Submission to the Joint Standing Committee on Treaties

on

The Rome Statute of the International Criminal Court

by

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on behalf of

The Australian Institute for Holocaust and Genocide Studies

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SUMMARY

The points made in this submission can be summarised as follows:

- Australia's pre-existing regime for prohibiting and punishing genocide, crimes against humanity and war crimes is insufficient;
- Australia will be unable to fulfil its obligations under the Rome Statute (in the event of ratification) without the introduction of far and wide reaching legislation;
- The *International Criminal Court Bill* 2001 (Cth) and the *International Criminal Court (Consequential Amendments) Bill* 2001 (Cth) will be sufficient for the purpose of fulfilling Australia's obligations under the Rome Statute;
- The *International Criminal Court Bill* and *International Criminal Court (Consequential Amendments) Bill* will be valid with respect to the external affairs power of the Commonwealth Constitution;
- A request by the International Criminal Court for the 'surrender' of an alleged offender residing in Australia in circumstances where the Federal Government is unable or unwilling to prosecute is unlikely to violate the separation of powers doctrine in the Commonwealth Constitution as such a request is analogous to an act of extradition and does not invoke the judicial power of a Chapter III court;
- A request by the International Criminal Court for the 'surrender' of an alleged offender in circumstances where a Chapter III court is exercising or has already exercised judicial power could possibly violate the separation of powers doctrine in the Commonwealth Constitution. However, it is argued that such problems are unlikely to be insurmountable if the High Court adopts relevant and readily applicable American case law;
- The Rome Statute is unlikely to violate the right to trial by jury in the Commonwealth Constitution given the High Court's very narrow interpretation of that freedom
- Australia's participation in the International Criminal Court is unlikely to undermine our 'national sovereignty' given the fact that Australia has the right of first prosecution (i.e., the complementarity principle);
- Australia should be one of the first 60 countries to ratify the Rome Statute as that would give Australia the opportunity to appoint a judge to the Court; and
- The International Criminal Court will be a useful tool in the 'war against terrorism'.

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* This submission has been prepared by Mr. Ara Margossian BA LLB (*Macq.*). Although this submission is written on behalf of the Australian Institute for Holocaust and Genocide Studies, the views expressed and any errors are attributable to the author alone.

1. INTRODUCTION

In his book, *Crimes Against Humanity*, Geoffrey Robertson QC argues that recent global trends reveal hopeful signs that the human rights saga has entered a third historical period – the age of enforcement[1]. While the recent establishment of an International Criminal Court (ICC) seems supportive of Robertson's assertion, since such a Court has been designed to 'complement' national criminal jurisdictions[2], it means that the jurisdiction of the ICC will only be 'triggered' in circumstances where the State in which an alleged perpetrator of international crime resides is unable or unwilling to prosecute[3]. Given these restrictions on the jurisdiction of the Court, it follows that the success of the ICC is likely to depend on the extent to which the *Rome Statute of the International Criminal Court* is adopted and implemented domestically.

In the following submission, consideration will be given as to whether or not Australia should ratify the *Rome Statute*. Since a failure on behalf of Australia to ratify the *Rome Statute* is likely to prompt considerable international criticism, including allegations that Australia is a 'safe-haven for war criminals'[4], if Australia is to oppose ratification of the *Rome Statute*, the Federal Government must be able to justify its position in both legal and political terms. It is the viability of these legal and political arguments as articulated by both the proponents and opponents of the ICC that will be considered in this submission.

This submission is divided into three. First, consideration is given as to whether, and the extent to which Australia must introduce or amend pre-existing legislation in order to prohibit and punish the international crimes that the ICC purports to cover. Such an inquiry will reveal that while the ordinary criminal law and the *War Crimes Act* 1945 (Cth) covers some of the offences prohibited by the *Rome Statute*, there is currently a chronic 'gap' in Australia's ability to prohibit and punish genocide, crimes against humanity and war crimes. However, it is also argued that this problem will be largely resolved with the passing of the *International Criminal Court (Consequential Amendments) Bill* 2001 (Cth).

The second part focuses on the constitutional issues arising from Australia's ratification and domestic implementation of the *Rome Statute*. It will be revealed that while Australia's implementation of the *Rome Statute* is likely to raise several constitutional issues, such concerns are not insurmountable. It is argued that although there is powerful case law to

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[1] G Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, The Penguin Press, London, 1999.
[2] United Nations, *Rome Statute of the International Criminal Court*, 17 July 1998, Preamble and Article 1.
[3] Ibid, Article 17.

suggest that only courts constituted under Chapter III of the *Commonwealth Constitution* can exercise 'judicial power', there is no insurmountable obstacle against the Australian government 'surrendering' offenders to the ICC for prosecution. Similarly, it is submitted that even though the *Rome Statute* does not provide for trial by jury, this is unlikely to violate section 80 of the *Commonwealth Constitution*, given the very narrow interpretation of that constitutional freedom and relevant (and readily applicable) American case law.

The third part deals with the policy and political arguments against Australia's ratification of the *Rome Statute*. An analysis of some of the submissions already received by the Joint Standing Committee on Treaties (JSCOT) will reveal that most oppose the ICC on the grounds that such an institution undermines 'national sovereignty' by potentially exposing Australian nationals to the decisions and punishments of a foreign legal entity. On this point, it is argued that such concerns are largely unfounded, given the fact that such an institution will 'complement' national criminal jurisdictions thus only operating in circumstances where Australia is unable or unwilling to prosecute the alleged perpetrator of international crime residing within its borders. It is also argued that Australia should be one of the first 60 nations to ratify the *Rome Statute* as that would give the Federal Government the opportunity to ensure that the Court operates independently and in the manner intended.

2. WHAT IS THE EXTENT OF LEGISLATIVE CHANGE REQUIRED FOR AUSTRALIA TO FULFIL THE OBLIGATIONS IT MAY INCUR UPON RATIFICATION OF THE ROME STATUTE?

While it is clear that Australia's participation in the ICC will require some legislative and administrative changes, the extent of this change will ultimately depend on the scope and operation of Australia's pre-existing legislative regime for the prevention and punishment of international crime. Since the jurisdiction of the ICC will initially be confined to the prosecution and punishment of genocide[5], crimes against humanity[6] and war crimes[7], it is submitted that the extent of legislative change required is determinable by examining whether, and the extent to which, such crimes are already prohibited and punishable under Australian law. However, in making such a determination, several ancillary issues arise:

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[4] See generally, M Aarons, *War Criminals Welcome: Australia as a Sanctuary for Fugitive War Criminals Since 1945*, Black Inc., Melbourne, 2001; M Aarons, 'When you lie down with dogs...', in *The Sydney Morning Herald*, 16 June 2001.
[5] United Nations, *Rome Statute of the International Criminal Court*, 17 July 1998, Article 6.
[6] Ibid, Article 7.
[7] Ibid, Article 8.

1. Since the content and status of international law evolves over time[8], have the definitions of genocide, war crimes and crimes against humanity evolved to the point where the definitions contained in relevant national legislation have become inconsistent with those contained in the *Rome Statute*?
2. What amendments are required to pre-existing legislation to ensure that Australia complies with its obligations under the *Rome Statute*?
3. Are such amendments merely procedures changes, or are wider changes required?

