

Submission to Joint Standing Committee on Treaties: Ratification of the Rome Statute of the International Criminal Court¹

I thank the Joint Committee on the Ratification of the Rome Statute of the International Court, for the opportunity to address the Committee in person and present submissions on the question of whether the Parliament of Australia (and its executive) should proceed with ratification of the Statute.

I take this opportunity to posit a number of arguments for and against ratification, before presenting my conclusions.

Why Ratify the Statute?

It is hard to envisage any credible or humane argument against the aims of the Statute as expressed in its Preamble.

It would be a brave person who would argue against these 'motherhood' statements, which include the following:

.....

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

The most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution be ensured by taking measures at the national level and by enhancing international cooperation

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The author would like to thank Ms Holly Kneebone, Lecturer International and Human Rights law (University of Notre Dame Australia) for her invaluable suggestions and resources.

Substantive objections to ratification would need to be based upon technical, procedural, jurisdictional grounds or matters such as national interest, and state sovereignty grounds. Some of these grounds will be address later in the submission.

I will commence by presenting a number of arguments in favour of ratification before considering grounds for objecting to ratification.

Strategic Interests

It may seem trite to recite the well worn sentiment that to whom much has been given, much is expected. Per capita we are by global standards an extremely wealthy nation. We enjoy a quality of life and freedom from human rights violations which many who visit to our shores look upon with envy.

From our privileged place in the world much is expected of Australia, in the promotion of human rights. This is often a delicate diplomatic task with significant economic and trade implications to be considered.

However, the task is made significantly easier and more effective when a nation embraces the Statute, as we join a global movement for protection of human rights and prosecution of wrongdoers.

It is also significant to note that the largest trading block – the EU - places human rights at the centre of its legal and constitutional framework. It is in our interests as well as being our responsibility to cooperate and assist in the work of the proposed International Criminal Court (the Court).

East Timor

The aftermath of the 1999 elections in East Timor cast a spotlight on our national conscience. For the first time, many generations of Australian felt the spectre of conflict only miles from our own shores. We realised how precious we guard the fundamental rights and freedoms that Australians demand of our political leadership and institutions.

Most Australians are probably still unaware of the Rome Statute, and the reasons for its creation. The atrocities committed in East Timor brought those reasons into our living room each evening. They created a national anger that the crimes against humanity displayed on our TV screens could

be committed with impunity. The resounding cry in homes and workplaces around the country was “why aren’t these people being arrested and brought to justice?”

We demanded that our government act and send troops to restore order and protect the human rights of our nearest neighbours. It did not matter that we were not all versed in the language of international law - we knew what was happening was wrong and that Australia needed to do what we could to prevent atrocities being committed within miles of our territorial waters, and for the perpetrators to be brought to justice.

The diplomatic, humanitarian and public response to the plight of East Timorese was one of the most unifying and defining moments in our national conscientiousness.

It demonstrated our fundamental belief in the primacy of the rule of law, the desire of Australians to help others receive a fair go - our implicit commitment to the very aims and objectives expressed in the Rome Statute.

If a national survey were conducted setting out the purpose of the Statute and Australia’s opportunity to ratify the Statute, I have no doubt that the overwhelming majority of Australians would be in favour of ratification, seeing this step as being in the national and global interest. If the decision were made not to ratify, I am equally confident that the resounding response of an informed public would be “why on earth not?”

The Sacrifice of War Service Men and Women

Australian servicemen and women have served overseas in many conflicts throughout the last century. With few exceptions, the overwhelming sentiment was and remains that we were there to fight tyranny and oppression.

In the 1st World War it was hoped that our fallen soldiers fought a war to end all wars. The freedoms for which these Australian died remain jealously guarded within our country. It is hoped that a permanent international criminal court will by its very existence deter future crimes of aggression and so reduce if not eliminate the need for further service men and women to risk their lives in foreign wars.

In an era where peacekeeping roles proliferate, our service men and women will continue to put their lives on the line in regional and small

scale conflicts.. However they do so within the parameters of more clearly defined international norms. With the mandate of the United Nations, they serve with the primary aim of maintaining or enforcing global peace and security.

For those Australians who have made the ultimate sacrifice in defending our country and protecting the human rights of others, we have the opportunity to pay a lasting tribute – ratification of a Statute which promises by its very existence to do more than has ever been done before to achieve universal justice, by bringing to justice those who would create the very aggression, warfare, atrocities and suffering which prompted our forbearers to leave our shores and risk their lives.

The Policing of Multinational Corporations

The economic power of multinational corporations has put many such corporations beyond the political and legal reach of their states of origin. As these corporations move off shore to states with more relaxed taxation, environmental, occupational, health and safety regulations, the risk of human rights abuses among the world's poorest and most disadvantaged increases.

