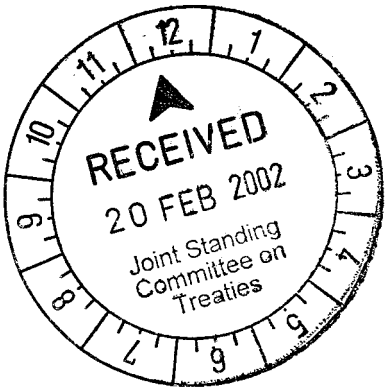
Submission No. 239



MONASH
UNIVERSITY

Professor David Kinley
Director,
Castan Centre for Human Rights Law

Direct Line: +61 3 9905 3366
Facsimile: +61 3 9905 5305
Email: david.kinley@law.monash.edu.au

15 February, 2002

Committee Secretary
Joint Standing Committee on Treaties
Department of House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Secretary,

Please accept the enclosed submission from the Castan Centre for Human Rights Law to the Committee's inquiry into the ratification of the Rome Statute of the International Criminal Court.

We are glad of course to answer any questions you may have regarding the submission, and should you require, we would be happy to provide oral evidence to the Committee.

Yours sincerely,

FACULTY OF LAW
PO Box 12
Monash University
Melbourne, Victoria 3800, Australia
Telephone: +61 3 9905 3356
Facsimile: +61 3 9905 5305
www.law.monash.edu.au

Castan Centre for Human Rights Law
Submission to the Joint Standing Committee on Treaties*
Inquiry into ratification of the Rome Statute of the International Criminal Court

The Castan Centre for Human Rights Law strongly supports the establishment of the International Criminal Court ("ICC") and urges the Joint Standing Committee on Treaties to recommend that the Government ratify the Rome Statute of the International Criminal Court ("the Statute"), without delay.

This submission outlines the reasons why ratification of the Statute should not only proceed but be expedited. We have considered and addressed the main objections to ratification. In addition, the Castan Centre has reviewed the Government's proposed implementing legislation, concluding that the Bills:

- fulfil Australia's obligations under the Statute;
- adequately protect national security interests and sovereignty; and
- should be enacted with a small number of amendments.

1. Reasons for ratifying the Rome Statute of the International Criminal Court

1.1 Reinforcement of the international criminal justice system

The ICC fills a long-standing gap in the international legal system. In the past, it has been possible for individuals guilty of the most egregious human rights abuses to hide, or rather, be hidden with impunity. The inability or unwillingness of certain States to bring to justice and hold fully accountable those responsible for genocide, war crimes and crimes against humanity is staggering. By bringing the ICC into existence, State Parties ensure that these individuals will be properly tried and duly punished – if not by the State in which the crimes were committed, then by the ICC itself. In this sense, the existence of the ICC will serve to encourage States to act responsibly and transparently when dealing with those charged with serious criminal offences.

1.2 The ICC is global and permanent

Whereas the ad hoc tribunals for the former Yugoslavia and Rwanda are restricted by geographical and time limitations, the ICC will be permanent and global in its scope. The global nature of the ICC means that it will not be selective in the areas of conflict it targets. The permanency of the court will greatly reduce the costs (both time-wise and financial) associated with establishing a new tribunal for every emerging human rights conflict.

2. Reasons against ratification

2.1 Concession of Sovereignty

Various commentators have voiced the concern that ratification of the Statute will constitute a concession of Australia's sovereignty. It is true that every time the Government agrees to be bound in international law, it yields some degree of autonomy. In the case of the Rome Statute, State Parties agree to cooperate with the ICC – a supranational tribunal – in its investigation, prosecution and punishment of individuals who commit the most egregious crimes within their sovereign

* Submitted by Professor David Kinley, Sarah Joseph, and Julie Debeljak on behalf of the Castan Centre; prepared by Ms Gabi Crafti.

territories. Certainly, Australia's accession to the Statute would indicate that an aspect of our criminal justice system is now shared with this supranational tribunal.

Would ratification mean a loss of sovereignty? The simple answer is clearly, no. Under the principle of complementarity, the ICC will act only when national courts are unable or unwilling to genuinely exercise jurisdiction.[1] On a practical level, this would mean that unless the Australian criminal justice system ceases to function in its current form, there would be no intervention on the part of the ICC. Some critics have argued that there may be arbitrariness in deciding whether a State Party has genuinely executed its primary duties in prosecuting individuals in respect of Article 5 crimes. This is countered by the carefully detailed definitions of unwillingness and inability in Article 17. In addition, the accused or any State (be it a party to the Statute or not) may challenge the jurisdiction of the ICC or the admissibility of the case.[2] Related decisions may be appealed.[3]

The Government's proposed implementing legislation reinforces the principle of complementarity and further safeguards Australia's sovereignty. Clause 3 of the *International Criminal Court Bill 2001* states:

> '(1) It is the Parliament's intention that the jurisdiction of the ICC is to be complementary to the jurisdiction of Australia.
> (2) Accordingly, this Act does not affect the primary right of Australia to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC.'[4]

2.2 Breach of Separation of Powers Doctrine

A concern has been raised in a number of submissions to JSCOT that Australia's domestic implementation of the Statute would be unconstitutional and, therefore, invalid.[5] The Government is empowered to enact implementing legislation under s 51(xxix) of the Constitution (the External Affairs Power), which is subject to the rest of the Constitution, including Ch. III. Under Ch. III, judicial power may only be vested in 'federal courts'[6], including the High Court and state courts.[7] The proposed legislation, it has been argued, would invalidly confer judicial power on the ICC, a court which is not a federal court as contemplated by s 71 of the Constitution.

In response, we offer three alternative arguments:

2.2.1 International tribunals exercise judicial power as an exception to the separation of powers doctrine

There is judicial support, albeit limited, for the notion that an international criminal court, operating in respect of a crime committed in Australia, is not exercising Commonwealth judicial power. In *Polyukhovich v Commonwealth*, Deane J commented in *obiter*:

> 'In so far as Australia's participation in the establishment and functioning of an international tribunal for the trial and punishment of... crimes [against international law] is concerned, the provisions of Ch. III would be inapplicable for the reason that the judicial power of the

---

[1] Article 17 of the *Rome Statute of the International Criminal Court*, UN Doc. No. A/CONF. 183/9 (July 17, 1998), 37 ILM 999. NB all references to Article numbers are references to Articles of the Statute.
[2] Article 19.
[3] Article 82.
[4] Clause 3 *International Criminal Court Bill 2001*. See *www.aph.gov.au/house/committee/jsct/ICC/statutebill.pdf*
[5] See submissions of Prof. George Winterton (22 August 2001), Charles Francis QC & Dr ICF Spry QC (1 August 2001) and Prof. Emeritus Geoffrey Walker (13 August 2001): *www.aph.gov.au/house/committee/jsct/ICC/ICC.htm*
[6] Section 71 of the Constitution of the Australian Commonwealth
[7] *NSW v Commonwealth* (1915) 20 CLR 54; *Waterside Workers' Federation v J W Alexander* (1918) 25 CLR 434; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

> Commonwealth would not be involved. 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.'[8]

Whilst it is unclear whether this argument would find favour with the current High Court, there is every reason why it should be raised in the event that Australia's proposed implementing legislation is challenged.

The US Supreme Court has created an exception to the strict doctrine of separation of powers by adopting a purposive approach. In *Commodity Futures Trading Commission v Schor*, the Court held that a tribunal which fulfils an expert function not fulfilled by the federal or state trial courts is not in breach of the separation of judicial powers provisions set out in Article III of the US Constitution.[9] Under this analysis, Audrey Benison argues that because the ICC will prosecute 'high profile crimes in an international forum..., [providing] the type of continuity that is lacking from patchwork domestic prosecutions', there is no constitutional impediment to US ratification of the Statute.[10] In any case, as the Statute makes clear in article 17, such international prosecutions will themselves only occur where domestic courts lack the competence to prosecute – which is precisely the sort of lacuna that must be filled.

2.2.2 The proposed domestic legislation is not constitutionally invalid because it does not confer Commonwealth judicial power on the ICC

The Government's proposed implementing legislation may not be in breach of Ch. III on the basis that it is not the instrument which confers judicial power on the ICC. Rather, it is the initial step of ratification – an act of the Executive – which triggers the jurisdiction of the ICC over crimes committed in Australian territory:

> 'When will the Court [ICC] have jurisdiction over crimes? A State must first consent to the Statute by ratifying...it. Once it is a party, it accepts the Court's jurisdiction.'[11]

Whilst the terms of an international treaty do not become binding in Australian domestic law until an implementing Act has been passed, ratification itself binds Australia in international law to the terms of the treaty. In this particular instance, ratification of the Statute would activate the ICC's jurisdiction over Australia irrespective of whether or not domestic legislation has been enacted.[12]

When the Government ratifies treaties, it is exercising its prerogative power, derived from s 61 of the Constitution. Unlike the External Affairs Power, s 61 is not subject to the rest of the Constitution. Requirements raised by Ch. III, therefore, are arguably immaterial to the exercise of prerogative power. As there is no precedent for resolving a conflict between s 61 and s 71, it is difficult to project which would be granted ascendancy. In any event, owing to its inherently "political" nature, the prerogative power to ratify treaties has been held to be non-justiciable.[13]