2.1 The International Crime of Genocide and Australian Law

The *Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention) was ratified by Australia on the 8th of July 1949 and entered into force on the 12th of January 1951. These proceedings culminated in the *Genocide Convention Act* 1949 (Cth) which provided legislative approval to the treaty ratification process. In passing the *Genocide Convention Act*, the Commonwealth Parliament enshrined the international definition of genocide into domestic law. Article 2 of the *Genocide Convention*, which is identical to Article 6 of the *Rome Statute*, states:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
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> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
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> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

Whilst such an initiative seems significant, this is not so. In Australia, 'ratification' (i.e., a formal act under which a State agrees to be bound internationally) "is an executive decision which has no effect unless the elected parliament subsequently passes legislation to *incorporate* the treaty into its body of local law"[9]. This means that genocide is not *directly* cognisable in Australian courts unless Parliament amends the *Genocide Convention Act* or incorporates the international definition and other relevant procedural provisions into the *Criminal Code Act* 1995 (Cth).

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[8] G Robertson 1999, op.cit, n1, p315; M.N. Shaw, *International Law*, Fourth Edition, Cambridge University Press, Cambridge, 1997, pp654-655.
[9] Ibid, p76.

Despite several calls for the implementation of the *Genocide Convention*[10], as well as the introduction of a Bill to do so[11], successive Australian governments have refused to do so[12], arguing that:

> the obligation to legislate does not require the creation of a specific offence of genocide, but may be satisfied by the provisions of State and Territory criminal laws. This view apparently accords with the practice of most other State Parties to the Convention and provides no basis for criticism from other countries that Australia is in breach of the Convention[13].

With respect, such an argument is highly questionable. Not only has the lawfulness of genocide in Australia been confirmed by the Federal Court[14], but such an argument incorrectly assumes that genocide is synonymous with physical killing. In doing so, such an argument fails to realise that:

- ordinary criminal laws provide no legal safeguard against the destruction of groups through non-murderous means (i.e., forced sterilisation/forcible removal of children);
- relying on pre-existing Australian law as a rationale for non-implementation "provides no political or legal safeguard against subsequent Commonwealth, State and Territory legislation that violates treaty provisions"[15]; and
- genocide, unlike homicide generally, is perpetrated against individuals *in their capacity as members of a particular group*[16].

When the lack anti-genocide legislation is coupled with the fact that ordinary criminal law is insufficient in prohibiting such a crime, it follows that Australia will be unable to fulfil

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[10] Senate Legal and Constitutional References Committee, *Humanity Diminished: The Crime of Genocide – Inquiry into the Anti-Genocide Bill* 1999, Canberra, June 2000; Human Rights and Equal Opportunity Commission, *Bringing Them Home: The Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Sydney, 1997, p295; Attorney-General's Department, *Review of Commonwealth Criminal Law: Final Report*, Canberra, 1991, p85-87; Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights*, Canberra, December 1992, p32.

[11] *Anti-Genocide Bill* 1999 (Cth).

[12] See generally, Parliament of the Commonwealth of Australia, *Hansard: House of Representatives*, 2nd of March 1998, p154; Parliament of the Commonwealth of Australia, *Hansard: House of Representatives*, 5th of December 1994, p3948.

[13] Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights*, Canberra, December 1992, p32.

[14] *Nulyarimma and Others v Thompson* (1999) 165 ALR 621.

[15] H Charlesworth, 'Australia's Split Personality: Implementation of Human Rights Treaty Obligations in Australia', in P Alston & M Chiam (eds), *Treaty-Making and Australia: Globalisation versus Sovereignty*, The Federation Press, Sydney, 1995, p133.

[16] R Lemkin, *Axis Rule in Occupied Europe*, Carnegie Endowment for International Peace, Washington, 1944, p79. Lemkin argues, "genocide does not necessarily mean the immediate destruction of a nation...*It is intended*

its obligations under both the *Genocide Convention* and *Rome Statute* without significant amendments to the *Commonwealth Criminal Code*.

Arguably, the successful passage of the amendments proposed in Schedule 1 of the *International Criminal Court (Consequential Amendments) Bill*, which appear to be modelled on the UN Preparatory Commission's *Finalised Draft Text on the Elements of Crimes*[17], are sufficient for the purpose of satisfying Australia's obligations under the *Rome Statute*.

2.2 Crimes Against Humanity and Australian law

Article 7 of the *Rome Statute* defines a 'crime against humanity' to include:

(a) murder[18];
(b) extermination[19];
(c) enslavement[20];
(d) deportation or forcible transfer of population[21];
(e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law[22];
(f) torture[23];
(g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity[24];
(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender..., or other grounds that are universally recognised as impermissible under international law[25];
(i) enforced disappearance of persons[26];
(j) the crime of apartheid[27];
(k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health[28].

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rather to signify a coordinated plan of different actions aiming at the destruction of the essential foundations of the life of national groups, with the aim of annihilating the groups themselves (my emphasis).

[17] United Nations Preparatory Commission for the International Criminal Court, *Report of the Preparatory Commission for the International Criminal Court: Finalized Draft Text of the Elements of Crimes*, PCNICC/2000/INF/3/Add.2, 6 July 2000.

[18] United Nations, *Rome Statute of the International Criminal Court*, 17 July 1998, Article 7(1)(a).

[19] Ibid, Article 7 (1)(b).

[20] Ibid, Article 7(1)(c).

[21] Ibid, Article 7(1)(d).

[22] Ibid, Article 7(1)(e).

[23] Ibid, Article 7(1)(f).

[24] Ibid, Article 7(1)(g).

[25] Ibid, Article 7(1)(h).

[26] Ibid, Article 7(1)(i).

[27] Ibid, Article 7(1)(j).

[28] Ibid, Article 7(1)(k).

Since Article 7 of the *Rome Statute* "contains what *will become* the authoritative definition of crimes against humanity"[29], it follows that the international definition of a 'crime against humanity' has evolved and developed over time. Given the evolution of this crime and the fact that this definition is relatively recent, it is submitted that *Australia cannot reasonably expect to prohibit all the acts deemed to constitute a 'crime against humanity' through legislation passed prior to the development of the Rome Statute.* Instead, *pre-existing legislation is only likely to prohibit a few of these acts.*

Arguably, the acts which are prohibited by pre-existing Australian legislation include:

- Murder and extermination – Part 3 (Division 1) of the *Crimes Act* 1900 (NSW) and corresponding criminal legislation in other States and Territories;
- Rape and other sexual offences – Part 3 (Division 10) of the *Crimes Act* 1900 (NSW) and corresponding criminal legislation in other States and Territories;
- Persecution against an identifiable group – Persecution *per se* is not covered but it may be arguable that such an act is partially covered by the *Racial Discrimination Act* 1975 (Cth), *Sexual Discrimination Act* 1984 (Cth) and the *Anti-Discrimination Act* 1977 (NSW); and
- Torture – *Crimes (Torture) Act* 1988 (Cth).

While it is clear that Australian legislation does not cover many of the acts which constitute a 'crime against humanity', it is submitted that the legislation which *does* cover the acts specified above is also insufficient. Since Article 7 of the *Rome Statute* requires the above mentioned acts to be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"[30], it means that while "a prosecution may be brought in respect of single act"[31], it must also "be known by the defendant to be part of a course of conduct involving multiple atrocities against civilians"[32]. Hence, *the legal standard required by a 'crime against humanity' is significantly higher and more demanding on prosecutorial authorities than any of the acts which are prohibited by pre-existing legislation.* Thus understood, it is clear that pre-existing legislation is insufficient – since pre-existing legislation does not require the relevant act to be "committed as part of a widespread or systematic attack", such legislation does not possess the essential attribute of a 'crime against humanity' and thus fails to acknowledge that 'crimes against humanity' are readily distinguishable from 'ordinary' criminal offences.