Many of these corporations have a collective wealth many times greater than the GDP of the states they economically colonise. It is not hard to imagine that during the exploration, mining, mineral processing, manufacturing and distribution stages of product, these corporations may wield unbridled power. Without any real checks or accountability measures, corporations are often able to pay off bureaucrats, politicians and officials and raise private armies to protect their interests.

The fear among many states is that if serious attempts are made to ensure compliance with international environmental, occupational, health and safety norms, these corporations will simply relocate to other developing countries, to do business with governments willing to compromise these standards in order to attract foreign revenue.

Private armies and security forces may then become increasingly willing and able to act with impunity in overcoming local resistance to the corporation's development agenda and modus operandi. Acts of enslavement, deportation or forcible transfer of populations, other inhumane acts intentionally causing suffering or serious injury to mental or physical health, and the persecution of identifiable groups within these states, are all actions which are not beyond the capabilities of unregulated

corporations or their unregulated agents. All of these forms of conduct are specifically included in the definition of crimes against humanity in Article 7 of the Statute.

Who then will police the corporations and their agents?

The mere ratification of a statute which contains powers and mechanisms for the investigation and prosecution of such conduct would in itself have a deterrent effect upon corporations tempted to place the “bottom line” and shareholder profits before the human rights of local people.

A Permanent International Criminal Court would be able to commence investigations of crimes against the Statute. If a state opposed such investigations, the matter could be referred to the Assembly of State Parties or the Security Council² where political and economic pressures could be brought to bear on these states by the UN and its organs and member states.

Internal Conflicts within States

Where there are internal conflicts within a nation-state, which do not threaten (international) peace and security the UN will not establish a tribunal under Chapter 7 of the United Nations Charter.

It is only where there is a significant out-flux of refugees across borders and into other countries that the international determination and momentum is created to establish a tribunal, and prosecute the perpetrators of crimes against humanity and war crimes.

Examples of internal population groups, which suffer persecution within its state, are Iraqi Kurds, and also the Montanyard Peoples of Vietnam. The later sided with the Americans during the Vietnam War and have suffered persecution since that time.

Without ‘leakage’ outside national borders, states sovereign rights prevent the international community from intervening to protect a persecuted population group.

² Article 87(7)

The coming into force of the Statute will bring greater pressure to bear on regimes which commit human rights violations against their own people. The Court will be empowered to request member states to arrest and surrender persons alleged to have committed crimes against the Statute.³ If those persons are citizens of a state, which is not a party to the Statute, these persons may still be arrested and surrendered to the court when they travel abroad. This in itself will have a deterrent affect on would-be human rights violators who wish to travel internationally.

Prosecution of the “Well Healed”

The great advantage of a permanent and impartial criminal court is that by its very nature, it stands ready to deal with whoever is alleged to have committed crimes against the Statute.

It does not matter who you are - from the driver of a truck that carries people to a place of human rights abuses to the President and Commander in Chief of an Army that carries out crimes against humanity. If you commit crimes set out in the statute then there will be machinery in place for you to be investigated, charged and dealt with according to law.

Even those of wealth, influence, and notoriety - generals, presidents, political leaders and their cronies will be subject to the rule of law.

This will remove the arbitrary nature of the prosecution of war criminals, instigators of crimes of aggression, and perpetrators of crimes against humanity.

It is hoped that the coming into force of the Statute will lead to the arrest and extradition of persons at all levels of the chain of command, and that member states will cooperate in the extradition of wealthy fugitives who cross borders in an attempt to escape justice.

The International Commission of Jurists

I leave it to others to trace:

1. the history and evolution of the international law of human rights, and
2. Australia's record in the;

³ Article 89

- i) protection of human rights and
- ii) ratification of international instruments
- iii) Implementation and enforcement of those international instruments.

I would however like to note for the record that ratification of this Statute is consistent with the fundamental objective of the International Commission of Jurists (ICJ) of which I am a member.

This objective is the promotion of the universal observance of human rights and fundamental freedoms by means of the rule of law. Ratification of the Statute signifies Australia's commitment to the goal of ensuring that the rule of law applies to all peoples at all times and in all places.

Other objectives and activities of the ICJ include:

1. Upholding the independence of the judiciary and
2. Monitoring the conduct of court proceedings to ensure due process and the right to a fair trial
3. Gathering evidence of alleged human rights violations
4. Bringing to the attention of the international community, instances where the rule of law is undermined through:
 - i) Deliberate acts of governments, political leaders and state sponsored militia
 - ii) Attempts to undermine the independence of the judiciary by placing political pressure on judicial officers.
5. Promotion of adherence to and observance of the Universal Declaration of Human Rights and other similar instruments .
6. The doing of all things necessary to promote the above objectives. This obviously involves addressing Committees such as this committee on Statutes such as the Rome Statute.

