by the treaty establishing it.
>
> … The judicial power exercised by the ICC will be that of the international community, not of the Commonwealth of Australia or of any individual nation state. That judicial power has been exercised on previous occasions, for example in the International Court of Justice and the International Tribunal for the Law of the Sea. Australia has been a party to matters before both of these international judicial institutions.
>
> … Numerous respected United States commentators have considered the alleged unconstitutionality of ratification of the ICC Statute by the United States and, in relation to those arguments which are relevant in the Australian context, have resoundingly concluded that there is no constitutional objection to ratification. For example, Professor Louis Henkin (*Foreign Affairs and the United States Constitution* (2nd Ed) 1996 at p.269) has written that the ICC would be exercising international judicial power. It would not be exercising the governmental authority of the United States but the authority of the international community, a group of nations of which the United States is but one.
>
> Decisions of the ICC would not be binding on Australian courts, which are only bound to follow decisions of courts above them in the Australian court hierarchy. However, decisions of courts of other systems are often extremely persuasive in Australian courts. It is a normal and well established aspect of the common law that decisions of courts of other countries, such as the United Kingdom are followed in Australian courts. Similarly, were an Australian court called upon to decide a question of international law, it could well find decisions of international tribunals to be persuasive.[48]

2.51 Having reviewed this matter the Attorney-General reported that:

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48 Office of General Counsel, 'Summary of Advice', pp 1-2, attached to Attorney-General's Department, *Submission No. 232*.

> The Government has satisfied itself that ratification of the Statute and enactment of the necessary legislation will not be inconsistent with any provision of the Constitution.[49]

2.52 Justice John Dowd, on behalf of the International Commission of Jurists, agreed that the ICC 'would not exercise Commonwealth judicial power' and would, therefore, operate independently of Chapter III of the Constitution.

> [Chapter] III applies to Australian courts. The foreign affairs power applies to foreign affairs. What we are doing is setting up something extra-Australian in the power vested in the Commonwealth to do that. The Commonwealth uses that power in a whole range of matters and treaties for the protection of the world. Chapter III deals with our court system.…
>
> Chapter III … is to ensure that the [court] system in Australia has integrity and probity, it does not govern an international treaty [such as would establish] extradition and the International Criminal Court.[50]

2.53 Further argument in response to the constitutional concerns was put in written and oral evidence received from government officials, the Attorney-General and the Minister for Foreign Affairs. The key elements of this argument are reproduced below:

- 'the ICC is not going to be a domestic tribunal of Australia; it does not fit within the Constitution. It is an international tribunal established by the international community to try international crimes … it operates within its own sphere, just as our courts operate within their own spheres';[51] and
- 'the ICC will have no authority over any Australian court and in particular will not become part of the Australian court system and will have no power to override decisions of the High Court or any other Australian court. As an international court, the ICC will not be subject to the provisions of Chapter III of the Constitution, which governs the exercise of judicial power of the Commonwealth. The High Court has

49 The Hon Daryl Williams AM QC MP, 'The International Criminal Court – the Australian Experience', an address to the International Society for the Reform of Criminal Law, 30 August 2001, p. 7.

50 The Hon Justice John Dowd, *Transcript of Evidence*, 13 February 2001, p. TR 107.

51 Mark Jennings (Attorney-General's Department), *Transcript of Evidence*, 30 October 2001, p. TR25.

stated (in the Polyukhovich case) that Chapter III would be inapplicable to Australia's participation in an international tribunal to try crimes against international law. In this regard the ICC will be akin to the International Court of Justice or the International Criminal Tribunals for the former Yugoslavia and Rwanda.'[52]

2.54 The Australian Red Cross (through its National Advisory Committee on International Humanitarian Law) also argued firmly against those who claim ratification would be beyond the Commonwealth's constitutional authority. It referred to such claims as being 'manifestly flawed' and as 'being entirely devoid of legal substance'. The Red Cross submitted that:

> Those who make such naïve arguments fail to mention existing Commonwealth legislation such as the *International War Crimes Tribunals Act 1995* which, on the basis of the same argument must be ultra vires Commonwealth legislative competence - this of course, despite the fact that the validity of that particular legislation has never been challenged. It should also be noted that the *Extradition Act 1998* is predicated upon the notion that the Commonwealth Parliament is constitutionally competent to legislate in respect of the transfer of Australians, and others within our territorial jurisdiction, to foreign courts.
>
> Quite apart from the existence of valid Commonwealth legislation which exposes the fallacy of the argument, the High Court's interpretation of the scope of the External Affairs Power in Section 51(xxix) of the Constitution extends to both the abovementioned Act as well as to any new legislation in respect of the Rome Statute.[53]

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52 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 10. The advice from the Office of General Counsel mentioned above also cites the Polyukhovich case, saying Justice Deane concluded that international tribunals trying crimes against international law would be exercising international judicial power: 'Chapter III of the Constitution would be inapplicable, since the judicial power of the Commonwealth would not be involved' (see Office of General Counsel, 'Summary of Advice', p1, attached to Attorney-General's Department, *Submission No. 232*). Amnesty International endorses the view that Justice Deane's comments in the Polyukhovich case are relevant and aptly cited by the Government witnesses (see Amnesty International, *Submission No. 16.2*, p. 3). Geoffrey Walker noted that Justice Deane's remarks were *obiter dicta;* that is, were said by the way, rather than as part of the essential legal reasoning of the case before him at the time (see Professor Emeritus Geoffrey de Q. Walker, Submission No. 228, p. 3).

53 Australian Red Cross (National Advisory Committee on International Humanitarian Law) *Submission No. 26.1*, pp. 1-2.

2.55 As the Australian Red Cross pointed out, if the arguments about constitutional invalidity are correct, then they should apply to Australia's involvement in other War Crimes Tribunals. That argument made by the RC was not countered in evidence put to the Committee.

The proposed implementing legislation and the ICC crimes

2.56 On 31 August 2001, the Attorney-General referred the following draft legislation to the Committee:

- *International Criminal Court Bill 2001,* (the ICC bill); and
- *International Criminal Court (Consequential Amendments Bill 2001,* (the consequential amendments bill).

The Committee then sought further public submissions from all parties who had previously had input to its review of the Statute to comment on any aspect of the proposed legislation.

2.57 As a result, a number of issues were raised concerning the proposed legislation. As with views on the Statute, there are a range of competing opinions relating to the impact and coverage of the legislation.

2.58 Organisations like the Australian Red Cross, the Australian Institute for Holocaust and Genocide Studies, the Castan Centre for Human Rights Law, Human Rights Watch and Amnesty International, who favour Australia's ratification of the Statute, indicated that in their view the legislation would be sufficient for the purpose of fulfilling Australia's obligations under the Rome Statute. In fact, Human Rights Watch contended that:

> By virtue of the comprehensive nature of this Bill, the likelihood of the ICC ever asserting jurisdiction in a case over which Australia would ordinarily exercise jurisdiction, is now extremely remote.[54]

2.59 The Australian Red Cross considered that while in several areas the legislation may need minor modifications:

> It is the general view of ARC that the Bills as drafted comprehensively provide for the national implementation of

54 Human Rights Watch, *Submission No. 23.1*, pp. 1-2.

> Australia's relationship with the new International Criminal Court if and when Australia chooses to ratify the *Rome Statute*.[55]

2.60 The Australian Red Cross also raised a number of concerns about several aspects of the legislation: 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 of the consequential amendments bill.

2.61 To avoid the situation exhibited with the two ad hoc tribunals, which have primacy over national jurisdictions, clause 3 of the ICC 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.[56] Clause 3 (1) emphasises that the jurisdiction is complementary to the jurisdiction of Australia; however, the Australian Red Cross stated that Clause 3 (2) does not convey the pre-eminence of Australian jurisdiction, and should be rephrased in the following manner:

> "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."[57]

2.62 In this context, the Australian Red Cross was of the view that clause 268 (2) of the consequential amendments bill should also be strengthened in the same manner with the inclusion of the same wording.[58]

2.63 The Red Cross's National Advisory Committee on International Humanitarian Law suggested that the Government should 'deposit a Declaration of Australia's understanding of the interpretation of preambular paragraph 9 and Article 1 [of the ICC Statute, which establish

55 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.3*, p. 1.

56 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.3*, p. 2.

57 The Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.3*, p. 2. Section 3 (2) in the Bill currently reads: 'Accordingly, this Act does not affect the primary right of Australia to exercise its national criminal jurisdiction with respect to crimes within the jurisdiction of the ICC'.