[29] G Robertson 1999, op.cit, n1, p310 (my emphasis).
[30] United Nations, *Rome Statute of the International Criminal Court*, 17 July 1998, Article 7(1).
[31] G Robertson 1999, op.cit, n1, p311.
[32] Ibid, p311.

Once again, the successful adoption of the amendments proposed in Schedule 1 of the *International Criminal Court (Consequential Amendments) Bill* are likely satisfy Australia's obligations under the *Rome Statute* to prohibit 'crimes against humanity'.

2.3 The War Crimes Act 1945 (Cth)

Article 8 of the *Rome Statute* prohibits the commission of 'war crimes'. Although considerations of length preclude the reproduction of Article 8 here, it is clear that the *War Crimes Act* 1945 (Cth) cannot reasonably fulfil Australia's obligations under Article 8 of the *Rome Statute*. Despite the fact that section 6 of the *War Crimes Act* criminalises a significant proportion of the acts prohibited by Article 8 of the *Rome Statute*, section 9 severely limits the operation of section 6. Section 9(1) states:

> a person who:
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> (a) on or after 1 September 1939 and on or before 8 May 1945; and
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> (b) whether as an individual or as a member of an organisation;
>
> committed a war crime is guilty of an indictable offence against this Act.

In practice, section 9 effectively limits the application of the *War Crimes Act* to 'war crimes' committed during World War II. In doing so, *the War Crimes Act fails to criminalise 'war crimes' committed after the entry into force of the Rome Statute and is thus incapable of satisfying Australia's obligation under that Statute to prosecute war criminals who are residing or seeking refuge in Australia.*

2.4 International Criminal Law and the Common Law

In addition to the fact that pre-existing legislation is insufficient for the purpose of prohibiting and punishing genocide, crimes against humanity and war crimes, the common law of Australia also fails to criminalise such offences.

In *Nulyarimma v Thompson*[33], a Federal Court majority held that the international customary prohibition against genocide was not cognisable under the common law of Australia in the absence of implementing legislation. On the 4th August 2000, the plaintiffs in *Nulyarimma v Thompson* and *Buzzacott v Hill* were denied "special leave" to appeal the

[33] *Nulyarimma and Others v Thompson* (1999) 165 ALR 621.

decision of the Full Federal Court to the High Court of Australia[34]. Consequently, *Nulyarimma* currently represents the most authoritative judicial statement on the status of international crimes under the common law. The Supreme Courts of Victoria and South Australia have also held that *Nulyarimma* is the authoritative judicial statement on this issue[35].

2.5 The Need for Far and Wide-Reaching Legislation: The International Criminal Court Bills 2001 (Cth) and the Need for Additional Retrospective Legislation

The above discussion makes it unambiguously clear that Australia has to enact wide far-reaching legislation in order to fulfil its obligation under the *Rome Statute* of apprehending and prosecuting the perpetrators of international crime (in the event that Australia decides to ratify it). This dire need for wide and far-reaching legislation has been acknowledged by Joint Standing Committee on Treaties (JSCOT). In addition to the *International Criminal Court Bill*, which is primarily concerned with establishing procedures to enable the 'surrender' of offenders to the ICC, JSCOT has also introduced the *International Criminal Court (Consequential Amendment) Bill*. The purpose this Bill is to establish a *definitional framework*, which effectively criminalises genocide, war crimes and crimes against humanity in Australia, and in doing so, gives the Australian government the legal means by which to prosecute persons accused of committing such crimes.

While this is a significant development, since the ICC will not operate retrospectively[36], it follows that the *International Criminal Court Bills* will have no legal effect with respect to crimes committed prior to the entry into force of the *Rome Statute*. When the lack of retrospectivity is viewed in light of the fact that Australia, unlike other Western countries, has not already legislated against international crimes which the ICC purports to cover, it means that there is still a significant 'gap' in Australia's ability to prosecute international criminal acts committed prior passing of the *International Criminal Court Bills* or the entry into force of the Rome Statute. It is therefore recommended that the *International Criminal Court Bills* should be complimented by separate legislation which operates retrospectively. A suitable starting point for such legislation would be the *Anti-Genocide Bill* 1999 (Cth) which was proposed by the Senator Brian Greig of the Australian Democrats. There are unlikely to be any constitutional obstacles to retrospective legislation of this kind provided

[34] *Nulyarimma and Others v Thompson* C18/1999 (4 August 2000); *Buzzacott v Hill, Minister for the Environment & Ors* C19/1999 (4 August 2000).
[35] *Sumner v United Kingdom of Great Britain & Others* [1999] SASC 462 (2nd November 1999); *Thorpe v Kennett* [1999] VSC 442 (15th November 1999); *Buzzacott v Morgan (No. 2)* [1999] SASC 562. See, http://www.austlii.edu.au

that the retrospective operation of such legislation begins from the time that genocide acquired the status of international customary law (i.e., 11 December 1946)[37].

3. CONSTITUTIONAL ISSUES ARISING FROM AUSTRALIA'S RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

In considering whether Australia should ratify the *Rome Statute*, it is necessary to consider whether the proposed implementing legislation is constitutionally valid. Not only is the constitutionality of the *International Criminal Court Bill* and the *International Criminal Court (Consequential Amendments) Bill* critical to Australia's participation in the ICC, but it is also arguable that if the *Rome Statute* is at variance with the *Commonwealth Constitution*, particularly a freedom guaranteed therein, it is also likely to be contrary to the 'national interest'.

3.1. Is the Implementation of the Rome Statute via the International Criminal Court Bill and the International Criminal Court (Consequential Amendments) Bill a valid exercise of the external affairs power of the Commonwealth Constitution?

Since "a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations"[38], it follows that Australia will be unable to prosecute perpetrators of international crime, and to fulfil its obligations under the *Rome Statute* (in the event of ratification) unless appropriate implementing legislation is also passed. The Joint Standing Committee on Treaties (JSCOT) has already proposed the *International Criminal Court Bill* and the *International Criminal (Consequential Amendments) Bill* for such a purpose.

The fate of these two Bills will ultimately depend on whether they can be appropriately characterised as a law with respect to the 'external affairs' power of the *Commonwealth Constitution*[39]. Since the 'external affairs' power has been construed widely[40], it is clear that the domestic implementation of a bona fide international treaty is a valid exercise of the 'external affairs' power. Indeed, in *Koowarta v Bjelke-Peterson*, Brennan J held:

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[36] United Nations, *Rome Statute of the International Criminal Court*, 17 July 1998, Article 11 and 24.
[37] See generally, *Polyukhovich v The Queen (War Crimes Act Case)* (1991) 172 CLR 501; United Nations, *International Covenant on Civil and Political Rights*, 16 December 1996, Articles 15(1) and 15(2); *Nulyarimma v Thompson and Others* 165 ALR 621 at 627 per Wilcox J.
[38] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287 per Mason CJ and Deane J.
[39] *Commonwealth Constitution* 1900 (UK), section 52(xxix).
[40] *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 528 per Mason CJ.