The ICJ is comprised of many of the world's leading judges, including a number of judges serving on the ad hoc tribunals for the prosecution of crimes committed in the Balkans and Rwanda.

The Geneva Headquarters of the ICJ and branches throughout the world regularly brings matters involving the rule of law to the attention of various government and non governmental organs.

Measures taken include forwarding reports and submissions to the World Bank the World Trade Organisation, the Secretary General of the United

Nations, various United Nations Committees as well as Embassies and ministers of States.

A recent example is a submission by Matthew Davy of the WA Branch of the ICJ on the Montanyard Peoples of Vietnam. The ICJ in Geneva is currently bringing this report to the attention of governments, embassies, and UN committees.

The ICJ and other legal organisations including the Australian Intitute of Judicial Adminstration (AIJA), the Law Council of Australia and the Australian Bar Association, also taking an active role in provision of assistance to members of the judiciary in East Timor in order to facilitate the administration of justice in accordance with international norms. These initiatives include the provision of books, resources, training and equipment.

Ratification of the Statute would in the writer's view crystalize Australia's commitment to the universal application of the rule of law, and advance the primary objective of the ICJ. It will demonstrate to the world that the people of Australia recognise that there are somethings which should be pursued without compromise. One of those things is the application of universal justice

Grounds for Opposing Ratification

I will discuss three grounds upon which ratification could plausibly be opposed.

1. The Statute undermines and interferes with state sovereignty.

This argument relies upon the notion that state sovereignty is diminished if states are required to cooperate with the ICC in:

1. the investigation of alleges crimes,
2. the handing over of citizens, and
3. giving priority to ICC prosecutions where the state also wishes to prosecute persons who are the subject of charges brought by the ICC.

China's position is clear. China has always jealously guarded its sovereign powers and refused to adopt international human rights standards and fundamental rights and freedoms, which conflict with its own norms regarding the power of the state. The supremacy of the

interests of the state over the rights of the individual remains a fundamental obstacle to China's ratification of the Statute.

It has legitimate reasons to fear an ICC. If it were to ratify the Statute, then barring a significant departure from its systemic human rights abuses, many of China's military and political leaders could be brought before an ICC for crimes against humanity committed against its own citizens. The persecution of pro-democracy activists, and members of religious movements such as the Falong Fong, provide recent examples of China's unwillingness to heed or be bound by international human rights norms.

Australia, by contrast, is a pluralistic democracy which has ratified virtually all of the leading international conventions protecting fundamental rights and freedoms,. It is hard to envisage how there could be any concern that the work of the ICC would undermine our state sovereignty in any detrimental way.

Indeed the refusal to ratify may raise suspicions that Australia has reason to fear that some of its citizens may be subject to prosecution for crimes against humanity, or other offences in the Statute.

The Statute is not retroactive⁴. Therefore, fears that Australia or its citizens may be prosecuted for crimes against humanity committed against:

1. Aboriginal and Torres Strait Islander peoples,
2. Members of the 'Stolen Generations', or
3. Other persons inside or outside Australia ,

any time prior to coming into force of the Statute, are unfounded.

2. *Military personnel may be falsely accused by adversaries of committing war crimes or crimes against humanity during peacekeeping or defensive operations.*

The ground for opposing ratification relies upon the assumption that there those willing to make false allegations, manufacture evidence and arrange

⁴ See Article 11 and Article 24 Jurisdiction *ratione temporis* – the Court only has jurisdiction for crimes committed after the Statute comes into force, and no person shall be criminally responsible under the Statute for conduct prior to the entry into force of the Statute.

for the giving of false testimony against military personnel and possibly other Australian citizens.

The Statute provides the machinery for the proper investigation of allegations of crimes. The investigative methodology set out in the Statute accords with accepted standards and international norms.⁵

The Statute also provides for the prosecution of those who commit attempt to pervert the course of justice.

Those who are found to be criminally responsible for:

1. giving false testimony after having undertaken to tell the truth⁶,
2. corruptly influencing a witness,
3. obstructing or interfering with a witness,
4. impeding or corruptly influencing an official, or
5. soliciting or accepting a bribe from an official of the court

face a maximum penalty of 5 years imprisonment⁷

The integrity of those who investigate and prosecute⁸ and judicially determine⁹ crimes will be essential in allaying the fears of military personnel serving in hostile environments.

So too will be the calibre and ability of the presiding judges¹⁰.