58 Clause 268 (2) of the consequential amendments bill currently states: 'It is the Parliament's intention that the jurisdiction of the International Criminal Court is to be complementary to the jurisdiction of Australia with respect to offences in this Division that are also crimes within the jurisdiction of that Court'.

the complementarity principle].' Such a declaration, to be made upon ratification of the Statute, would:

> … not alter Australia's position at law – that is, the Declaration would not increase Australia's primacy of jurisdiction in respect of acts committed in its own territory or by one of its own nationals. However, the Declaration would constitute a clear statement to other States and to the ICC itself of the level of Australia's resolve to insist on its primary national jurisdiction in specified situations.[59]

2.64 The Australian Red Cross was also concerned about the proposed amendment to the *Geneva Conventions Act 1957*, involving the repeal of Part II of the Act, which will occur as a result of the passage of the ICC legislation. The Australian Red Cross was concerned 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*.
>
> [The Australian Red Cross therefore recommends:]….
>
> If this interpretation is correct, ….. that the *Explanatory Memorandum* to accompany the legislation explicitly indicate this interpretation of Section 8(b) of the *Acts Interpretation Act 1901*.[60]

2.65 A third area of concern for the Australian Red Cross was that the consequential amendments legislation should reflect more closely the crimes of rape as laid out in the *Elements of Crimes* in relation to the victim's lack of consent. The Australian Red Cross suggested that

> 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 –

59 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.1*, p. 3. The Red Cross argued that, while the ICC Statute prohibits the making of Reservations, a Declaration of this type would be 'entirely consistent with the treaty's [that is, the ICC Statute's] terms – it would be, in effect, an affirmation of one of the treaty's existing provisions'.

60 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.3*, p. 3.

> 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.[61]

2.66 Human Rights Watch also raised this issue and recommended that consideration should be given to harmonising these provisions according to the *Elements of Crimes* paper and includes a less restrictive definition for rape in the consequential amendments bill.[62] Human Rights Watch also believed that Sections 268.63 and 268.86 should reflect more closely the terminology used in the *Elements of Crimes* paper Articles 8(2)(b)(xxii) and 8(2)(e)(vi).[63]

2.67 The Australian Red Cross also highlighted inconsistencies under Section H of the consequential amendments bill dealing with grave breaches of Protocol I of the Geneva Convention. It contended that, while Sections 268.96 and 268.47 enumerated 5 similar elements of the specific offence, those elements are not identical and such:

> 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.[64]

2.68 The Australian Institute for Holocaust and Genocide Studies in recommending ratification of the Statute also suggested that:

> Given the fact that pre-existing legislation is insufficient in prohibiting and punishing the international crimes that the ICC purports to cover … implementation of the *International Criminal*

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61 Australian Red Cross (National Advisory Committee on International Humanitarian Law), Submission No. 26.3, p. 4.

62 Human Rights Watch, Submission No. 22.1, pp. 3-4.

63 Human Rights Watch, Submission No. 22.1, pp. 4-5.

64 Australian Red Cross (National Advisory Committee on International Humanitarian Law), Submission No. 26.3, p. 6.

> *Court Bills* is an ideal way of strengthening Australia's legislative and definitional framework for the apprehension and prosecution of persons committing genocide, war crimes and crimes against humanity.[65]

2.69 In addition, the Institute argued that, while the crimes encompassed under the proposed legislation will allow prosecutions after it comes into force, because the laws do not currently exist in Australia, retrospective antigenocide legislation should be considered. Such legislation should operate from the time that genocide acquired the status of international customary law – 11 December 1946.[66]

2.70 In supporting strongly the establishment of the ICC, the Castan Centre for Human Rights Law suggested that the legislation sets out thoroughly and precisely Australia's obligations under the Statute and further that:

> The definitions given to the ICC crimes are highly progressive, often duplicating the Statute's own definitions. At the same time, the draft Bills amply provide for the protection of Australia's national interests and its primary right to exercise its own criminal jurisdiction.[67]

2.71 The Castan Centre suggested several minor amendments to the proposed legislation. These are summarised below:[68]

- there should be time constraints on issuing arrest warrants – cl 21 and 22 of the Statute Bill are deficient because they do not impose time limitations like those under Article 59 of the Statute;[69]
- that cl 102 be amended to extend privileges and immunities to ICC officials not named in Article 48(2) of the Statute;
- that the legislation should articulate a position on the statute of limitations and immunities attaching to official capacities, as sought under Articles 27 and 29 of the Statute. The Castan Centre saw the possibility arising that application of these barriers might lead the ICC

65 The Australian Institute for Holocaust and Genocide Studies, Submission No. 46, p. 27.

66 The Australian Institute for Holocaust and Genocide Studies, Submission No. 46, p. 10.

67 The Castan Centre for Human Rights Law, Submission No. 239, p. 4.

68 The Castan Centre for Human Rights Law, *Submission No. 239*, p. 6.

69 Article 59 of the Statute covers the arrest proceedings in the custodial State and s(1) states that a State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question.

to determine that under Article 17, Australia was unwilling to investigate a case itself;

- that in defining torture as a war crime the consequential amendments bill has the effect of broadening the crimes ambit rather than following the approach in the Statute; and
- the need for consideration of Australia's commitment to the minimum age for conscription, which is set at 15 under the Statute and the consequential amendments bill, although Australia's commitment under the Convention on the Rights of the Child sets the age at 18 years.

2.72 In recommending that the Committee endorse the legislation, Amnesty International recognised that some improvements could be made. They were particularly concerned about the coverage of Article 27 of the Statute under the draft legislation.[70] Amnesty suggested that the legislation as currently drafted, does not reflect the intent of Article 27 which provides that the official capacity of a government official shall not exempt that person from criminal responsibility under the Statute.

2.73 In Amnesty's view:

> The government, in omitting Article 27 from the legislation, may take the view that, because the statute renders the crimes specified in it enforceable, they could not be characterised as official acts. This may be so but it is undesirable for that aspect to be left in doubt—but it would, in any event, leave an official immune by virtue of his status, and thus exempt from liability whilst he remains an official. We say it is far too late in the day for some future Hitler to extend his cover of immunity by some future enabling law. The quintessential feature of these crimes is that they are committed by or authorised by government officials. In our view, there should be no immunity, and Article 27 should be introduced into the legislation.[71]

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70 See also Human Rights Watch supplementary submission which also commented on Article 27 and recommended: 'it would be best to explicitly provide that immunities and other barriers to prosecution do not apply to crimes covered in the ICC Crimes Bill, either in relation to arrest and surrender of persons to the ICC or for the purpose of prosecution of the ICC Crimes Bill offences in Australian Courts. Both bills should be amended to include a provision expressly excluding the application of the immunities in the *Foreign States Immunities Act 1985* and the *Diplomatic Privileges and Immunities Act 1961* (*Submission No. 22.1*, p. 3).

71 Amnesty International Australia, *Transcript of Evidence*, 10 April 2002, p. TR273.

2.74 Amnesty also highlighted their view that the implementing legislation enhances Australia's sovereignty by conferring on Australian courts the jurisdiction to try persons accused of crimes subject to the Statute, in circumstances where Australian courts would previously have lacked the power.[72]

2.75 Several submissions expressed strong reservations, not only about the possible ratification of the Statute, but also about aspects of the legislation. Organisations including the Council for the National Interest (WA) (CNI), the National Civic Council (WA) (NCC) and the Australian Patriot Movement (APM) were of the view that to ratify the Statute and implement the proposed legislation would endanger Australia's sovereignty.[73]

2.76 CNI was 'implacably' opposed to ratification of the Statute and considered that Australia would find its law being circumvented by the ICC. CNI believed that the implementing legislation, although closely modelled on the Statute crimes, would only ensure 'total compliance' with all requests of the ICC and that complementarity is only 'an exercise in semantics'. CNI further suggested that the legislation is 'unconstitutional, undemocratic and an abrogation of Australia's sovereignty'. [74]

2.77 CNI was also critical of a number of the definitions of crimes in the consequential amendments bill which it suggested are written in vague and imprecise terms and could leave the way open for future initiatives in international law to be inserted into Australian law without the approval of the Australian Parliament.[75] CNI cited as examples of this problem in the definitions of crimes such as 'causing serious mental harm'; and 'causing great suffering'; and 'serious injury to physical health'. CNI suggested that:

> The offence of persecution, "severely deprives, contrary to international law, one or more persons of fundamental rights" and "on grounds that are universally recognised as impermissible under international law". This would appear to open the way for

72 Amnesty International Australia, *Submission No. 16.4,* p. 6.

73 Australian Patriot Movement, *Submission No. 241*, p. 1.

74 Council for the National Interest, *Submission No. 19.2,* p. 2.

75 Council for the National Interest, *Submission No. 19.2,* p. 2

> future initiatives in international law to be inserted into Australian law without the approval of the Australian Parliament.[76]

2.78 Similar views about the legislation were expressed by the NCC in relation to 'absolute compliance'. The NCC went further in suggesting that under the ICC bill the ICC could be seen as a superior court because of its capacity to issue binding directives to the Attorney General.[77] The NCC was also critical of the consequential amendments bill in its definitions of two offences that they believed could lead to quite frivolous charges - namely 'genocide by causing mental harm' and 'persecution by severely depriving'. Like the CNI, the NCC believed that inclusion of the latter offence in the federal criminal code would create:

> .. an open-ended means of importing developments in international law into Australian criminal law without any parliamentary debate.[78]

Definition of ICC crimes

2.79 Many of those who argued against ratification of the ICC Statute expressed concern about the manner in which the crimes proposed to be within the ICC's jurisdiction are defined. It was suggested that the definitions are too vague and thereby open to wide interpretation and, potentially, abuse.