> If Australia, in the conduct of its relations with other nations, accepts a treaty obligation with respect to an aspect of Australia's internal legal order, the subject of the obligation thereby becomes...an external affair, and a law with respect to that subject is a law with respect to external affairs[41]

Given the fact that there is no judicial distinction "between reach of the power in its application to persons on the one hand and matters, things and circumstances on the other"[42], it is reasonably clear that the aspects of the *International Criminal Court (Consequential Amendments) Bill* which criminalise and allow for the domestic prosecution of genocide, war crimes and crimes against humanity are a valid exercise of the 'external affairs' power. Not only is there powerful case law supporting the validity of legislation prohibiting war crimes[43], but in *Nulyarimma v Thompson*, Wilcox J stated that "it would be constitutionally permissible for the Commonwealth Parliament to enact legislation providing for the trial within Australia of persons accused of genocide, wherever occurring"[44].

While this much is clear, since the 'external affairs' power is a purposive power[45], a law will only be valid with respect to the 'external affairs' power if there is a "reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it"[46]. As the High Court has noted:

> ...when Parliament exercises the external affairs power so as to carry into effect or give effect to such a treaty, it is for Parliament to choose the means by which this is to be achieved, provided at any rate that the means chosen are capable of being reasonably considered appropriate and adapted to that end[47].

Arguably, both the *International Criminal Court Bill* and the *International Criminal Court (Consequential Amendments) Bill* are 'proportionate' or 'reasonably appropriate and adapted' to the end of fulfilling Australia's obligations under the *Rome Statute* (in the event of ratification). Since the purpose of the *International Criminal Court Bill* is to establish

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[41] *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168 at 259 per Brennan J.
[42] *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 528-529 per Mason CJ.
[43] Ibid.
[44] *Nulyarimma and Others v Thompson* (1999) 165 ALR 621 at 627 per Wilcox J.
[45] See generally, J Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality', in *Melbourne University Law Review*, Volume 21, 1997, p1; B Selway, 'The Rise and Rise of Reasonable Proportionality Test in Public Law', in *Public Law Review*, Volume 7, 1996, p212; H.P. Lee, 'Proportionality in Australian Constitutional Adjudication', in G Lindell (ed.), *Future Directions in Australian Constitutional Adjudication*, The Federation Press, Sydney, 1994, p126.
[46] *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 260 per Deane J.
[47] *Richardson v Forestry Commission (Tasmania)* (1988) 164 CLR 261 at 289 per Mason CJ and Brennan J. See also, *Tasmania v Commonwealth* (1983) 158 CLR 1 at 130-131, 172, 232 and 259.

procedures for the 'surrender' of persons to the ICC in circumstances where Australia is unable or unwilling to prosecute, it is reasonably clear that such measures are conducive and 'proportionate' to fulfilling Australia's international obligation of 'surrendering' offenders to the ICC in circumstances where Australia is unable or unwilling to prosecute[48]. Similarly, since the *International Criminal Court (Consequential Amendments) Bill* criminalises international crimes such as genocide, war crimes and crimes against humanity[49], it is clear that such a measure is 'proportionate' to the end of allowing for the prosecution of the perpetrators of international crime. Hence, the *International Criminal Court Bills* are likely to be a valid exercise of the 'external affairs' power of the *Commonwealth Constitution.*

3.2 Does the International Court Bill 2001 (Cth) contravene an express or implied constitutional freedom?

Since the power of the Parliament "to make laws for the peace, order, and good government of the Commonwealth with respect to...external affairs" is "subject to this Constitution"[50], it follows that the *International Criminal Court Bill* will only be valid if it does not contravene another provision of the *Commonwealth Constitution.*

3.2.1 Avoiding the Invocation of Chapter III: The 'Surrender' of an Offender to the ICC as Analogous to an Act of Extradition

Several commentators have suggested that the *International Criminal Court Bill* could be invalid on the grounds that it violates the separation of powers doctrine inherent in Chapter III of the *Commonwealth Constitution.* Since 'judicial power' can only be vested in courts identified in Chapter III of the Constitution[51], and in light of the fact that Chapter III is an "exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested"[52], it has been argued that the Constitution prohibits Australia from vesting judicial power in the ICC[53]. In his submission to JSCOT, George Winterton stated:

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[48] United Nations, *Rome Statute of the International Criminal Court*, 17 July 1998, Article 17.
[49] *International Criminal Court (Consequential Amendments) Bill* 2001 (Cth), Schedule 1.
[50] *Commonwealth of Australia Constitution Act* 1900 (UK), section 51(xxix).
[51] Ibid, section 71.
[52] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ. The majority continued, "no part of judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of the Chapter III".
[53] G Walker, *Submission to the Joint Standing Committee on Treaties: 1998 Rome Statute of the International Criminal Court*, Canberra, 13 August 2001, pp2-4.

> The judicial power of the Commonwealth can be vested only in courts contemplated by s 71 of the Constitution...If the ICC's power to try offences under the Statute is an exercise of the judicial power of the Commonwealth for the purposes of Australian law, *it would contravene Ch. III because the ICC is neither a State court nor a federal court constituted in compliance with s 72 of the Constitution*[54].

Similar concerns have also been raised in the United States[55]. While it is true that the power to try a person accused of a criminal offence is an exercise of judicial power[56], in *Polyukhovich v Commonwealth*, Deane J stated that Chapter III would be inapplicable with respect to Australia's participation in an international criminal tribunal because "Australia's participation would be as a member State of the International Community and the judicial power involved would be the judicial power of that Community"[57]. Although Deane's J interpretation has been criticised[58], such criticism need not be considered here. Since Deane's comments were made in a factual and contextual vacuum, it seems that his argument is predicated on certain assumptions which do not accurately reflect the arrangement between ratifying States and the ICC (i.e., 'complementarity' of the ICC to national criminal jurisdictions). Consequently, Deane's J comments are unlikely to be relevant to a future determination of whether the *International Criminal Court Bill* contravenes Chapter III of the Constitution. More importantly, there are other ways in which to interpret the relationship between Australia and the ICC without raising Chapter III concerns.

Arguably, the most reasonable interpretation of Australia's relationship with the ICC is one that is akin or analogous to an 'extradition treaty'[59] between two sovereign States. Indeed, such an interpretation is consistent with, and is accommodated by the terms of the *Rome Statute*. Article 91 of the *Rome Statute* states that a request to surrender an offender to

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[54] G Winterton, *Submission to the Joint Standing Committee on Treaties concerning the 1998 Rome Statute of the International Criminal Court*, Canberra, 22 August 2001, p2 (my emphasis).
[55] K Ailslieger, 'Why the United States Should Be Wary of the International Criminal Court: Concerns Over Sovereignty and Constitutional Guarantees', in *Washburn Law Journal*, Volume 39, 1999, pp93-96; S.W. Andreasen, 'The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?', in *Iowa Law Review*, Volume 85, 2000, pp726-730; Subcommittee on International Operations of the Senate Committee on Foreign Relations, *Is a UN International Criminal Court in the US National Interest? : Hearings on the UN International Criminal Court*, 105th Congress, 1998.
[56] *Chu Kheng Lim v Commonwealth* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.
[57] *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 627 per Deane J.
[58] G Winterton 2001, op.cit, n54, pp2-3; G Walker 2001, op.cit, n53, pp2-4.
[59] Section 5 of the *Extradition Act* 1988 (Cth) defines an 'extradition treaty' as "a treaty to which the country and Australia are parties (whether or not any other country is also a party), being a treaty relating in whole or in part to the surrender of persons accused or convicted of offences".

the ICC shall contain or be supported by information identifying the person[60], a copy of the arrest warrant[61], and:

> 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 and arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court*[62].