Ultimately those accused of crimes must look to:

1. the integrity of the court's prosecutors investigators, judges and defence counsel,
2. the requirement that alleged crimes be proved to the criminal standard – beyond reasonable doubt
3. the appeals processes in the statute¹¹

⁵ Article 54 for example sets out the powers and duties of the Prosecutor with respect to investigations. It requires the prosecutor to investigate the evidence and *investigate incriminating and exonerating circumstances equally*.

⁶ See Article 70 Offences against the Administration of Justice.

⁷ Article 70(3)

⁸ See Article 42: Office of the Prosecutor

⁹ See Article 41: Excusing and Disqualifying Judges and Article 46 Removal from Office of Judges, and Prosecutors

¹⁰ See Article 36: Qualifications, nomination and election of Judges

¹¹ Articles 81-84

for protection from those who may make false accusations of war crimes or crimes against humanity.

Those who are innocent of any crimes under the Statute and falsely accused, should rely upon the integrity and independence of the judiciary¹², which affords procedural fairness¹³ and rules of evidence¹⁴ which by world standards, are extremely favourable to the accused, and the envy of many defence lawyers including the writer.

3. *Cost*

The establishment of a permanent court will involve the expenditure of considerable resources and require significant contributions from member states –of both a financial and non financial nature.

This will include:

1. Administrative costs referred to in Article 100,
2. The provision of places of detention for persons including foreign nationals convicted of crimes
3. Costs associated with ongoing cooperation and judicial assistance¹⁵.

This is the price we pay for the pursuit of universal justice. It is hoped that the costs of the court administration will be balanced and even outweighed by a corresponding decrease in the commission of war crimes and crimes against humanity.

4. *The Creation of Ad Hoc International Tribunals is a Sufficient Response to Major Human Rights Violations*

¹² Article 40 Independence of Judiciary

¹³ Article 60 Initial Proceeding as before the Court. Article 61 Confirmation of Charges Before Trial,

¹⁴ Article 55 Rights of Accused during an investigation, Article 60 Initial Proceeding as before the Court, Article 61 Confirmation of Charges Before Trial, Article 65, Article 66 Presumption of Innocence, Article 67 Rights of the Accused – to details of the nature and content of charges, time for preparation of his or her defence, to be tried without undue delay, to have legal counsel assigned by the court, to an interpreter free of charge, to examine witnesses, to raise a defence and call witnesses, to remain silence, to make unsworn oral or written statement in his or her defence, to not have imposed on him or her any reversal of the onus or burden of proof, disclosure by the prosecution of its case, as well as evidence tending to show the innocence of the accused.

¹⁵ See Chapter 9 International Cooperation and Judicial Assistance

The existing tribunals are stretched in their ability to cope with the volume of cases brought before them. The conditions under which accused persons are detained in many countries is a cause for concern, as are the limited resources of the tribunals.

The number of places throughout the world where war crimes and crimes against humanity have gone largely unpunished puts paid to the contention that the current regime of the establishment ad hoc Tribunals is a sufficient method of responding to war crimes and crimes against humanity.

Justice delayed is often justice denied.

It is clear that where there is inadequate political will among members of the security council to establish a particular international tribunal, the perpetrators of crimes are more likely to disappear into their own and neighbouring countries and avoid prosecution for their crimes.

The ability of pro Indonesian militia to cross the border into Indonesian West Timor and evade criminal sanctions illustrates this point. Without a permanent court, resourced and empowered to send investigators into member states and arrange for the arrest and extradition of alleged offenders, justice is delayed and in many cases denied to the victims of crime and their families.

Conclusion

There are no substantive grounds for objecting to ratification of the Statute which either individually or collectively provide a sufficient basis for Australia to decline to ratify the Statute.

There are no provisions which require amendment or reservation. The Statute, and the framework for its implementation are consistent with domestic legal norms, and community notions of the administration of justice.

In summary there are no sustainable objections to the Statute which should stand in the way of its ratification.

We therefore have a unique opportunity to demonstrate to our children and those generations which follow, that in ratifying the Rome Statute Australia:

1. Has joined in the most comprehensive and effective international effort for the pursuit of universal justice yet achieved by humanity
2. Expressed its unequivocal support for the universal protection of human rights
3. Stood against the perpetration of crimes against humanity with impunity
4. Committed itself to the deterrence of further human rights abuses by the impartial and efficient prosecution of the perpetrators of inhumane acts.
5. Would not compromise its integrity in the pursuit of universal justice by bowing to the political and economic pressures of those who oppose ratification.
6. Did not let those who have suffered human rights violations and crimes against humanity do so in vain.
7. Recognised that where good people do nothing, evil (including the commission of crimes against humanity) may flourish with impunity.

Having considered the articles of the Statute I would commend it to the Joint Committee and urge the Commonwealth of Australia to ratify the Statute at the earliest opportunity.

Ben Clarke
Thursday, 19 April 2001