2.80 Dawn Brown suggested that the definitions of genocide, war crimes and crimes against humanity are 'so breath-takingly elastic and wide open to manipulation' that the ICC will become not just a war crimes tribunal but a human rights court.[79]

2.81 The Festival of Light likewise referred to the 'elastic terms' and 'sweeping language' of the Statue in doubting that the Court will ultimately restrict its activities to the most serious crimes of international concern. In commenting on the crime of genocide (the definition of which refers, in

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76 Council for the National Interest, *Submission No. 19.2*, p. 2. See also comments from James Crockett who raised similar terminological issues with the draft legislation, *Submission No. 174.1*, p. 2. The Australian Patriot Movement voiced similar sentiments towards the legislation and cited a number of clauses which it considered might lead to unforseen outcomes if passed into Australian law. Australian Patriot Movement, *Submission Nos. 241 and 241.1*.

77 National Civic Council (WA), *Submission No. 1.1*, p. 1.

78 National Civic Council (WA), *Submission No. 1.1*, p. 1.

79 Dawn Brown, *Submission No.21*, p. 2.

part, to 'causing serious mental harm to a members of a national, ethnic, racial of religious group') the Festival asked whether:

> those Australians who were involved in helping care for Aboriginal children a generation ago [a practice which the 1997 Human Rights and Equal Opportunities Commission report *Bringing Them Home* described as causing mental anguish akin to genocide] … [could] find themselves transported to The Hague to be prosecuted in the International Criminal Court for the crime of genocide?[80]

2.82 The Festival of Light also questioned the language used to define some aspects of crimes against humanity.

> These crimes [being murder, extermination, enslavement, forcible transfer of population, torture, sexual slavery, persecution and other inhumane acts] certainly *sound* terrible but the ICC Statute gives very little guidance as to what these words *actually proscribe*.
>
> For example, the crime of 'persecution' as set out in the Statute and as further defined in the recently issued '*Elements of Crimes*', condemns the 'severe deprivation' of a group's 'fundamental rights'. The crime of 'inhumane acts' criminalises the infliction of 'great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.' What do these terms proscribe? At present it is impossible to say definitively.[81]

2.83 Geoffrey Walker shared some of these concerns, submitting that the 'list of offences punishable by the court extends to acts that are not normally regarded as major crimes, such as "outrages upon personal dignity"'. Moreover, the provisions are:

> … capable of expansion to cover conduct far beyond anything most people would regard as the 'most serious crimes of international concern'. The range of acts that could be treated as constituting an attempt to commit 'cultural persecution' (Art.7(1)(k)) or an attempt to outrage human dignity might be limited only by the imagination of the prosecutors and their NGO-supplied helpers.[82]

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80 Festival of Light, *Submission No. 30*, pp.5-6. See also Dr I C Spry QC, *Submission No.18.2*, p. 2 and June Beckett, *Submission No. 11*, pp. 3-5; Australian Family Association (Mildura Branch) *Submission No. 210*, p. 1.

81 Festival of Light, *Submission No. 30*, p. 6.

82 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, p. 8.

2.84 The 'imprecise' manner in which these crimes are defined allows for the possibility, according to the Festival of Light and many other submitters, that the ICC could be used to 're-engineer social policies throughout the world.' The Festival of Light was especially concerned about what it saw as the potential for the Court to be used to force changes to national family, gender and abortion policies.[83]

2.85 The Council for the National Interest (WA) endorsed these concerns, suggesting that the language in the Statute is 'so vague that at some point down the track – maybe 10 to 15 years out – other interpretations will be placed on that language.'[84]

2.86 June Beckett mentioned also that whatever definition is ultimately agreed for the crime of aggression 'must necessarily be loose, open-ended and wide open to criminal misinterpretation.'[85]

2.87 In response to these concerns the Committee received submissions from a number of individuals including the New South Wales Bar Council, Justice Perry, Human Rights Watch, Nicole McDonald and others arguing that the crimes within the jurisdiction of the ICC are, in fact, comprehensively defined and draw on long established principles of law.[86]

2.88 For example, the NSW Bar Association submitted that, read together, the ICC Statute and the accompanying *Elements of Crimes*:

> Codify existing customary international law and incorporate the provisions of treaties including the Genocide Convention, the

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83 Festival of Light, *Submission No.30*, pp. 6-7. These argument were presented in a number of other submissions, including those from Fay Alford, Council for the National Interest (WA), Endeavour Forum, Richard Gellie, Arthur Hartwig, National Civic Council (Isaacs Federal Electorate Group), Catharina O'Connor, Youth Concerned and Davydd Williams. All of these submissions drew heavily on a paper entitled *Doing the Right Thing: The International Criminal Court and Social Engineering* prepared by Professor Wilkins, who is the Director of the World Family Policy Centre at Brigham Young University, USA. George Winterton also sees merit in Wilkins' argument that the 'sweeping language' of the Statute is 'limited largely by the imagination of international lawyers and the judicial restraint (or lack of it) that will be exhibited by the judges on the ICC' (see GeorgeWinterton, *Submission No. 231*, p. 1).

84 Denis Whitely (Council for the National Interest (WA)), *Transcript of Evidence*, 19 April 2001, p. TR200.

85 June Beckett, *Submission No. 11*, p. 4.

86 See the submissions from the NSW Bar Association, the International Commission of Jurists, UNICEF Australia, Justice John Perry, Helen Brady, Phillip Scales, Nicole McDonald, Australian Red Cross, Australian Lawyers for Human Rights, World Vision and Ben Clarke.

> Apartheid Convention, the Torture Convention and the Geneva Conventions are 'strictly, rather than broadly defined.'[87]

2.89 Further, and by way of example, the NSW Bar Association referred to the various elements of the proposed definition of 'genocide by killing', concluding ultimately that the 'definition is anything but broad':

> … 'genocide by killing … contains the following elements, each of which must be proved. These are: the perpetrator must kill more than one person; the persons must belong to a 'particular national, ethnical, racial or religious group'; the perpetrator must have intended to destroy in part or in whole that 'national, ethnical, racial or religious group'; and the conduct must have taken 'place in the context of a manifest pattern of similar conduct directed against that group or was the conduct that could itself effect such destruction'.
>
> … It is clearly directed to conduct such as 'ethnic cleansing' and the events in Kosovo obviously are within this proposed definition. The offence is strictly rather than broadly defined.[88]

2.90 Helen Brady emphasised that the definitions contained in the Statute must be read in conjunction with the further descriptions contained in the *Elements of Crimes.*

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87 NSW Bar Association, *Submission No. 20*, p. 6. The International Commission of Jurists noted that 'These offences already exist in the international calendar.' (*Submission No. 24*, p. 6). Justice Perry likewise noted that all of the ICC crimes are 'based upon definitions already established in international law' (*Submission No. 8.3*, p. 4). UNICEF Australia noted that the 'jurisdiction of the ICC goes no further than that already in existence and already endorsed by Australia including:

- the Convention on the Rights of the Child;
- the International Covenant on Civil and Political Rights (particularly Articles 23 and 24);
- the International Covenant on Economic, Social and Cultural Rights (particularly Article 10);
- the Convention on the Elimination on All Forms of Discrimination Against Women; and
- the Geneva Conventions and their additional protocols. (Submission No 34, p. 8).