This has two implications. Firstly, Article 91 clearly contemplates the 'surrender' of an offender to the ICC to be analogous to an extradition arrangement between States. Although the ICC is not a sovereign entity as such, there is unlikely to be any legal obstacle against 'extraditing' or 'surrendering' a person to an international criminal tribunal. Indeed, in *Ntakirutimana v Reno*, the US Fifth Circuit held that there was no constitutional impediment preventing the surrender of a Rwandan citizen residing in the United States to the International Criminal Tribunal for Rwanda to face charges of genocide[63]. In doing so, the Court clearly proceeded on the assumption that "extradition to foreign entities is no different from extradition to foreign states"[64].

Secondly, Article 91 suggests that the domestic procedures for 'surrendering' a person to the ICC could be modelled upon the pre-existing extradition procedures of the ratifying State. In Australia, extradition is governed by the *Extradition Act* 1988 (Cth), which utilises "a 'no evidence' (of guilt) approach as the general standard to be applied in modern extradition relationships"[65]. The *International Criminal Court Bill* also adopts the 'no evidence of guilt' approach[66], as does implementing legislation in both the United Kingdom[67] and New Zealand[68].

Since the 'no evidence of guilt' approach does not require a Chapter III court to make a determination of guilt or innocence, it follows that *the 'surrender' of a person to the ICC does*

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[60] United Nations, *Rome Statute of the International Criminal Court*, 17 July 1998, Article 91(2)(a).
[61] Ibid, Article 91(2)(b).
[62] Ibid, Article 91(2)(c) (my emphasis).
[63] *Ntakirutimana v Reno* 184 F 3d 419 (5th Cir. 1999) at 426-427 per Garza J.
[64] A.I. Benison, 'International Criminal Tribunals: Is There a Substantive Limitation on the Treaty Power?', in *Stanford Journal of International Law*, Volume 37, Number 1, 2001, p94.
[65] Departments of the Attorney-General and Foreign Affairs and Trade, *Inquiry by JSCOT into the International Criminal Court Statute: Response to Matters Raised by JSCOT at its 30 October 2000 Hearing*, Canberra, 30 January 2001, p6. See also, *Extradition Act* 1988 (Cth), section 19.
[66] *International Criminal Court Bill* 2001 (Cth), sections 18-20, 28, 42 and 43.
[67] *International Criminal Court Act* 2001 (UK), sections 2-7 and 84 (Schedule 2 – Part 2).
[68] *International Crimes and International Criminal Court Act* 2000 (NZ).

not contravene Chapter III of the Constitution as it does not involve a exercise of judicial power.

Indeed, with the exception of circumstances where the ICC requests the 'surrender' of a offender when a Chapter III court is exercising or has already exercised jurisdiction over that offender (discussed below), *it is unclear as to why Chapter III would be invoked at all,* as the circumstances in which the ICC will exercise jurisdiction is effectively confined to situations where Australia is unable or unwilling to prosecute the offender residing within its borders[69]. In other words, while a Chapter III court may have the *capacity* to try a case brought under the *International Criminal Court Bill*, since the jurisdiction of the ICC is most likely to be 'triggered' in circumstances where Chapter III courts have not, for political or other reasons, been given the *opportunity* to try the case, it follows that 'judicial power' has not been exercised in the manner required to invoke the operation of Chapter III of the Constitution. Indeed, in *Huddart, Parker & Co Pty Ltd v Moorehead*, Griffith CJ stated that the exercise of 'judicial power':

> *does not begin until some tribunal which has power to give a binding and authoritative decision...is called upon to take action*[70].

3.2.2 Constitutional Issues Arising From the Surrender of a Person to the ICC when a Chapter III Court is Exercising or Has Already Exercised 'Judicial Power'

While it is clear that a Chapter III court cannot be logically "called upon to take action"[71] in circumstances where Australian prosecutorial authorities are unable or unwilling to initiate proceedings, the *Rome Statute* also gives the ICC the power to request the surrender of a person in circumstances where a Chapter III court is exercising or has previously exercised jurisdiction over that person. Article 17 of the *Rome Statute* gives the ICC the responsibility for determining whether a State is unwilling to prosecute an offender by considering whether:

a. the proceedings were or are being undertaken...for the purpose of shielding the person concerned from criminal responsibility for the crimes within the jurisdiction of the Court[72];
b. there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice[73]; or

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[69] United Nations, *Rome Statute of the International Criminal Court*, 17 July 1998, Article 17.
[70] *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ (my emphasis).
[71] Ibid, at 357 per Griffith CJ.
[72] United Nations, *Rome Statute of the International Criminal Court*, 17 July 1998, Article 17(2)(a).

c. the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which...is inconsistent with an intent to bring the concerned to justice[74].

The *discretionary nature* of the ICC's power under Article 17 has been vehemently criticised. In his submission to the Joint Standing Committee on Treaties, Geoffrey Walker argued:

> The ICC will have jurisdiction *whenever it decides* that 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[75].

Similarly, Kristafer Ailslieger has objected to US ratification of the *Rome Statute* on the grounds that:

> the determination as to whether a state is unwilling or unable to 'genuinely prosecute', or whether prior domestic court proceedings were independent and impartial, lies solely with the ICC itself. Therefore, because it will set precedents regarding what it considers 'effective' and 'ineffective' domestic criminal trials, the ICC will indirectly force states to adopt those precedents or risk having cases called up before the international court[76].

With respect, such arguments should be rejected. If a State rather than the ICC itself was responsible for determining the circumstances in which a 'genuine' prosecution occurred, even blatantly biased cases or cases with pre-determined legal outcomes could be considered 'genuine'. Not only would this reduce and effectively nullify the jurisdiction of the ICC, but in doing so, perpetrators who would otherwise be guilty of an international crime would be unfairly and undeservingly exonerated.

Furthermore, such arguments fail to acknowledge the nature and dynamics of the crimes that the ICC purports to cover. Since international crimes such as genocide, crimes against humanity and war crimes are committed almost exclusively by States or by persons acting under State authority[77], it means that unless the perpetrator is tried by an independent foreign court or tribunal (i.e., the International Criminal Court), the State that perpetrated such

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[73] Ibid, Article 17(2)(b).
[74] Ibid, Article 17(2)(c).
[75] G Walker 2001, op.cit, n53, p5.
[76] K Ailslieger 1999, op.cit, n55, p88.

a crime would be responsible for prosecuting the individuals that acted under its own authority! Not only is this unlikely, but even if criminal proceedings were somehow instituted, it is difficult to envisage a scenario where an individual acting under State authority would be imprisoned by the State which authorised such behaviour.

For the sake of argument then, it may be possible to envisage a scenario where the Australian government has initiated a prosecution for the sake of preventing the surrender of an offender to the ICC (e.g., where an Australian national has committed a 'war crime'). Although a request for the surrender of an offender in such an instance would probably not involve a 'usurpation' of judicial power[78], such a request could possibly constitute 'interference' with judicial power because it "attempts to change the direction or outcome of pending judicial proceedings"[79].