---

[8] Deane J in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 627.
[9] *Commodity Futures Trading Commission v Schor* 478 US 833 at 856 (1986).
[10] A I Benison "International criminal tribunals: is there a substantive limitation on the Treaty Power?" (2001) 37 *Stanford Journal of International Law* 74 at 104.
[11] See question 12: "When will the Court have jurisdiction over crimes?" at *www.un.org/law/icc/statute/iccq&a.htm*
[12] Note also that even if Australia does not ratify the Statute (for fear of constitutional invalidity or for any other reason), under Article 13(b), the ICC may still exercise its jurisdiction with respect to a crime committed in Australia or by an Australian upon the referral of the matter to the ICC Prosecutor by the UN Security Council.
[13] See V Waye, "Justiciability" in M Harris and V Waye (eds) *Australian Studies in Law: Administrative Law* (Federation Press, 1991), p 47 cited in S Joseph and M Castan, *Federal Constitutional Law: a Contemporary View* (LBC, 2001), p 107.

2.2.3 'Other courts' in s 71 should include international tribunals

Even if ratification was held to vest judicial power in the ICC (and this argument itself poses conceptual difficulties: under s 71, judicial power cannot be *vested* by the exercise of the prerogative; it can only be vested by the Constitution or by Parliament), it could be argued that the ICC falls within the category of 'such other courts as it [Parliament] invests with federal jurisdiction'.[14] The phrase has previously been read to include state courts; with the increasing role of international law, 'other courts' should be further expanded to include international courts.

2.3 Further breaches of Ch. III / double jeopardy

Under the Statute, the ICC may decide to prosecute an individual who has previously been tried by an Australian court.

If the ICC reached such a decision, it would no doubt request the assistance of Australian executive officers to arrest and surrender the individual to the ICC. This raises concerns about double jeopardy and breaches of Ch. III. In his submission to JSCOT, Professor George Winterton writes:

> '...such action by Australian executive officers may contravene the separation of judicial power which requires executive compliance with *lawful* decisions of courts exercising the judicial power of the Commonwealth. It would seem to be a contravention of Ch. III of the Constitution for the executive to arrest a person acquitted by a Ch. III court and surrender him or her for further trial by another court exercising *authority derived from Commonwealth law* (insofar as Australian law is concerned) for essentially the same offence.'[15] [emphasis added]

Several points can be made here. Firstly, the ICC is prohibited by Art 20(3) from prosecuting a person who has previously been tried *lawfully*: it may only do so where the original trial was not conducted independently or impartially or was undertaken for the purpose of shielding the defendant from criminal responsibility for crimes within the jurisdiction of the ICC.[16] As such, any request made by the ICC to Australian executive officers would not put them in breach of Ch. III which requires compliance with *lawful* decisions of Ch. III courts.

Secondly, it has been argued that the ICC is not a court which derives its power from Commonwealth law (see 2.2.1 and 2.2.2). It could be said that the ICC derives its judicial authority from the International Community, adopting Deane J's contention in *Polyukhovich*. Alternatively, it could be argued that ratification, and not *Commonwealth law* actuates the jurisdiction of the ICC over Australians and/or over criminal acts committed in Australian territory. Under either analysis, executive officers would not be in breach of Ch. III as they would not be surrendering a previously tried defendant to *another court exercising authority derived from Commonwealth law*, i.e. another Ch. III court.

Thirdly, political realities must be taken into consideration: if the ICC requested the arrest and surrender of a person who had previously been tried lawfully by an Australian court, it would seem most unlikely that the Australian Government would comply. More to the point, it is highly improbable that the ICC would invoke its jurisdiction in respect of an Article 5 crime committed in Australia in the first place; therefore, the risk of a successful constitutional challenge to ratification would seem minimal. This minute risk needs to be weighed against the greater value of joining the international community in protecting global peace and security.

---

[14] Section 71 of the Constitution of the Australian Commonwealth

[15] See submission of Prof. George Winterton (22 August 2001) at *www.aph.gov.au/house/committee/jsct/ICC/ICC.htm*

[16] Article 20(3).

3. Reasons for expediting ratification

The ICC is established once 60 States have ratified the Statute. These States will form the Assembly of States Parties which makes crucial management decisions for the ICC. States which ratify but which are not within the first 60 to do so will only be accorded observer status at the initial meetings of the Assembly of States Parties. To date, 52 countries have ratified the Statute.[17]

If Australia is not amongst the first 60 countries to ratify the Statute, its ability to influence the ICC's constitution and its processes will be minimal:

- It will be unable to vote on the adoption of crucial instruments, such as the Rules of Procedure and Evidence and the ICC's first year budget.
- No Australian can be nominated for election as a judge, prosecutor or deputy prosecutor and Australia will be unable to vote in the elections for these positions. The 18 judges are elected on a staggered basis: one third for 3 years, one third for 6 years and the final third for 9 years.[18] The judges elected for 3 years will be eligible for reappointment for a further 6 years and it is quite likely that all will be re-elected. As such, there would be virtually no possibility of an Australian judge on the ICC for at least the first 6 years of its operation.

