Submission No. 41

INQUIRY BY JSCOT INTO THE INTERNATIONAL CRIMINAL COURT STATUTE

RESPONSE TO MATTERS RAISED BY JSCOT AT ITS 30 OCTOBER 2000 HEARING

1. Why is it in Australia's national interest to ratify the Statute?

Australia has a direct national interest in the establishment of a permanent International Criminal Court based on the role the Court will play in enhancing international peace and security, including in our immediate region. One of the Court's prime roles is deterrence: it is designed to deter individuals from committing these kinds of crimes. It is also designed to encourage States to have the necessary laws to enable them to prosecute the perpetrators of such crimes themselves, in priority to the ICC (the complementarity principle). The ICC as a strategy to achieve these goals is in our national interest by providing for action against rogue States while at the same time protecting the national jurisdiction of responsible States such as Australia.

Crimes against humanity and human rights abuses on the scale of interest to the Statute are amongst the principal causes of large-scale movements of people. Such movements place pressures on neighbouring countries, and may lead to the development of resistance movements and civil unrest. Similarly, the commission of war crimes exacerbates conflict by increasing the scale of violence and reducing the prospect of a negotiated solution. These crimes are committed by individuals who believe themselves unaccountable, or at least protected under the umbrella of the State or authority on whose behalf they are acting. Removing this sense of protection will go a long way to making such individuals reconsider their proposed actions before committing criminal acts.

The Court's most powerful deterrence will be through the pressure it places on States themselves to investigate, prosecute and punish genuinely such crimes when committed on their territory or by their nationals abroad.

Australia has been a regular and respected contributor to United Nations and multinational peace operations. The existence of the ICC will potentially be of assistance in situations where the Australian Defence Force (ADF) deploys, with such operations, into an environment in which effective law enforcement or judicial systems do not exist (as was the case in Somalia). It will ensure that the UN or multinational force to which we contribute does not have to fill the vacuum and assume the responsibilities involved in bringing to justice the perpetrators of war crimes and crimes against humanity.

ADF personnel who deploy into a hostile environment may also become 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.

2. What are the implications for Australian Defence Force personnel operating abroad?

As indicated above, the existence of the ICC will potentially be of assistance to ADF operations abroad and may enhance our operational capabilities in some situations. The Court is designed to operate primarily in post-conflict situations where war crimes and other atrocities have been committed but there is no functional national criminal justice system existing to prosecute the alleged perpetrators. In such situations, the perpetrators, such as the war-lords in Somalia, are able to remain on the scene, threatening to destabilise the situation and impeding opportunities for an eventual long term peace. This is a likely environment in which the ADF may operate overseas.

It is highly unlikely that the Court would ever seek to prosecute Australian service personnel. This is because the Australian Government will retain full jurisdictional authority over the activities of the Australian Defence Force abroad and therefore always be able itself to investigate and if necessary prosecute allegations of the commission of Statute crimes by such personnel. The Statute of the International Criminal Court obliges the Court to respect that jurisdiction and to refrain from investigating or prosecuting Australian service personnel where Australian authorities are themselves investigating or have already investigated and prosecuted the matter. In addition to Australia's existing jurisdictional coverage over war crimes, the Government has decided that, in the course of enacting the legislation necessary for Australia to ratify the Statute, all the crimes within the ICC's jurisdiction will become offences under Australian law. This would ensure that Australia has a complete basis to prosecute under Australian law all of the crimes within the ICC's jurisdiction. This is precisely what the International Criminal Court is designed to encourage States to do: to take on this responsibility themselves.