In considering whether there has been an 'interference' with the judicial power of a Chapter III court, several questions arise:

1. Given the fact that the judicial power of a Chapter III court is usually 'interfered' with by the Executive or Legislature[80], what happens when such 'interference' is by another judicial institution (i.e., a non-Chapter III court)?
2. Although the *actual* 'interference' is by the ICC, since the power of the ICC to 'interfere' with the judicial power of a Chapter III court is a product of legislation, is the legislation authorising 'interference' by an international, extra-constitutional institution unconstitutional?

In *Re Wakim; Ex parte McNally*[81], a majority of the High Court invalidated legislation which allowed federal courts to exercise state judicial power[82]. In doing so, the majority held that "ss 75 and 76 of the Constitution define *exhaustively* those 'matters' in relation to which jurisdiction may be conferred on a federal court"[83]. While *Re Wakim; Ex parte McNally* suggests that matters "arising under any treaty"[84] are in the exclusive realm of Chapter III courts, it is submitted that such a precedent should not be applied to invalidate legislation that requires Australia to 'surrender' a person when an objective analysis of the facts suggests that

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[77] C Tatz, *Genocide in Australia*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1999, p3.
[78] T Blackshield & G Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, Second Edition, The Federation Press, Sydney, 1998, pp1132-1133.
[79] Ibid, pp1132-1133.
[80] *Cheng Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Polyukhovich v Commonwealth* (1991) 172 CLR 501;
[81] *Re Wakim; Ex parte McNally* [1999] HCA 27 (17 June 1999).
[82] F Wheeler, 'The Rise and Rise of Judicial Power under Chapter III of the Constitution: A Decade in Overview', in *Australian Bar Review*, Volume 20, 2000, p290.
[83] Ibid, p290 (my emphasis).
[84] *Commonwealth Constitution* 1900 (UK), section 75(i).

prosecution domestically has only been instituted to prevent the ICC from exercising jurisdiction. Instead, it is submitted that the High Court is likely to be influenced by the American approach to determining the constitutionality of such legislation.

American opponents of the ICC[85] have argued that the *Rome Statute* should not be ratified because it contravenes the principle established in *Ex parte Milligan*[86]. In this case, Milligan was sentenced to death by a military tribunal for treason and for violations of the laws of war. In accepting his petition for a writ of Habeas Corpus, the Supreme Court stated:

> Every judicial trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred upon them; because the Constitution expressly vests it 'in one Supreme Court and in such inferior courts as the Congress may from time ordain and establish'...One of the plainest constitutional provisions was...infringed when Milligan was tried by a court not ordained and established by Congress"[87]

While this precedent "prevents certain types of cases from being adjudicated outside of Article III courts"[88], in *Commodity Futures Trading Commission v Schor*[89], the US Supreme Court held that there are some "circumstances under which Congress may remove cases to non-Article III courts if the balance of factors indicates that the independence of the judiciary will not threatened"[90]. According to the US Supreme Court, these factors include:

> the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested in Article III courts, the origin and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III[91].

If such a principle is applied in Australia, it is arguable that the ICC's request for the surrender of a person who is being prosecuted or has already been prosecuted by a Chapter III court for the 'non-genuine' purpose of avoiding the jurisdiction of the ICC would be constitutionally permissible. While it is beyond doubt that the most important constitutional guarantee is that a citizen can only be subject to Commonwealth judicial power by the 'courts'

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[85] K Ailslieger 1999, op.cit, n55, pp93-94; S.W. Andreasen 2000, op.cit, n55, pp726-729; Subcommittee on International Operations of the Senate Committee on Foreign Relations 1998, op.cit, n55.
[86] *Ex parte Milligan* 71 US (4 Wall) 2 at 122 (1866).
[87] Ibid, at 122.
[88] A.I. Benison 2001, op.cit, n64, p102.
[89] *Commodity Futures Trading Commission v Schor* 478 US 833 (1986).
[90] A.I. Benison 2001, op.cit, n64, p102.
[91] *Commodity Futures Trading Commission v Schor* 478 US 833 (1986) at 851.

designated in Chapter III[92], since the extent to which the ICC can exercise the power of a Chapter III court is limited, both in terms of the subject-matter (i.e., genocide, war crimes and crimes against humanity) and in terms of the circumstances in which it would apply (i.e., when a person is subject to a non-genuine domestic prosecution in order to avoid prosecution by the ICC), it is arguable that the 'balance of factors' favours the ICC exercising what would otherwise be the judicial power of a Chapter III court. Arguably, permitting the ICC to exercise judicial power in such a instance would only enhance the independence of Chapter III courts – by not adjudicating in a matter where the prosecution is withholding evidence for the purpose of securing a non-guilty verdict, a Chapter III court would not 'tarnish' its reputation by making a determination that was based upon evidence which was far less conclusive and complete than that put before the ICC by apparently independent prosecutors.

3.3 Does the Rome Statute violate section 80 of the Commonwealth Constitution?

The *Rome Statute* possesses several mechanisms which purport to protect the accused and the integrity of the trial process, including the principles of non-retrospectivity[93], *nulla crimen sine lege*[94] and *nulla poena sine lege*[95], as well as the right to silence, legal representation, trial without undue delay, to be present at trial, and not to be subject to a reversal in the burden of proof[96]. One notable omission is the right to trial by jury.

While the lack of trial by jury is understandable given the difficulty of forming juries at an international level[97], several commentators have nonetheless submitted that that this omission may breach a constitutional guarantee of 'trial by jury'[98]. Section 80 of the *Commonwealth Constitution* states that "the trial on indictment of any offence against any law of the Commonwealth shall be by jury"[99].

Although the language of section 80 seems wide and far-reaching, a literal construction of that provision suggests that such a right only applies to 'indictable offences'. This raises two question:

1. What constitutes an 'indictable' offence?
2. Who decides what constitutes an 'indictable' offence (i.e., the Courts or Parliament)?

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[92] *Street v Queensland Bar Association* (1989) 168 CLR 461 at 521 per Deane J.
[93] United Nations, *Rome Statute of the International Criminal Court*, 17 July 1998, Articles 11 and 24.
[94] Ibid, Article 22.
[95] Ibid, Article 23.
[96] Ibid, Article 67.
[97] A.I. Benison 2001, op.cit, n64, p97.
[98] G Walker 2001, op.cit, n53, pp7-8; K Ailslieger 1999, op.cit, n55, pp98-100; S.W. Andreasen 2000, op.cit, n55, pp728-731.

The predominant approach of the High Court to section 80 was explained by the majority in *R v Archdall & Roskruge; Ex parte Carrigan and Brown*:

> The suggestion that the Parliament, by reason of the s 80 of the Constitution, could not validly make the offence punishable summarily has no foundation[100].

Such commentary has two implications. First, if Parliament does not define or categorise a particular offence as 'indictable', section 80 does not apply[101]. Second, the question of what constitutes an 'indictable' offence is not a constitutional issue determinable by the High Court but rather is a political one, determinable and subject to manipulation by the Federal Parliament[102].

In light of the High Court's narrow and restrictive interpretation of section 80, it is submitted that the *International Criminal Court Bills* will only be unconstitutional if they define and classify the crimes they purport to cover as 'indictable offences'. Since the *International Criminal Court Bill (Consequential Amendments) Bill* does not classify genocide, war crimes and crimes against humanity as 'indictable' offences[103], it is reasonably clear that a defendant could not challenge the trial process on the grounds that it breached a constitutional guarantee of trial by jury.