Many elements of the crimes within the ICC's jurisdiction, although not all, have been offences under Commonwealth law for many years – see the *War Crimes Act 1945* (as amended in 1988), the *Geneva Conventions Act 1957*, the *Defence Force Discipline Act 1982* and a series of related laws which outlaw the use of weapons which may, in certain circumstances, offend the ICC's war crimes provisions, including: the *Chemical Weapons (Prohibition) Act 1994*, the *Crimes (Biological Weapons) Act 1976*, the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* and the *Anti-personnel Mines Convention Act 1998.*

88 NSW Bar Association, *Submission No. 20*, p. 6.

> The Elements of Crimes paper sets out each of the crimes and their elements. They are designed to assist and guide the Court … 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.[89]

2.91 Justice Perry agreed that while the definitions contained in the ICC Statute itself might not be fully prescriptive, the definitions contained in the *Elements of Crimes* are sufficiently detailed to overcome any concerns.[90]

2.92 The ICC crimes are defined comprehensively in the Government's proposed implementing legislation discussed later in this Chapter. In a recent speech to the International Society for the Reform of Criminal Law, the Attorney-General stated that the legislation will 'result in the enactment of all the crimes within the Court's jurisdiction as crimes in Australian law … [to] be contained in a new Division of the Criminal Code'.[91]

2.93 The Australian Red Cross and others noted that, as the jurisdiction of the ICC is prospective (see Article 11), claims that those involved in the policies which lead to the 'stolen generation' of aboriginal children might be exposed to prosecution for genocide are 'completely unfounded'.[92]

2.94 The Attorney-General was dismissive of claims that the ICC would be used as an instrument of 'social engineering', describing them as 'totally false and absurd … to suggest otherwise is to engage in deliberate scare mongering.'[93]

2.95 In relation to the crime of aggression, advice from the Attorney-General and the Minister for Foreign Affairs was that the crime has not yet been defined and that it cannot be added to the Court's jurisdiction until a

89 Helen Brady, *Submission No. 7*, p. 11. See also the *Elements of Crimes* paper which states that the elements of crimes will assist the court in the interpretation and application of Articles 6, 7 and 8, consistent with the Statute. The *Elements of Crimes* paper focuses on the conduct, consequences and circumstances associated with each crime. (*Elements of Crimes*, United Nations, PCNICC/2000/1/Add.2, p. 5). See also comments in Chapter 1, paragraph 1.27.

90 Justice John Perry, *Submission No. 8.3*, p. 4.

91 The Hon Daryl Williams AM QC MP, 'The International Criminal Court – the Australian Experience', an address to the International Society for the Reform of Criminal Law, 30 August 2001, p. 9.

92 Australian Red Cross (National Advisory Council on International Humanitarian Law), *Submission No. 26*, p.5. See also Nicole McDonald, *Submission No. 10*, p. 4 and Helen Brady, *Submission No.7*, p. 1.

93 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 5.

definition is adopted by the State Parties. The earliest that the crime could be added to the Court's jurisdiction is 7 years after the establishment of the Court. At this time, a State Party may decline to accept the definition, in which case the Court may not exercise jurisdiction over that crime when committed by the nationals of that State Party or on its territory.[94]

Role and accountability of the Prosecutor and Judges

2.96 Some of those opposed to ratification of the ICC Statute pointed to the differences between the judicial system described in the Statute and the common law traditions in Australia and claimed that the ICC's standard of justice will be both 'alien' and 'inferior'.

2.97 Some of the particular concerns raised were that the Statute:

- by requiring that State Parties take into account a 'fair representation of female and male judges' and 'legal expertise on specific issues, including … violence against women and children' when selecting judges, encourages the selection of 'ideological' judges;
- by allowing the Prosecutor to initiate investigations without governmental oversight or control and accept 'gratis personnel offered by State Parties, intergovernmental organizations or non-governmental organizations', allows for the possibility that the Prosecutor will be supported and influenced by 'well-funded international NGOs who are hostile to religion and traditional values';
- by providing that the one institution will investigate crimes, prosecute, pass judgement, sentence and hear appeals, concentrates rather than separates power and ignores the 'hard-won safeguards of our common law system and instead adopts trial by inquisition, which is common in European countries and dictatorships'; and
- removes or modifies some of the important features of our common law system of justice, such as the right to trial by jury, the inadmissibility of hearsay evidence and the right of an accused to know and confront his or her accusers.[95]

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94 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 9.

95 Festival of Light, *Submission No. 30*, pp. 7-10. Some or all of these concerns were shared by the Council for the National Interest (WA), National Civic Council (Isaacs Federal Electorate Group), National Civic Council (WA), Alan Barron, Stewart Coad, Richard Gellie, Mary

2.98 According to the Festival of Light, reliance on an inquisitorial system and the absence of some common law safeguards means that 'opportunities for collusion and corruption abound' and that 'the innocent will suffer.'[96] The Council for the National Interest suggested that 'the broad prosecutorial power [provided for by the Statute] may be particularly subject to … corrosive kinds of political influence.'[97]

2.99 On the other hand, the Committee received evidence from Justice Perry, Nicole McDonald, Phillip Scales and others arguing that the ICC Statute contains sufficient safeguards to prevent politically motivated prosecutions, to ensure that judges are of the highest calibre and integrity and to protect the rights of the accused.

2.100 The NSW Bar Association was satisfied that the Statute and its draft *Rules of Procedure and Evidence* provide 'probably the most sophisticated and comprehensive codified right to a fair trial of any court system in the world.'

> The Statute contains fundamental rights for the accused common to common law countries, including a presumption of innocence (art 66); the right to a speedy trial; a right of silence; a right to make an unsworn statement; the right to legal assistance if the accused lacks sufficient means to pay for legal representation (art 67). It mandates important procedural rights during the trial. The prosecutor must also disclose exculpatory material to the defence (art 67(2)).
>
> The Statute also provides victims with significant rights, including some rights of participation in the trial process (art 68) (which is closer to the civil rather than common law model) and empowers the Court to make reparation orders against accused persons (art 75) – common to both systems.
>
> …
>
> The draft rules [of procedure and evidence] also contain highly sophisticated rules for the acceptance of evidence in the new Court, which are consistent with Australia's own procedures. The Court too has a comprehensive appeals mechanism, the Court's

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Hertzog, Michael Kearney, Jim Kennedy, Brenda Lee, David Mira-Batemen, Marlene Norris, Dr I C Spry QC, Valerie Staddon, and Davydd Williams.

96 Festival of Light, *Submission No. 30*, p. 9.

97 Council for the National Interest (WA), *Submission No. 19*, p. 4.

> Appeals Chamber. The main difference between the world's common law and civil law systems is the right under Article 81 of the prosecutor to appeal and acquittal.
>
> A major right, missing from our own system, is an enforceable right to compensation for unlawful arrest or detention or an acquittal on appeal on the grounds of a miscarriage of justice after the discovery of new evidence unknown at the time (art 85 and Chapter 10 of the rules).[98]

2.101 The Committee also received lengthy submissions from Helen Brady and from the Attorney-General and the Minister for Foreign Affairs on the safeguards contained in the ICC Statute to prevent politically motivated prosecutions.

> If the Prosecutor wishes to initiate an investigation, … the three judge Pre-Trial Chamber must authorise the investigation. 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 jurisdiction of the court.
>
> After that … the Court must inform countries that would normally exercise jurisdiction. 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 countries 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. The State (and the Prosecutor) may appeal this decision.
>
> …
>
> 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,

98 NSW Bar Association, *Submission No. 20*, p. 5. Human Rights Watch also submitted that the 'Rome Statute guarantees the highest international standards for fair trial and the protection of the rights of accused persons. The guarantees are … comprehensive and extensive' (*Submission No. 23*, p. 3). The International Commission of Jurists (Australian Section) submitted that the 'legal tests to be met in the course of proceedings are the most stringent tests extracted from both common law and civil law systems' (*Submission No. 24*, p. 5). James Cockayne submitted that the ICC's proceedings will be consistent with 'internationally established norms and standards for judicial process, including common law standards' (*Submission No. 217*, p. 4).

> complementarity does not stand in the way); and interests of justice factors do not militate against proceeding. 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.
>
> 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.[99] 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. Both the Prosecutor and the accused can appeal against the decision of conviction or acquittal and against any sentence imposed.[100]

2.102 In Ms Brady's opinion, these features make it 'almost impossible for the Prosecutor to even *begin* an investigation or prosecution that is not without great merit'.[101]

2.103 The Attorney-General has acknowledged that the ICC will be, of necessity, a blend of different legal systems. Nevertheless, he was confident that it will apply the standards of justice that Australians expect from a court.

> … the Court will respect the basic legal principles that are applied in Australia and throughout the world. The presumption of innocence, the need to establish guilt beyond reasonable doubt and the observation of due process will all apply at the ICC.
>
> The ICC won't operate in exactly the same way as an Australian Court, but … it will operate in a completely fair and just way.[102]

2.104 The Attorney- General also argued that the rigorous processes to be followed for the selection of judges will ensure that only persons of the highest quality will be appointed.

> The composition of the benches of the Tribunals for the former Yugoslavia and Rwanda suggests that persons of the highest

99 Under Article 58 of the Statute the Pre-Trial Chamber can only issue an arrest warrant if there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.

100 Helen Brady, *Submission No. 7*, pp. 6-7.

101 Helen Brady, *Submission No. 7*, p. 7.

102 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, pp. 4-5.