3. How widespread is support for the ICC in the international community?

The Statute has at present been ratified by 27 countries. We are aware of several additional States that are well advanced in their ratification processes. At least twenty States have introduced into their Parliaments legislation necessary for ratification, and should be ready to ratify within twelve months. These include the United Kingdom, the Republic of Korea, Denmark, Hungary, Ireland, The Netherlands, Switzerland, the Czech Republic, Poland, and Argentina. Another eleven States have committed publicly to early ratification of the Statute or have received parliamentary approval for the ratification process to commence. The rate of ratification, with a total of six States in 1999 and 21 in 2000, indicates that the pace of ratification is accelerating and most observers expect the sixtieth ratification, that will bring the Statute into force by the middle of 2002, if not before.

The rate at which the Statute is being ratified compares favourably with that of many other multilateral treaties of the same degree of complexity, which are generally ratified at a rate of around five to ten States per year. (For example, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances reached twenty ratifications in just under two years; the United Nations Convention on the Law of the Sea reached sixty ratifications in just under eleven years.). For many States, particularly those in civil law countries (mainly European

and Latin American), Constitutional amendments, to allow the surrender of their own nationals to the Court and to allow cooperation with the Court where a life sentence may be imposed, are necessary before ratification. This is not the case for Australia.

To correct any misconception about the position of the United Kingdom, it signed the Statute on 30 November 1998, has announced its intention to ratify and has drafted legislation to enable it to ratify. This legislation has been circulated for public comment.

When the Statute closed for signature on 31 December 2000, 139 States, including Australia, had signed the Statute. Signature of a treaty (as opposed to ratification) is a significant step. The Vienna Convention on the Law of Treaties provides that a State is obliged to refrain from acts which would defeat the object and purpose of a treaty before its entry into force if it has signed the treaty.

120 countries which participated at the Rome conference voted in favour of the adoption of the Statute, while 7 voted against and 21 abstained. The United States was one of 7 countries, including China, India and Israel, which voted against the adoption of the ICC Statute in Rome. Nevertheless, on 31 December 2000 the United States and Israel both signed the Statute. The US continues to have concerns about the capacity of the Court to try the nationals of non-States Parties. Its concerns are not shared by 3 of its fellow permanent members of the UN Security Council (the United Kingdom, France and Russia, each of whom has signed the Statute, and France has ratified), nor by its NATO allies (of the 19 members, only Turkey has not signed, while 9 have ratified).

Despite its concerns, the United States has continued to be productively engaged in the process of negotiation towards the entry into force of the Statute, in particular in relation to the development of the Rules of Procedure and Evidence and the Elements of the Crimes.

4. How widespread is support for the ICC within Australia?

There is evidence of support for the Court in the Australian community. Both the Department of Foreign Affairs and Trade and the Attorney-General's Department conduct regular forums for non governmental organisations. A number of organisations represented at these forums have expressed strong support for the ICC.

In March 2000 the Joint Standing Committee on Foreign Affairs, Defence and Trade conducted an inquiry into "Australia's Relations with the United Nations in the post Cold War Environment". One of its terms of reference was the viability of the ICC. The Committee received a number of submissions which addressed this term of reference, some of which supported the ICC and Australia's involvement with it and some of which opposed it.

The overwhelming response by the Australian community to accept refugees from conflicts not only close to home, such as in East Timor, but also from distant countries such as Yugoslavia, is evidence that atrocities of the kind covered by the Statute, and the plight of victims of such atrocities, are of immediate interest to many Australians. This is inevitable given the access the global media gives Australians to

images of atrocities from all over the world almost as soon as they occur. Their concern is manifested in generous contributions to and support for humanitarian agencies such as the Red Cross and Care Australia. Ministerial correspondence received by the Minister for Foreign Affairs clearly demonstrates that the community looks to the Government to take a leadership role in doing more to use Australia's influence in the international arena to put a stop to such atrocities.