Despite the High Court's insistence that section 80 should be construed narrowly, Geoffrey Walker, in his submission to the Joint Standing Committee on Treaties, has argued that "it is unlikely that the Court has written its last word on s 80, and indeed the section is gradually being given more substantive content"[104]. This is indeed the case. For example, in *Kingswell v The Queen*[105], Deane J argued that section 80 should apply "wherever an offence carries a term of imprisonment of more than 12 months"[106]. Even though Deane's J reason for specifying a 12 month period is irrelevant for present purposes, since the bulk of successfully prosecuted offences under the *Rome Statute* will have penalties exceeding 12 months

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[99] *Commonwealth Constitution* 1900 (UK), section 80.
[100] *R v Archdall64 & Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128 at 136 per Knox CJ, Isaacs, Gavan, Duffy and Powers JJ.
[101] *R v Bernasconi* (1915) 19 CLR 629 at 637 per Isaacs J.
[102] G Williams, *Human Rights under the Australian Constitution*, Oxford University Press, Melbourne, 1999, p106.
[103] *International Criminal Court (Consequential Amendments) Bill* 2001 (Cth), Schedule 1 – Division 268.
[104] G Walker 2001, op.cit, n53, p7.
[105] *Kingswell v The Queen* (1984) 159 CLR 264.
[106] G Williams 1999, op.cit, n102, p107.

imprisonment[107], the adoption of Deane's J approach by a High Court majority could allow a defendant to challenge the trial process on the grounds that it did not provide for trial by jury.

If this were to occur, there would be an obvious conflict between the defendant's right to trial by jury and the need to establish an institutional framework to punish perpetrators of international crime. Despite suggestions that such problems could be overcome by amending the relevant national Constitution[108], since this is highly unlikely in Australia, such a problem (should it actually arise) will have to be resolved by the High Court.

Since section 80 of the *Commonwealth Constitution* is based on Article III, section 2 of the United States Constitution[109], it is submitted that the High Court should seek guidance from relevant American jurisprudence. Indeed, there are several American cases of direct relevance. In *Palko v Connecticut*[110], the US Supreme Court held that even though the right to trial by jury and to immunity from prosecution except as a result of indictment were important, because they were "not the very essence of a scheme of ordered liberty"[111], their abolition did not violate "a principle of justice so rooted in the traditions and conscience of our people as to be fundamental"[112]. Such an interpretation of the right to trial by jury implies that that right is neither fundamental to a fair trial, nor absolute in the sense that it would prevail over another conflicting right or interest. In light of such an interpretation, it is relatively clear that section 80, even when it is constitutionalised and given substantive content, is unlikely to prevent Australian courts from convicting an offender of an international crime in the absence of a jury.

In *Reid v Covert*, the US Supreme Court held that the right to trial by jury should not be interpreted in such a way as to prevent the extradition of an American citizen to face trial in another jurisdiction[113]. The Court reasoned that while an "individual may have the right to be judged by a jury before judicial authorities of their own State, (they) may not necessarily enjoy this right in other jurisdictions"[114]. Since the 'surrender' of an offender to the ICC has already been likened to an extradition arrangement between two sovereign States, the application of the principle in *Reid v Covert* to this arrangement would suggest that although an offender may enjoy the right to trial by jury in Australia, such a right does not extend to proceedings conducted by the ICC following the 'surrender' of the offender to that institution.

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[107] United Nations, *Rome Statute of the International Criminal Court*, 17 July 1998, Article 77.
[108] International Centre for Criminal Law Reform and Criminal Justice Policy *et al*, *International Criminal Court: Manual for the Ratification and Implementation of the Rome* Statute, Vancouver, May 2000, p62.
[109] G Williams 1999, op.cit, n102, p103.
[110] *Palko v Connecticut* 302 US 319 (1937).
[111] Ibid, at 325.
[112] Ibid, at 325.
[113] *Reid v Covert* 354 US 1 (1957) at 6.

Hence, even if the scope of section 80 was expanded and given substantive content, it is highly unlikely that it would affect the constitutionality of the *International Criminal Court Bills*.

4. OTHER POLICY ARGUMENTS AGAINST AUSTRALIA'S RATIFICATION OF THE ROME STATUTE

Given the fact that there are no insurmountable constitutional limitations on the power of the Federal Parliament to pass the *International Criminal Court Bill* and the *International Criminal Court (Consequential Amendments) Bill*, it is necessary to consider whether there are any other policy arguments against Australia's proposed ratification of the *Rome Statute*.

4.1 Implications Arising from the 'Complementarity' Principle: Does it Undermine Australia's National Sovereignty?

Perhaps the most common argument employed by the opponents of the ICC is that ratification of the *Rome Statute* will undermine the 'national sovereignty' of the ratifying State. One American commentator has argued:

> if allowed the stand – and to thrive and grow, as its champions intend – this Court will sound the death knell for national sovereignty, and for the freedoms associated with limited, constitutional government[115].

Despite favouring ratification himself, George Winterton, in his submission to the Joint Standing Committee on Treaties, summarised the views of a prominent opponent of Australia's ratification of the *Rome Statute*:

> Sir Harry Gibbs...regards the Statute as detracting from the right of national self-determination. Sir Harry bluntly condemns it as a surrender of 'sovereignty' (in the sense of national power to act autonomously), but the Statute would do so to a greater degree than most because it would potentially subject Australian citizens to the jurisdiction of an international court in respect of acts performed in Australia[116].

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[114] International Centre for Criminal Law Reform and Criminal Justice Policy *et al* 2000, op.cit, n108, p62.
[115] W.F. Jasper, 'Courting Global Tyranny', in *The New American*, Number 18, 1998, p10.
[116] G Winterton 2001, op.cit, n54, p1.

The argument here appears to be that since ratifying States are required to 'surrender' an offender whenever the ICC decides that domestic prosecutions are not 'genuine'[117], the ratifying State will effectively be subject to the 'will' of the ICC, and in doing so, the ability of that State to act autonomously will also be undermined[118].

Apart from the obvious problems associated with allowing States to decide whether their own judicial proceedings are 'genuine' (discussed above – 3.2.2), it is submitted that such an argument adopts an unrealistic view of the relationship between Australia and the ICC. Arguably, the ICC's jurisdiction should be not be viewed as being superior to, or in a "vertical relationship"[119] with those of national courts. Instead, the better view is to construe such a relationship as "horizontally complementary"[120]. Not only does such an interpretation emphasise the fact that national criminal jurisdictions have the 'first right of prosecution', but in doing so, it implies that *the decision to prosecute domestically is an exercise of sovereignty that would have the practical effect of allowing the State, should it decide to do so, of being the sole and only adjudicator of the guilt or innocence of the accused.* As one submission to JSCOT has already noted:

> Ratification of the ICC statute should not be characterised primarily as a *surrender* of sovereignty but as a voluntary and advantageous *exercise* of sovereignty...Ratification may in fact *enhance* Australian sovereignty, because it will broaden Australia's ability to prosecute crimes that are committed by its nationals in another state that is a party to the statute[121].