> calibre are likely to be selected. For example, Australia has been represented at these Tribunals by Sir Ninian Stephen and Justice David Hunt.[103]

2.105 Justice John Perry argued in a similar vein, stating that:

> There is no reason to suppose that the bench of the International Criminal Court will be composed of judges who are any less eminent and qualified for the role expected of them than is the case with judges of the International Court of Justice, which decides civil disputes arising between States and has sat successfully for many years at The Hague.[104]

Impact on the Australian Defence Force

2.106 Some witnesses were concerned also about the potential impact of ratification of the ICC Statute on the ability of the Australian Defence Force (ADF) to participate in peacekeeping and other operations.

2.107 Ian Spry QC submitted that the ICC Statute, if ratified, would place the ADF 'under reasonable threat of constraint'. This point was supported by Bruce Ruxton, Victorian State President of the Returned and Services League:

> Ratification would ham-string our Defence Force, who would be prevented from acting effectively by the threat of false and contrived crimes.[105]

2.108 Ian Spry argued that the 'uncertainty' attaching to the definitions of genocide, crimes against humanity and war crimes (an issue discussed

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103 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 5. In its submission the NSW Bar Association noted that 'Australian judges, lawyers and investigators have been prominent in both the current ad hoc tribunals and the post-World War II War Crimes Tribunals. Presently in the [ICTY] … the Deputy Prosecutor Graeme Blewitt and senior appeals chamber judge, Justice David Hunt, are Australian. A former AFP officer is the head of investigations. The NSW Bar Association has two members working as senior prosecutors at the tribunal' (*Submission No. 20*, p. 2).

104 Justice John Perry, *Submission No. 8.3*, p. 3. The Hon Justice John Dowd submitted that the qualifications for the selection and election of ICC judges are 'a lot more comprehensive' than the requirements for appointment as judge to an Australian court (see Hon Justice John Dowd (International Commission of Jurists), *Transcript of Evidence*, 13 February 2001, p. 100).

105 Mr Bruce Ruxton, *Submission No. 250*, p. 1.

above) is particularly troublesome for an ADF member required to engage in armed combat, pursuant to orders.

> The threat of proceedings in the ICC would be capable of constituting a significant inhibiting factor in relation to the use of Australia's armed forces, and in relation to particular actions by members of those armed forces. The existing strains of warfare would be added to by the further important consideration in the mind of ADF members that they might be subjected to prosecution in an ICC.
>
> This matter is made worse because, in effect, any defence of superior orders would be effectively ruled out. The defence of superior orders would not apply to prosecutions for 'genocide' or 'crimes against humanity', and it would be extremely limited in other cases.[106]

2.109 Ian Spry also suggested that the threat of making false charges against Australian citizens and 'complaints to the ICC against Australian forces would be a powerful weapon, and would be particularly relevant where peacekeeping operations are concerned.'[107] These concerns were endorsed by Major-General Digger James and by the Returned Services League of Australia.[108]

2.110 Similar concerns were expressed in a letter from five retired senior military officials published in the *Australian Financial Review* on 13 March 2001. The letter argued that the 'wide jurisdiction of the ICC 'and the 'ambiguity of its provisions' means that:

> … Australian servicemen would not be protected against charges which could not be sustained under the provisions of the Australian Defence Force Discipline Act.[109]

2.111 The Government is of the view that ratification of the ICC Statute will potentially be of benefit to the ADF when deployed into environments

106 Dr I C Spry QC, *Submission No. 18*, p. 2. See also Dr I C Spry QC, *Transcript of Evidence*, 14 March 2001, pp. TR151-4.

107 Dr I C Spry QC, *Submission No. 18.2*, p. 2.

108 See Major-General WB (Digger) James, *Submission No. 9*, p. 1 and Dr I C Spry QC, *Transcript of Evidence*, 14 March 2001, p. TR151.

109 Major-General DM Butler (rtd), Major-General WB (Digger) James (rtd), Air Vice Marshall JC (Sam) Jordan (rtd), Rear Admiral PGN Kennedy (rtd), Major-General KJ Taylor (rtd), 'International court will limit our freedom' (letter to the Editor), *Australian Financial Review*, 13 March 2001. Support for this letter was expressed in a number of submissions, including those from Fay Alford and Robert Doran.

where effective law enforcement and judicial systems do not exist (as was the case in Somalia).

> [Ratification] … will ensure that the UN or multinational force to which we contribute does not have to fill the vacuum and assume responsibilities involved in bringing to justice the perpetrators of war crimes and crimes against humanity.[110]

2.112 Ratification will also afford protection for ADF personnel who may be the victims of war crimes. In such instances, the ICC may be able to investigate and prosecute these crimes if the State of the perpetrator is unwilling or unable to do so.[111]

2.113 The Attorney-General and the Minister for Foreign Affairs were confident also that the principle of complementarity (underwritten by the Government's proposed implementing legislation)[112] would ensure that:

> … the Australian Government will retain full jurisdictional authority over the activities of the ADF abroad and therefore always be able itself to investigate and, if necessary, prosecute allegations of the commission of Statute crimes by such personnel.[113]

2.114 Admiral Chris Barrie, the Chief of the Defence Force, was reported in the *Army* newspaper (dated 7 June 2001) as having welcomed moves by the Government to ratify the ICC Statute, stating that it would 'provide Australia with a mechanism to hand over alleged war criminals.' Admiral Barrie also endorsed the complementarity principle and stated that:

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110 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 1. The Australian Red Cross made the same point in relation to the ADF's deployment in East Timor claiming that 'the ADF was forced to allocated substantial resources to the detention of alleged criminals pending their proper trial. It would have been much less expensive, less dangerous and more efficient for ADF personnel to have transferred custody of individuals to the ICC … The ICC will substantially reduce the responsibilities of militaries such as the ADF in Peace Operations' (Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26*, p. 2).

111 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 1.

112 Section 3 of the Exposure Draft of the of the *International Criminal Court Bill 2001* states:

S3(1) It is the Parliament's intention that the jurisdiction of the ICC is to be complementary to the jurisdiction of Australia.

S3(2) Accordingly, this Act does not affect the primary right of Australia to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC.

113 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 2.

> The ADF will always investigate and, where necessary, prosecute any serving member of the ADF accused of committing genocide, crimes against humanity.[114]

2.115 In evidence to an inquiry by the Joint Standing Committee on Foreign Affairs, Defence and Trade, representatives of the ADF reported that the Defence Organisation had been 'an active participant in the Government's efforts to establish the ICC'. They advised that ratification would 'not have any effect [on ADF operations] because we will be asserting national jurisdiction over our servicemen'.

> It is not a threatening issue for members of the Australian Defence organisation and all members of the defence organisation who operate in accordance with the Defence Force Discipline Act and the normal acceptable law of the country.[115]

2.116 The Australian Defence Association and the Australian Legion of Ex-Servicemen and Women both support ratification of the ICC Statute, with the Australian Defence Association stating that it 'perceives no aspect of the Statute upon which we would have reservations'.[116]

2.117 The Legacy Coordinating Council also supported ratification, although it admitted to some reservations about aspects of the ICC definition of war crimes.[117] In oral evidence, Graham Riches, on behalf of the Council, discussed some of the definitional problems in the context of his military service in Vietnam as a legal officer. While expressing some reservations, Mr Riches noted that 'these sorts of definitional problems are faced all the time by courts and judges around the world' and that the principle of complementarity means that any allegations involving Australian servicemen would be investigated and prosecuted by Australian authorities. Mr Riches concluded that:

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114 'Australia courts international war crimes statute' in *Army: the newspaper for soldiers*, 7 June 2001. On 12 December 1999, the then Minister for Defence, the Hon John Moore MP, issued a press release (jointly with the Minister for Foreign Affairs and the Attorney-General) saying, in part, 'I am confident that the ICC will prove to be an effective instrument for the enforcement of international humanitarian law.'

115 Shane Carmody (Department of Defence) and Group Captain Ric Casagrande (Department of Defence), *Transcript of Evidence*, 22 March 2001, pp. FADT517 and 520. This evidence was presented to the inquiry into Australia's relationship with the United Nations, recently conducted by the Joint Standing Committee on Foreign Affairs, Defence and Trade.

116 See Australian Legion of Ex-Servicemen and Women, *Submission No. 147*; and Australian Defence Association, *Submission No. 167*.

117 Legacy Coordinating Council, *Submission No. 32*, p. 1.

> Certainly the rights of our defence force must be protected. The best protection they can have is proper training and instruction … so that they do understand right from wrong and for our legal criminal system to be such that it can cope with these situations.[118]

Other issues

Permanent vs ad hoc

2.118 Many of those opposed to ratification argued that the creation of a permanent international criminal court was unnecessary, as the United Nations' had demonstrated the capacity to establish *ad hoc* tribunals to prosecute violations of international humanitarian law.