5. Why is it important for Australia to ratify the Statute so early, and in particular, be among the first 60 ratifiers?

The first 60 States to ratify the Statute will essentially determine who will be the principal officers of the Court (judges, prosecutors, registrars etc). They will also determine the administrative arrangements for the Court. That is because these decisions will need to be made by the first meeting of the Assembly of States Parties, which will be held when the Statute enters into force. Furthermore, because the Court will need to be more or less operational from the moment the Statute enters into force, many decisions relating to staffing - including determining the candidates for elected office - will need to be made in the months leading to the Statute's entry into force. A similar process is presently underway in relation to the Comprehensive Test Ban Treaty. The States that will exercise the most influence over this process prior to the Statute's entry into force will naturally be those States that have ratified the Statute. States that have only signed but not ratified the Statute will have a lesser role.

6. What are the reasons for having a permanent Court? Are there any benefits over ad hoc tribunals?

The two ad hoc Tribunals for the Former Yugoslavia and Rwanda were created by Special Resolutions of the UN Security Council. They deal with specific situations after crimes have been committed. The jurisdiction of these Tribunals is limited to the time and the territories concerned. On the other hand, the ICC will be a permanent institution not constrained by time and place limitations. It will be able to act more quickly than if an ad hoc tribunal had to be established. Importantly, the Government is confident that the Court, as a permanent institution, will act as a deterrent against the commission of international crimes, whereas ad hoc tribunals, created after the event in response to atrocities already committed, can have no such deterrent value.

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.

A permanent International Criminal Court would obviate the need for this time consuming, costly and reactive approach and lessen the risk that further atrocities will

be committed, evidence may be destroyed, witnesses may no longer be available and victims may be forced to wait longer for justice.

7. Why should Australia wish to join the Statute rather than relying solely on domestic legislation?

Creating the degree of deterrence necessary for the Court to make a difference to international peace and security requires a globally co-ordinated effort. It would be difficult for Australia to make even our regional environment more secure solely by providing in our criminal law for the crimes covered by the Statute to be crimes in Australia.

If Australia were to rely solely on domestic legislation, we would need to co-ordinate domestic legislation with as many other States as possible, to ensure that there will be no safe havens for the perpetrators of such crimes, and that their commission can be prosecuted and punished by a national jurisdiction. Even then, it would be almost impossible to achieve the same degree of coverage as that which we can expect from the International Criminal Court. The Statute enhances the effect of Australia's proposed domestic action in legislating for the crimes covered by the Statute. It makes our action a more powerful regional and international deterrent than it could ever hope to be outside of the network represented by the Statute.

8. Will there be a relationship between the ICC and the UN?

Yes. The Court will not be part of the UN, but will enter into a relationship with it. There is provision for the UN Security Council to refer a situation to the Court's Prosecutor and for the Council to request the Court not to commence or proceed with an investigation or prosecution. There is also provision for the Court to be funded by the UN, subject to the approval of the General Assembly, in particular in relation to expenses incurred due to referrals to it by the Security Council.

Relationship Agreement: Article 2 of the Statute requires that the Court be brought into a relationship with the UN through an agreement to be approved. A draft agreement will be considered by the Preparatory Commission for the ICC at its meeting from 27 November to 8 December 2000. A copy of the draft agreement can be provided to the Committee if that would assist it (and is available at www.un.org/law/icc).

Security Council: Article 13(b) of the Statute provides that the Court may exercise jurisdiction if a situation in which one of the crimes within its jurisdiction appears to have been committed is referred to it by the Security Council acting pursuant to its powers in Chapter VII of the UN Charter to take action with respect to threats to the peace, breaches of the peace and acts of aggression. Article 16 provides that no investigation or prosecution may be commenced or proceeded with for a period of 12 months after the Security Council, again acting under Chapter VII of the Charter, has requested it to that effect.

Funding: Article 115 deals with the funding of the Court, and provides for it to be funded by assessed contributions made by States parties and by the UN, subject to the approval of the General Assembly, in particular in relation to expenses incurred due to

referrals to it by the Security Council. Article 117 provides that the assessment of contributions will be in accordance with a scale adopted by the UN for its regular budget and adjusted in accordance with the principles on which that scale is based.