Conversely, if the ICC does in fact request the 'surrender' of a person on the grounds that Australia is unable or unwilling to prosecute, it is arguable that such a request stems from the fact that Australia has *failed to exercise sovereignty* over the offender. Indeed, as Sir Anthony Mason has noted in readily applicable commentary:

> It is extraordinary that the people of Australia must resort to an international body to redress in circumstances where it is alleged that Australia has not complied with the very international obligations that the government's executive branch has explicitly stated it will uphold...By not providing a mechanism for the Australian legal system to consider and adjudicate such issues before an international body does so, it seems that the government of Australia *is in fact*

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[117] United Nations, *Rome Statute of the International Criminal Court*, 17 July 1998, Article 17(2) and 17(3).
[118] G Walker 2001, op.cit, n53, p5; K Ailslieger 1999, op.cit, n55, p88.
[119] D McGoldrick, 'The Permanent International Criminal Court: An End to the Culture of Impunity?', in *Criminal Law Review*, August 1999, p631.
[120] Ibid, p631.
[121] Sydney University Law School Amnesty Group, *Submission to JSCOT: Support for Ratification of the Rome Statute of the International Criminal Court*, Canberra, 13 July 2001, p1.

abrogating sovereignty rather than exercising this sovereignty through the Australian legal system[122].

4.2 Claims of Judicial Bias and the Partiality of Judicial Members

Another common argument employed by the opponents of the *Rome Statute* is that the ICC will lack judicial independence, with its members being nothing more than political appointees without any real concern for bringing the perpetrators of international crime to justice. In his submission to JSCOT, Geoffrey Walker argued:

> There is nothing to prevent the situation where all the judges in a case represent countries unfriendly to Australia. Most of the world's governments are unelected, and one way they can hamper the spread of democratic ideas to their own countries is to strike at the Western democracies through international bodies such as the ICC...Australia is a soft target that does not normally hit back when attacked, inviting a quarry for governments reluctant to risk a confrontation with the United States, the EU or Israel[123].

The *Rome Statute* provides that there will be 18 full-time judges[124], and "no two judges may be nationals of the same State"[125]. Those judges are to be "chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices"[126]. However, in light of the fact that many judges, even those chosen from the highest judicial offices, can be mere 'mouthpieces' for their respective governments, it seems that such a criteria is unlikely to be of great significance. As Geoffrey Robertson observes, "the viability of the ICC will depend more on the calibre and experience of its judges and prosecutors than on the fine print of its statute"[127].

Despite the obvious risks associated with the composition and operation of the ICC, it is submitted that if Australia wishes to avoid dealing with a Court that is nothing more than a political tool of unfriendly powers, it must be willing to play an active role in the establishment of the Court and the appointment of its judges:

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[122] A Mason, 'The Influence of International and Transnational Law on Australian Municipal Law', in *Public Law Review*, Volume 7, March 1996, p28 (my emphasis).
[123] G Walker 2001, op.cit, n53, p5.
[124] United Nations, *Rome Statute of the International Criminal Court*, 17 July 1998, Article 35(1) and Article 36(1).
[125] J Perry, *Submission to JSCOT Regarding the International Criminal Court*, Canberra, 22 November 2000, p5.
[126] United Nations, *Rome Statute of the International Criminal Court*, 17 July 1998, Article 35(1) and Article 36(3).

> If Australia is one of the first sixty states to ratify, it will have an active role in the composition and administration of the Court, ensuring that the ICC complies with the high and impartial standards of justice for which Australian is generally known[128].

Indeed, if Australia is to 'punch above its weight' in international affairs and is to secure outcomes that are beneficial both domestically and to international security, it must, as it did in relation to the Cairns Group of agricultural trading countries, be willing to take a leadership position which will allow it to participate in the formulation of the rules and procedures of the institution which it seeks to utilise and participate in.

4.3 The International Criminal Court as the Basis for Fighting the 'War Against Terrorism'

An argument which has thus far been overlooked is that the *Rome Statute* can provide a comprehensive basis for the prosecution and punishment of people accused to have engaged in terrorist activities.

Although the ICC will not operate retrospectively[129], if an incident such as the September 11 attacks on the United States is ever repeated after the *Rome Statute* gains entry into force, the ICC will be able to prosecute the alleged perpetrator (assuming that the State in which the alleged perpetrator resides is unable or unwilling to prosecute).

Indeed, based on the evidence now available about the al-Qaeda terrorist network, it is relatively clear that the actions of al-Qaeda terrorists would constitute a 'crime against humanity' as defined in Article 7 of the *Rome Statute*. As Geoffrey Robertson has noted:

> The atrocities of September 11 amount precisely to such a crime, defined as 'multiple acts of murder committed as part of a widespread and systematic attack against a civilian population', because they were the culmination of numerous such attacks (many foiled) by al-Qaeda since 1992, including the 1998 US embassy bombings in East Africa which took over 200 civilian lives[130].

Arguably, the prosecution of al-Qaeda terrorists before the ICC or a similarly constituted *ad hoc* tribunal (like the ICTY) is preferable to the decision by the United States to prosecute such people before a military tribunal, as such a tribunal is essentially "a secret hearing at which three army officers, paid and promoted by the US Defence Department,

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[127] G Robertson 1999, op.cit, n1, p326.
[128] Sydney University Law School Amnesty Group 2001, op.cit, n121, p2.
[129] United Nations, *Rome Statute of the International Criminal Court*, 17 July 1998, Articles 17 and 24.
[130] G Robertson, 'A Licence for Vigilantes', in *The Sydney Morning Herald*, 22 December 2001.

decide by majority and without any standard of proof or any rules of evidence, whether the defendant is suitable for execution by firing squad"[131].

Prosecuting al-Qaeda terrorists before such a military tribunal would not only lead to cries of 'victors justice' but would also make such terrorists martyrs for their causes. The better approach would involve prosecuting such terrorists before the ICC, where the guilt of the accused will depend on the existence of a sufficient evidentiary basis and satisfying the burden of proof, and will be decided in accordance with established methods of judicial reasoning. Not only would such a transparent approach 'debunk' claims of 'victors justice', but such a trial could also have an educational purpose:

> The trial of the Taliban leaders (and bin Laden, if available) will also serve to de-mythologise their movement. These men used their theocratic power to persuade thousands of followers to die rather than surrender...then sought to save their own skins by fleeing the battlefield...A trial would expose their cowardice and hypocrisy, destroy their cult status and emphasise the evil of any movement which calls for the racist murder of innocents[132].

5. CONCLUSION

In conclusion, it is strongly recommended that Australia ratify the *Rome Statute*. Given the fact that pre-existing legislation is insufficient in prohibiting and punishing the international crimes that the ICC purports to cover, ratification of the *Rome Statute*, and implementation of the *International Criminal 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. Such a framework however, should be complimented by retrospective legislation also. Not only is the *International Criminal Court Bill* and the *International Criminal Court (Consequential Amendments) Bill* valid with respect to the external affairs power of the Commonwealth Constitution, but since the relationship between Australia and the ICC is akin to an extradition treaty between two countries, such legislation (assuming it is passed) is unlikely to pose a problem with respect to Chapter III of the Constitution. It is also clear that even if section 80 of the Constitution is given substantive content, the fact that the ICC does not provide for trial jury is unlikely to constitute a contravention of this provision. Finally, it has been argued that the policy arguments against Australia's ratification of the *Rome Statute* are unfounded. Not only is the relationship between Australia and the ICC best interpreted as 'horizontally

[131] Ibid.
[132] Ibid.

complimentary', but the best way for Australia to ensure that the Court works effectively is to ensure that Australian judges, such as Sir Ninian Stephen who is currently serving on the ICTY, are appointed to the ICC. This will only occur if Australia is one of the first 60 countries to ratify the Statute. It is hoped that Australia's political leaders have the courage and foresight to ratify the *Rome Statute* and pass the *International Criminal Court Bills* as soon as reasonably possible.