2.119 The Festival of Light, the Council for the National Interest, Ian Spry and others argued that the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have not only been successful, but that they display the following advantages over a permanent court:

- their mandate is limited to specific purposes and circumstances;
- their mandate is defined and sanctioned by the United Nations' Security Council; and
- they will cease to exist when their task is completed.[119]

2.120 Rupert Sherlock suggested that the flexibility of ad hoc tribunals also allows different cultural values to be accommodated:

> An ad hoc committee could accommodate different levels of values according to the nation in which the matter they are dealing with occurs. For instance, if an ad hoc committee were set up to

118 Graham Riches (Legacy Coordinating Council), *Transcript of Evidence*, 14 March 2001, p. TR150.

119 See Festival of Light, *Submission No. 30*, p. 10; Denis Whitely (Council for the National Interest (WA)), *Transcript of Evidence*, 19 April 2001, p. 197; Dr I C Spry, *Transcript of Evidence*, 14 March 2001, p. 156. In a subsequent written submission the Council for the National Interest (WA) proposed that a permanent 'War Crimes Unit' should be established under the auspices of the Security Council of the United Nations and that this be activated 'as and when the need emerges subject only to the final approval of the Security Council' (Council for the National Interest (WA), *Submission No. 19.1*, p. 2).

See www.un.org/icty and www.un.org/ictr for information about the record of the Tribunals in relation to indictments, convictions and sentences passed.

> deal with a problem in Africa, it need not in any way concern China or Canada. In dealing with the matter of an offence committed on African soil, a different set of values from ours should be accommodated.[120]

2.121 Those who advocated the establishment of a permanent court acknowledged the success of the ICTY and the ICTR, but noted that on only two occasions since World War II had the Security Council agreed to establish such tribunals. In that time the world has seen:

> a myriad of atrocities in other parts of the world … and a litany of ineffective prosecutions, cover-ups, token enquiries and court martials and often pathetically lenient sentences. Judicial processes have been followed in a small minority of cases.[121]

2.122 The Attorney-General and the Minister for Foreign Affairs noted that establishing *ad hoc* tribunals can be a time consuming and costly process, with the consequence that evidence may be destroyed, witnesses may no longer be available and victims may be forced to wait longer for justice.

> Generating the international political will and support to establish the ad hoc tribunals to investigate and prosecute atrocities in the former Yugoslavia and Rwanda was a very difficult task.
>
> To take a topical example, the UN has been concerned about war crimes committed in Cambodia by the Khmer Rouge and was considering setting up an ad hoc Tribunal. The Cambodian Government negotiated with the UN and it was decided that Cambodia should set up its own Tribunal under UN auspices. However, after two years of difficult negotiations between the UN and Cambodia, the Cambodian national legislation necessary to set up the tribunal has not yet been passed.[122]

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120 Rupert Sherlock, *Transcript of Evidence*, 19 April 2001, p. 204.

121 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26*, p. 3. Similar views were expressed by Human Rights Watch, Amnesty International, Elizabeth Bennett (on behalf of a group of 12 university students) and Ben Clarke.

122 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 4. John Greenwell (on behalf of Amnesty) emphasised the selective nature of ad hoc tribunals by suggesting that 'one might say it was largely because the atrocities got on the television screens of certain countries that [the ICTY and the ICTR] were established' (John Greenwell (Amnesty International), *Transcript of Evidence*, 13 February 2001, p. TR11). The United Nations pulled out of negotiations in February 2002 after failing to reach agreement with the Cambodian Government concerning the modalities and structure of the tribunal.

2.123 In addition, the following arguments have been advanced in support of a permanent court rather than *ad hoc* tribunals:

- because ad hoc tribunals are created retrospectively, their deterrent effect is diluted;[123]
- because ad hoc tribunals are established by the Security Council of the United Nations, political and diplomatic influences irrelevant to the prosecution of war crimes and crimes against humanity are brought to bear,[124] whereas under the ICC the Security Council must initiate actions through the prosecutor and the Pre-Trial Chamber; and
- a permanent court will facilitate the development and application of consistent judicial standards and procedures, and allow for the efficient administration of justice.[125]

Victor's justice

2.124 The suggestion that *ad hoc* tribunals can be perceived as lacking impartiality can give rise to accusations of 'victor's justice' – or the strong and powerful declaring who the criminals are and escaping prosecution themselves.

2.125 An example cited in some submissions was that neither the American President not the British Prime Minister had been charged for war crimes committed during the NATO campaign in Kosovo, yet former Yugoslav President Slobodan Milosovic is currently being prosecuted before the ICTY.

2.126 Advocates of the ICC argued the establishment of a permanent court, to apply widely accepted principles of law in a consistent manner without political influence from the powerful nations, is the best way of avoiding

123 Amnesty International, *Submission No. 16*, p. 5 and Sydney University Law School Amnesty Group, *Submission No. 224*, p. 2.

124 See Tim Game (NSW Bar Association), *Transcript of Evidence*, 13 February 2001, p. TR31; Justice John Perry, *Submission No. 8.1*, p. 3; Sydney University Law School Amnesty Group, *Submission No. 224*, p. 2 and John Greenwell (Amnesty International), *Transcript of Evidence*, 13 February 2001, p. TR11.

125 International Commission of Jurists (Aust), *Submission No. 24*, p. 5; International Commission of Jurists (QLD), *Submission No. 219*, p. 1, Amnesty International, *Submission No. 16*, p. 2; Elizabeth Bennett, *Submission No. 204*, p. 1; Benjamin Clarke, *Transcript of Evidence*, 19 April 2001, p. 211. Nicole McDonald referred to the advantages of a 'permanent body with administration and support apparatus, unlike the somewhat reactionary and *ad hoc* tribunals in Rwanda and the former Yugoslavia' (Nicole McDonald, *Transcript of Evidence*, 13 February 2001 pp. TR57-8).

accusations of 'victor's justice'. The chances of any one nation abusing the process of the Court are minimal as all State Parties have exactly the same rights and obligations and none of the State Parties will be involved in the day to day operation of the Court.

2.127 The Sydney University Law School Amnesty Group argued that the structure of the ICC will help ensure its impartiality and effectiveness, limiting the extent to which it could be manipulated for political ends:

> The establishment of a standing Court as opposed to further ad hoc tribunals will lessen the degree to which prosecutions are seen to be politicised and selective dispensers of 'victor's justice'.

2.128 The Secretary-General of the United Nations addressed this point when speaking at the Rome conference which endorsed the ICC Statute:

> 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 is happening only 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 impugned 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, to deal with crimes committed in specific conflicts or by specific regimes. Such procedures seem to imply that the same crimes, committed by different people, or at different times and places, will go unpunished.
>
> Now at last … we shall have a permanent court to judge the most serious crimes of concern to the international community as a whole: genocide, crimes against humanity and war crimes.[126]

126 United Nations Press Release L/ROM/23, 'Secretary-General says Establishment of International Criminal Court is Major Step in March Towards Universal Human Rights Rule of Law', 18 July 1998 (at www.un.org/icc/pressrel/lrom23.htm).

The international position

2.129 Of the 19 NATO member countries, 12 have ratified the Statute, while of the 15 members of the Security Council, 6 members have ratified and 4 others signed it, including the United States of America. Of the permanent members of the Security Council the USA, China and Russia have not ratified the Statute while the United Kingdom and France have ratified.

2.130 The position of the USA has changed since the Committee commenced its inquiry. On 6 May 2002, in a letter to the Secretary-General of the United Nations, the USA provided notification that it will not become a party to the ICC, effectively reversing its previous decision to become a signatory.

2.131 The Under Secretary for Political Affairs, Marc Grossman, indicated that the USA had taken this action for several reasons:

- …the ICC undermines the role of the United Nations Security Council in maintaining international peace and security…;
- …The Rome Statute creates a prosecutorial system that is an unchecked power…;
- …The ICC asserts jurisdiction over citizens of states that have not ratified the treaty. This threatens US sovereignty…; and
- …the ICC is built on a flawed foundation. These flaws leave it open for exploitation and politically motivated prosecutions.[127]

2.132 The Secretary of Defense, Donald Rumsfeld, reiterated the above points and said:

> These flaws would be of concern at any time, but they are particularly troubling in the midst of a difficult, dangerous war on terrorism. There is the risk that the ICC could attempt to assert jurisdiction over U.S. service members, as well as civilians, involved in counter-terrorist and other military operations -- something we cannot allow. …

2.133 The ICC's entry into force on July 1st means that our men and women in uniform -- as well as current and future U.S. officials -- could be at risk of prosecution by the ICC. We intend to make clear, in several ways, that the United States rejects the jurisdictional claims of the ICC. The United States will regard as illegitimate any attempt by the court or state parties to the

127 Under Secretary for Political Affairs, Marc Grossman, *Remarks to the Center for Strategic and International Studies*, Washington DC, May 6 2002, p. 1, URL: www.state.gov/p/9949.htm.

treaty to assert the ICC's jurisdiction over American citizens. …[128]The Secretary of State, Colin Powell, is quoted in a transcript of an interview released by the State Department as saying on 5 May 2002:

> But the ICC, where prosecutors and a court beholden to no higher authority, not beholden to the Security Council, not beholden to anyone else, and which would have the authority to second guess the United States after we have tried somebody and take it before the ICC, we found that this was not a situation that we believe was appropriate for our men and women in the armed forces or our diplomats and political leaders.[129]

2.134 There are arguments for and against each of these stated reasons and, although there are differences in the debate occurring in the USA and Australia, the arguments are essentially as outlined in this report.