9. Should there be a concern that once we join the Statute we are in it forever?

Once a country has become a Party to the ICC Statute, it is possible for it to withdraw at a later date.

The Statute provides that a State Party may, by written notification addressed to the Secretary-General of the UN, withdraw from the Statute, with effect from one year after the date of receipt of the notification, unless the notification specifies a later date. Obligations arising while a Party to the Statute, including financial obligations and obligations to cooperate with the Court in connection with criminal investigations and proceedings commenced prior to the date on which the withdrawal became effective, remain binding. A State's withdrawal does not prejudice in any way the continued consideration of any matter that was already under consideration by the Court prior to the date on which the withdrawal became effective (**Article 127**).

A State Party may withdraw from the Statute with immediate effect if it has not accepted an amendment which has been accepted by seven-eighths of other States Parties, by giving notice no later than one year after the entry into force of such amendment (**Article 121**). As for withdrawal under **Article 127**, obligations arising while a Party to the Statute remain binding and withdrawal does not prejudice the continued consideration of any matter already under consideration by the Court prior to the date on which the withdrawal became effective.

The latter provisions were designed to prevent a country from "pulling out" of its obligations. Without such provisions, a newly installed "rogue" regime in a country could always renounce the treaty obligations of a former regime.

10. Are there safeguards in place to prevent politically motivated prosecutions?

Yes. There are numerous safeguards in the ICC Statute to ensure that the Prosecutor and Court would not be able to embark on politically motivated investigations or prosecutions, or be involved in "make work" situations.

The safeguards are built into the several stages of an investigation and prosecution. The Prosecutor must consider whether the information available provides a reasonable basis to believe that crimes within the jurisdiction of the Court have been or are being committed and whether the case passes the admissibility tests in the Statute. The Prosecutor may also decide not to proceed if there are substantial reasons to believe that an investigation would not serve the interests of justice, taking into account the gravity of the crime and the interests of victims. The rights of an accused person are protected during an investigation. These include the rights against self incrimination, to remain silent, to an interpreter and against arbitrary arrest or detention.

If the Prosecutor decides to proceed, there are a number of opportunities for a State to make submissions to the Court. For cases other than those referred to the Court by the Security Council, the Prosecutor must inform the States which would normally exercise jurisdiction over the crimes. A State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to the matter, and can ask the Prosecutor to defer to it. The Prosecutor must defer to this request unless he or she asks the Pre-Trial Chamber to authorise the investigation.

Further procedural safeguards are afforded by the standards which apply to the application for and issue of an arrest warrant. In the event that a case proceeds to trial, the State concerned has another opportunity to challenge the ICC's exercise of jurisdiction before or at the commencement of the trial. Before the commencement of a trial, the State of nationality of the accused or the State on whose territory the alleged offence was committed has another opportunity to challenge the ICC's jurisdiction. The same opportunity is afforded to any State on the ground that it is investigating or prosecuting or has investigated or prosecuted the case. At the commencement of a trial, a State may make a challenge on the ground that the person has already been tried for the conduct which is the subject of the charge. In exceptional circumstances, this challenge can be made after this time.

The Statute sets high standards for qualification for appointment as judges and as Prosecutor, thereby affording a further safeguard against the prospect of improperly motivated investigations and prosecutions.

In summary, the Statute provides many checks and balances on the processes of the Court, and provides rights of challenge for the accused person and the relevant State, to ensure that politically motivated prosecutions are not undertaken.

11. What standard of evidence will be required if the ICC requests Australia to surrender a person?

The ICC Statute provides some flexibility in this regard. Article 91 of the Statute deals with the contents of the Court's request for arrest and surrender. In relation to persons accused of an offence, it provides that the request shall contain or be supported by information as to identification of the person and a copy of the arrest warrant, together with:

> - 2(c) "Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those 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".

Australia's current extradition law and practice, as reflected in the *Extradition Act 1988* and Australia's model extradition treaty, adopts the "no evidence" approach as the general standard to be applied in modern extradition relationships. This is subject to the inclusion of more onerous standards in cases where regulations applying the Act expressly provide for this. Accordingly, and in line with the requirement in

Article 91(2) (c) of the Statute, it is not proposed to require evidence as to the guilt of the accused person for the purpose of implementing the surrender requirements under the Statute. This is consistent with the approach taken in the implementing legislation enacted in New Zealand, and in the draft legislation prepared by the United Kingdom Government. The arrangements for surrender of persons by Australia to the existing International War Crimes Tribunals under the *International War Crimes Tribunals Act 1995* do not require the production of any evidence as to the guilt of the accused person.

Therefore, the Government's current proposals for implementing legislation would provide that the "no evidence" approach will be taken for surrenders to the ICC. This means that Australia would require a duly authenticated arrest warrant from the ICC and a duly authenticated statement in writing setting out a description of the offence and the acts or omissions constituting the offence.

In the event that the Government determined that Australia's general policy on extradition should be modified by the introduction of more burdensome requirements than apply under current law and practice, it would be open to the Government to review the applicable standards for surrenders to the ICC under the domestic implementing legislation.

12. How is a State's claim as to its exercise of jurisdiction to be tested?

Australia's interests are well served by the principle of complementarity, which means that the ICC is intended to complement national jurisdictions, not to replace them. The ICC will only be able to act in cases where a national jurisdiction is unable or unwilling genuinely to deal with a case. There must be a means for the ICC to determine inability or unwillingness and the Statute sets out this means.

The test for "inability" is ".. whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings". This is effectively the "collapsed State" situation.

When the Court considers whether a State is "unwilling" to proceed in a particular case, it will need to consider, having regard to principles of due process, whether one or more of the following conditions exist:

(i) whether the national proceedings/decision were made to shield the person from criminal responsibility for crimes within the Court's jurisdiction;

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

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

This means 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.

13. What are the elements of the crimes within the Court's jurisdiction?

The Assembly of States Parties may adopt elements of the crimes, which are intended to assist the Court in the interpretation and application of the crimes within its jurisdiction.

Article 9 of the Statute provides for the adoption of elements of the crimes of genocide, crimes against humanity and war crimes. On 30 June 2000 the Preparatory Commission for the ICC finalised a draft text of the elements of the crimes, which will be submitted to the first meeting of the Assembly of States Parties for adoption. The text provides for elements of each of the crimes. As an example, the first crime is described as 'genocide by killing'. The elements are:

1. The perpetrator killed one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

A copy of the elements compiled by the Preparatory Commission will be made available to the Committee, as well as the draft Rules of Procedure and Evidence, which were also finalised by the Preparatory Commission on 30 June 2000. They are also available at www.un.org/law/icc.

The elements of crimes prepared by the Preparatory Commission do not deal with the crime of aggression. The Court will have no jurisdiction over this crime until it is defined and conditions are established under which the Court may exercise jurisdiction. There is at present no provision in the Statute for elements to be adopted for the crime of aggression.

The earliest that a crime may be added to the court's jurisdiction is 7 years after entry into force of the Statute. If a crime, for instance aggression, is added by amendment to the Statute, a State Party may decline to accept the amendment, 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. A State Party may also withdraw from the Statute in these circumstances.

14. Would not a crime-by-crime process, such as represented by the OECD Convention on the Bribery of Foreign Public Officials, be a better solution than a criminal Court with broad jurisdiction?

No. The proposed Court represents a crime-specific institution which will be only competent to act in relation to three specific and tightly defined crimes: genocide, crimes against humanity and war crimes. It may be that in the future additional crimes will be added to the Statute by agreement of the States Parties. For example, States are negotiating on the definition of the crime of aggression, with a view to adding it to the Statute once amendments are allowed to the Statute (from seven years after entry into force).