2.135 Amnesty International directly addressed the concerns raised about the impact of the ICC Statute on peacekeeping operations, arguing that the Statute clearly differentiates war crimes from activities which might arise in peacekeeping operations. In discussing the definition of war crimes at Article 8(2)(b)(ii), Amnesty noted that the definition refers to 'intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects', but then goes on to specify that such action must 'be clearly excessive in relation to the concrete and direct overall military advantage anticipated'.

> The offence thus applies where a military advantage is anticipated. In that event the prosecutor is required to prove not merely … [the attack, the intention, knowledge that it will cause incidental loss of life or injury etc. to civilians but] the anticipated military advantage and that the loss of life etc. was 'clearly excessive' in relation to its attainment. This is a very heavy evidentiary threshold for any prosecution to meet.[130]

128 United States Department of Defense News Release, *Secretary Rumsfeld Statement on the ICC Treaty* 6 May 2002, www.defenselink.mil/news/May2002/b05062002_bt233-02.html.

129 Secretary of State, Colin Powell, Interview on ABC's *This Week* program, 5 May 2002, www.state.gov/secretary/rm/2002/9941pf.htm.

130 Amnesty International, *Submission No. 16.2*, p.2.

Application to non-State parties

2.136 Another issue of concern that has arisen in the USA debate about ratification is the potential reach of the ICC – its application not just to State parties.[131]

2.137 Professor Richard Wilkins, from the World Family Centre at Brigham Young University, argued that the 'jurisdiction claimed by the ICC is unquestionably novel – not since the Treaty of Westphalia in 1648 has a treaty ever purported to bind parties who are not signatories to the treaty. The ICC Statute, however, does just that'.[132]

2.138 A number of submissions drew on Wilkins' analysis in stating that 'by asserting that the ICC can claim jurisdiction over a non-signatory state and its citizens, the ICC Statute makes an unabashed claim of international supremacy over the actions of domestic policy makers'.[133]

2.139 Geoffrey Walker also raised concerns about the proposed application of the ICC Statute to non-State parties. He submitted that there is a strong argument to say the Statute is 'void' because it offends one of the recognised norms of international law:

> A fundamental rule of international law, enshrined in Art. 34 of the Vienna Convention, is that a treaty does not create obligations or rights for a state without its consent. Obligations can only be accepted by a third state in writing (art. 35). The rule that a treaty cannot violate the rights of a third state without its consent rests firmly on the sovereignty and independence of states, which is the whole basis for international relations.[134]

2.140 In response to these concerns, the Attorney-General and the Minister for Foreign Affairs submitted that the ICC Statute does not impose any obligations on States not party to it, unless such a State voluntarily accepts

131 The position of the current administration in the United States was explained by witnesses from the Department of Foreign Affairs and Trade in the following terms: 'Basically, the United States wishes to ensure that, as a non-state party, there will be provision for non-state parties which will guarantee them that none of their nationals engaged in official acts will be brought before the court without the consent of the non-state party. In other words, they are seeking an exemption from the jurisdiction of the court – a tightening of the complementarity regime' (see Richard Rowe (DFAT), *Transcript of Evidence*, 30 October 2000, p. TR14).

132 Professor Richard Wilkins, '*Doing The Right Thing: the International Criminal Court and Social Engineering*' p. 5.

133 See Festival of Light, *Submission No. 30*, p. 3 and Council for the National Interest (WA), *Submission No. 19*, p. 2.

134 Geoffrey de Q Walker, *Submission No. 228*, p. 12.

the Court's jurisdiction over a particular case, in writing. However, the Court can, in certain circumstances, seek to prosecute the nationals of non-State parties.

> Nationals of non-State parties may be liable for prosecution by the Court if they commit Statute crimes in the territory of a State party or in the territory of a non-State party that has recognised the Court's jurisdiction over the case in writing. …
>
> The only exception to this is referrals by the [UN] Security Council. The Security Council can refer matters to the Court even if they were committed by a national of a non-State party in the territory of a non-State party. The Security Council has always had this power … so in this respect the Statute is not conferring on the Court a power that is not already binding on all States.[135]

2.141 The Ministers make the additional point that non-State parties are protected by the complementarity principle in the same way as State parties: 'the Court is not able to hear a case if it has already been legitimately heard by a State, even if that State is not a Party to the Statute.'[136]

2.142 The Law Council of Australia and the Australian Red Cross (through its National Advisory Committee on International Humanitarian Law) also submitted that the ICC Statute does not impose obligations on non-State parties, but rather that it may be applied to the nationals of non-State parties who commit Statute crimes.[137]

2.143 Furthermore, both the Law Council and the Red Cross took issue with the view that the ICC Statute violates fundamental norms of international law, with the Law Council stating that:

- the House of Lords held in the Pinochet case that the 1984 Torture Convention confers universal jurisdiction;[138]

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135 The Minister for Foreign Affairs and the Attorney-General, *Submission No. 41*, pp.`11-12.

136 The Minister for Foreign Affairs and the Attorney-General, *Submission No. 41*, p. 12.

137 Professor Tim McCormack, *Transcript of Evidence*, 14 March 2001, p. TR130 and the Law Council of Australia, *Submission No. 29*, p. 6.

138 Law Council of Australia, *Submission No. 29*, p. 6. This refers to the action taken by the Spanish Government for the extradition of General Pinochet, former ruler of Chile, to face charges relating to crimes allegedly committed in Chile. Refer to Reg v Bow Street Magistrate, Ex parte Pinochet Ugarte (No. 3) (1999) 2 WLR 827.

- the United States has exercised universal jurisdiction in applying the 1970 Hijacking and 1979 Hostage Conventions to a Lebanese citizen accused of hijacking a Jordanian aircraft in the Middle East;[139] and
- the 1949 Geneva Conventions impose an obligation on all parties to prosecute war crimes, regardless of nationality.[140]

2.144 Some witnesses considered that the ICC Statute falls short of its full potential because it allows for the possibility that nationals of non-State parties might evade the jurisdiction of the Court – in other words, it fails to establish universal jurisdiction. On the other hand, the Committee also received evidence from a number of human rights organisations arguing that the ICC Statute is deficient because it does not propose universal jurisdiction for genocide, crimes against humanity and war crimes.

2.145 Amnesty International, for example, argued that:

> The restrictions imposed by Article 12 are not consistent with the principles of jurisdiction under international law. International law prescribes that jurisdiction for war crimes and crimes against humanity is universal … not confined to offences committed on the territory of or by the nationals of a State.[141]

2.146 The practical consequence of limiting jurisdiction in the manner contemplated by the ICC Statute is that by 'remaining in or moving to jurisdictional "safe havens'' offenders can evade justice. Amnesty suggested that this 'area of impunity' is significant because the nations 'most disposed to commit or allow crimes against humanity are the least likely to ratify the Statute'. To overcome this problem, Amnesty called upon the Government to ensure that the legislation:

> … confers universal jurisdiction upon Australian courts in respect of the ICC offences. New Zealand has done so … [and such a provision in Australia's implementing legislation] would be in line with the provisions of the Crimes (Torture) Act 1988 which confers jurisdiction upon our Courts in respect of 'any person present in

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139 Law Council of Australia, *Submission No. 29,* p. 7. Note: the US District Court in US vs Yunis, 924 F2d 1086 (D.C. Cir. 1991).

140 Law Council of Australia, *Submission No. 29,* p. 6. See also Professor Tim McCormack, *Transcript of Evidence,* 14 March 2001, pp. TR129-130. We note that Richard Wilkins described the 'concept of inherent or universal jurisdiction' as 'highly questionable' (see Richard Wilkins, '*Doing The Right Thing: the International Criminal Court and Social Engineering*' p. 6).