If a crime is added by amendment to the Statute, a State Party may decline to accept the amendment, 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. A State Party may also withdraw from the Statute in these circumstances.

15. Is Australia's proposed ratification of the Statute a surrender of our sovereignty?

No. Australia's sovereignty will be unaffected by ratification of the ICC Statute.

There will be no need to alter our governmental or legal structures in any way. 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 Australian Constitution, which governs the exercise of the judicial power of the Commonwealth. The High Court has 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.

The importance given to the principle of complementarity in the Statue recognises the concern of State parties to ensure that their national sovereignty is not infringed by ratification of the Statute.

16. Is the Government's support for the ICC inconsistent with its concern for the effectiveness of the United Nations human rights treaty bodies?

No. The Government has expressed a number of concerns about the relationship between the UN human rights treaty bodies and democratically elected governments and the functioning of those bodies.

The Government's concerns include: the need for committees and their individual members to work within their mandates; the need to ensure adequate recognition of the views of democratically elected governments and the lack of coordination between committees.

Importantly, the Government has expressed a concern that UN committees need to be more strategic about targeting serious human rights offenders rather than disproportionately focussing their attention on countries with good human rights records.

The Government has been careful to make it clear that its expressions of concern in no way represent a scaling-back of Australia's commitment to human rights or to the fundamental work of the United Nations. However, our interaction with UN human rights treaty bodies will be more robust and strategic, both to maximise positive outcomes for Australia and to enhance the effectiveness of the UN committee system.

The Government believes that its efforts to effect reform of the UN treaty system will assist the UN in becoming more focussed and better targeted on serious human rights issues around the world. The establishment of the ICC, focussing on serious human rights crimes, will assist in refocussing attention on real international human rights issues. Such a focus is consistent with the concern the Government has expressed with UN Committees focussing on less serious domestic matters.

The relationship between the ICC and States parties to its Statute will be different to that between States parties and UN human rights committees. The Court's mandate is not comparable to those of the UN human rights treaty bodies and its officials will not have any role in monitoring compliance with the Statute. In any event, the Court will not be an organ of the United Nations.

The Government's review of Australia's interaction with the UN human rights treaty bodies found that these bodies need a complete overhaul. Accordingly, the Government decided on a range of measures in relation to reporting to treaty bodies, requests for information and possible visits to Australia by them, as well as by other UN human rights mechanisms.

The basis for the findings of the review and the Government's resulting decisions is not applicable to the Court. The treaty bodies are mandated to assess the implementation by States Parties to the main human rights treaties of their obligations under these treaties. The Court will have no comparable mandate. States parties to the Statute will not incur any reporting obligations. Officials of the Court will not enjoy any rights to conduct visits to States Parties to monitor compliance with the Statute. On becoming Party to the ICC Statute, a State does not bind itself to conduct itself in any particular way, except to co-operate with the Court in its operations and enforce its decisions.

The Government's support for the ICC reflects its policy of seeking to achieve practical outcomes, particularly of an institutional nature, that will materially benefit people's lives.

17. What will be the relationship between the Court and non-States parties?

The Statute imposes no obligations on States not Party to it, unless such a State voluntarily accepts the Court's jurisdiction over a particular case in writing. Nationals of non-States 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. A Statute crime

committed in the territory of a non-State Party may be investigated and prosecuted by the Court if it was committed by the national of a State Party or by the national of a non-State Party that has accepted the Court's jurisdiction over the case in writing.

The only exception to this is referrals by the 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 the power to order prosecutions under Chapter VII of the Charter of the United Nations, as demonstrated by the ad hoc criminal tribunals for the former Yugoslavia and for Rwanda. So in this respect, the Statute is not conferring on the Court or on the Security Council a power that is not already binding on all States.

States that are not party to the Statute are protected by the complementarity principle in the same way as States 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. Such States have the right to appear before the Pre-Trial Chamber and the Appeals Chamber of the Court to challenge the admissibility of such a case.