141 Amnesty International, *Submission No. 16.1,* p. 1.

Australia' alleged to have committed extraterritorial torture as provided in the Act.[142]

2.147 On the issue of universal jurisdiction, witnesses from the Attorney-General's Department confirmed that the proposed consequential amendments legislation will, under cl 268.123, under the heading of 'Geographical Jurisdiction', provide such universal coverage for the crimes under the Statute.[143]

Extradition

2.148 In August 2001 the Committee tabled in Parliament *Report 40, Extradition: a review of Australia's law and policy*. In this report it was noted that international extradition arrangements (involving the formal surrender by one State, on request of another, of a person accused or convicted of a crime in the requesting State's jurisdiction) are extremely common - dating back to ancient times. Australia has an extensive network of extradition arrangements, including: arrangements inherited from the United Kingdom upon Federation; bilateral agreements negotiated pursuant to the *Extradition Act 1988* (which replaced the *Extradition (Foreign States) Act 1966*); and 12 multilateral conventions which contain extradition obligations for offences described in the conventions. The multilateral conventions with extradition provisions include: the *1929 Counterfeit Currency Convention*; the 1970 and 1971 *Hijacking Conventions*; the 1988 *Illicit Drugs Trafficking Convention*; and the 1984 *Torture Convention*.

2.149 As well as legislating to give effect to the extradition arrangements in these conventions, the Commonwealth has enacted the *International War Crimes Tribunal Act 1995* which, in part, allows for the arrest and surrender, to the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, of persons in respect of whom the Tribunals have issued an arrest warrant. The Committee notes that the *War Crimes Amendment Act 1988* contained

142 Amnesty International, *Submission No. 16.1*, p. 2.

143 Geoff Skillen (AG) and Joanne Blackburn (AG), *Transcript of Evidence*, 10 April 2002, p. 293 / See also Section 268.123 entitled - Geographical jurisdiction

(1) Section 15.4 (extended geographical jurisdiction—Category D) applies to genocide, crimes against humanity and war crimes.

(2) Section 15.3 (extended geographical jurisdiction—Category C) applies to crimes against the administration of the justice of the International Criminal Court. (*International Criminal Court (Consequential Amendments) Bill 2002).*

specific provisions referring to the arrest and surrender of persons accused of committing war crimes in Europe during World War II. These provisions were repealed in 1999 to bring the extradition procedures for alleged war criminals into line with the standard arrangements described in the Extradition Act.

2.150 In *Report 40, Extradition: a review of Australia's law and policy* the Committee reported to Parliament that it did not favour the continuation of the 'no evidence' approach to extradition. The Committee concluded that Australia's model extradition arrangements should be amended to require a higher standard of proof before extradition is sanctioned. Should the Government accept the recommendations of that report on this matter, the Committee considers that the new, higher standard of proof should also be applied to requests for surrender from the ICC.

2.151 This would be consistent with the ICC Statute which provides that '[surrender] requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court' (Article 91(2)(c)).

2.152 Raising the standard of proof and applying it equally to requests from extradition partners and from the ICC will:

- ensure further protection against false accusations; and
- provide assurance that the ICC will operate in a manner consistent with Australian law and practice in this area.

'Opt out' clause

2.153 A number of human rights organisations have objected to the provision in the ICC Statute (Article 124) that allows State Parties to:

> … declare that, for a period of seven years after the entry into force of this Statute … it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory.

2.154 UNICEF stated that this article has the potential to 'suspend the jurisdiction of the court, as it applies to the specific category of war crimes,

for up to seven years'.[144] The Australian Red Cross also believed that the 'opt out' clause is a great weakness in the Statute and hoped that Australia would not take advantage of it.[145]

2.155 UNICEF, along with World Vision, also recommended that the Government lobby other signatories to ensure they do not 'opt out', thereby delaying the jurisdiction of the ICC and extending impunity for the perpetrators of genocide, crimes against humanity and war crimes.[146]

The ICC and the United Nations

2.156 Many submissions were critical of the proposed ICC because, in the words of Gareth Kimberley, they considered it to be another element of the United Nations, an organisation that is 'bloated, incompetent …[and] riddled with graft and nepotism'.[147]

2.157 The Isaacs Branch of the National Civic Council contended that:

> It is also already established that international agencies, especially within the United Nations umbrella, have increasingly promoted the political claims of social groups (groups based on ethnicity, or gender, or age, or socio-economic position), under the banner of ' human rights'. There is no reason why these groups and their supporters in the international agencies will not explore every opportunity to use the authority of the ICC to enforce their claims.[148]

2.158 As noted in Chapter 1, the ICC will not be part of the United Nations organisation, it will have independent legal personality (Articles 1 and 4).

2.159 The Attorney-General and the Minister for Foreign Affairs in describing the relationship between the two organisation noted the following elements:

- the Security Council of the United Nations will be able to refer a situation to the ICC Prosecutor (Article 13(b)) and to request the Court not to commence or proceed with an investigation or prosecution (Article 16); and

144 UNICEF Australia, *Submission No. 34*, p. 7.

145 Australian Red Cross, *Submission No. 25*, p. 3.

146 See World Vision, *Submission No. 104*, p. 2 and UNICEF, *Submission No. 34*, p. 7.

147 Gareth Kimberley, *Submission No. 36*, p. 2.

148 Gerard J Flood, *Submission No. 203*, p. 4.

- the ICC may also be funded by the United Nations, subject to the approval of the General Assembly of the UN, in particular in relation to expenses incurred as a result of Security Council referrals to the ICC (Article 115(b)).[149]

2.160 Further details of the relationship are to be provided in a *Relationship Agreement between the United Nations and the International Criminal Court*, a draft of which has been prepared by the Preparatory Commission for consideration by the Assembly of States Parties when the Court begins operation.[150]

Timing of ratification

2.161 Most of those who made submissions in support of ratification of the ICC Statute also urged that Australia aim to be one of the first 60 countries to ratify the Statute.

2.162 Justice John Dowd suggested that early ratification would allow Australia to participate in the first meeting of the Assembly of States parties, meaning that:

> Australia will be able to nominate candidates for judge, Prosecutor and Deputy Prosecutor. It will be able to be involved, through Australian nationals, in the work of the Court at all levels from its inception (in judicial, prosecutorial, investigatory and various support capacities – counsellors, psychologists, administrators, interpreters etc.)[151]

2.163 The Minister for Foreign Affairs and the Attorney-General suggested that 'the States that will exercise the most influence over this process [that is, the process of determining the principal officers and administrative arrangements for the Court] will naturally be those States that have ratified the Statute. States that have signed, but not ratified the Statute will have a lesser role.'[152]

149 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 5. See also Helen Brady, *Submission No. 7*, p. 8 who noted that the ICC 'is not a UN body and will not be a subsidiary organ of the UN'.

150 A copy of the draft *Relationship Agreement between the United Nations and the International Criminal Court* adopted by the Preparatory Commission for the International Criminal Court on 9 August 2000 can be found at www.un.org/law/icc/prepcomm/mar2001/english/rev1ad1e.pdf. The agreement will come into effect after it is approved by the Assembly of States Parties at its first meeting following the establishment of the ICC.

151 International Commission of Jurists, *Submission No. 24*, p. 2.

152 The Minister of Foreign Affairs and the Attorney-General, *Submission No. 41*, p. 4.

2.164 The Sydney University Law School Amnesty Group submitted that by being actively involved in the early stages of the ICC, Australia can help 'ensure that it complies with the high and impartial standards of justice for which Australia is generally known.'[153]

2.165 Another reason for early ratification expressed by the Australian Red Cross was

> The new Court will only be able to deal with alleged crimes which arise after the Court has been established. This limiting principle is one key reason for encouraging Australian ratification as soon as possible and for pushing for early entry into force of the Rome Statute. Each new atrocity perpetrated somewhere in the world prior to the establishment of the Court and which goes unpunished reconfirms the urgency of the need for an effective international criminal court.[154]

2.166 On the other hand, some of those who opposed ratification argued that claims concerning the benefits of early ratification are greatly exaggerated. Geoffrey Walker was sceptical of Australia's capacity to influence the establishment of the ICC, saying:

> Given … [the] apparent inability [of the Australian delegation] to secure recognition of basic Australian constitutional democracy and the rule of law values to date, it would be naïve to expect that with only one vote in the Assembly, and a maximum of one judge on the Court, Australian representatives could bring about any significant improvement.[155]

2.167 As circumstances transpired with the late receipt of legislation and the intervention of a federal election, Australia was not in a position to be one of the first 60 parties to ratify the Statute. Nevertheless, as indicated in Chapter 3, if Australia is able to finalise all its local requirements before July 2002, it should still be able to participate in the initial meetings of the Court.

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153 Sydney University Law School Amnesty Group, *Submission No. 224*, p. 2.

154 [UNICEF argued along the same lines, suggesting that 'failure or delay in ratification means that current perpetrators of atrocities against children may never be brought to justice' (see, *Submission No. 34,* p. 56).

155 Geoffrey Walker, *Submission No. 228,* p. 13.