Quite apart from the fact that observer status would severely limit Australia's ability to influence and shape the future of the ICC, a failure to be within the first 60 countries to ratify would reflect most poorly on Australia's heretofore leading role in the negotiation process to create the ICC. The Department of Foreign Affairs and Trade notes that in its role as Chair of the "Like-Minded Group", a caucus of 67 States committed to the establishment of the ICC, 'Australia has been active in encouraging... signature and ratification [of the Statute].'[19] To retreat from such a position would be highly inappropriate.

4. The proposed domestic legislation for implementing the Statute

We note that the *International Criminal Court Bill* and the *International Criminal Court (Consequential Amendments) Bill*, produced by the Attorney-General as exposure drafts, were referred to JSCOT to '...assist it to make comprehensive recommendations on ratification of the Statute.'[20] Nonetheless, JSCOT has turned the focus of its inquiry from 'the question of whether or not it would be in Australia's interest to ratify the Statute' to an 'examination of the Government's proposed legislation'.[21] Whilst the Castan Centre welcomes the opportunity to comment on the important proposed legislation, we urge the Committee to not spend an undue amount of time assessing the substance of the drafts (as this is not the task with which it has been charged[22]).

Without wishing to conduct too technical an analysis of the two draft Bills, it is our belief that the proposed legislation sets out Australia's obligations under the Statute with precision and thoroughness. The definitions given to the ICC crimes are highly progressive, often replicating the Statute's own definitions. At the same time, the draft Bills amply provide for the protection of Australia's national interests and its primary right to exercise its own criminal jurisdiction.

Some minor amendments are recommended, however:

---

[17] As at 12 February 2002, 52 countries had ratified the Statute.
[18] Article 36.
[19] See Department of Foreign Affairs and Trade website: *www.dfat.gov.au/un/aus_un6.html*
[20] Proof Committee Hansard: Joint Standing Committee on Treaties. Reference: Statute for an International Criminal Court, 24 September 2001, Canberra, TR 222. See *www.aph.gov.au/house/committee/jsct/ICC/canberra1.pdf*
[21] Statement from Committee Chairman Kerry Bartlett MP, *The International Criminal Court: Statute of the Inquiry.* 27 September 2001, Canberra. See *www.aph.gov.au/house/committee/jsct/ICC/chairICC.pdf*
[22] See comments of Ms Joanne Blackburn, First Assistant Secretary, Criminal Justice Division, Attorney-General's Department, Proof Committee Hansard: Joint Standing Committee on Treaties. Reference: Statute for an International Criminal Court, 24 September 2001, Canberra, TR 229. See *www.aph.gov.au/house/committee/jsct/ICC/canberra1.pdf*

4.1 *International Criminal Court Bill 2001*

4.1.1 There should be time constraints on issuing arrest warrants

Under cl. 21, when the Attorney-General receives a request from the ICC for the arrest and surrender of a person, he or she must present that request to any magistrate who will then produce a warrant. Despite the fact that Article 59 of the Statue emphasises the need for immediate action in these circumstances, cl. 21 does not impose any time limitations upon either the Attorney-General's response to a request or upon the magistrate's granting of the warrant. The same deficiencies appear in cl. 22, regarding provisional arrests.

4.1.2 Immunity of all ICC officials needs to be protected

Clause 102 states that while the ICC is sitting in Australia, it may exercise its functions and powers as provided under the Statute, Article 48(2) of which sets out the privileges and immunities to be afforded to ICC judges, prosecutor, deputy prosecutors and the registrar. The Preparatory Committee recently adopted the Agreement on the Privileges and Immunities of the ICC ("APIC"), extending such protection to other ICC officials. We recommend that cl. 102 should be amended to reflect a commitment to APIC and its extension of privileges and immunities to ICC officials not named in Article 48(2).

4.1.3 Bill should articulate position on statute of limitations and immunities attaching to official capacity

Articles 27 and 29 state that regular barriers to prosecution, such as statutes of limitations and immunities attaching to official capacity, will not apply to Article 5 prosecutions, whether at the national level or in relation to a prosecution by the ICC. The draft legislation is silent on these matters.

There is an inherent danger in not explicitly removing the operation of statutes of limitations and official immunities in such circumstances. In the case of national prosecutions of ICC crimes,[23] the application of these barriers might lead the ICC to determine that under Article 17, Australia was unwilling to investigate or prosecute the case itself.

4.2 *International Criminal Court (Consequential Amendments) Bill 2001*

4.2.1 There should be no restrictive purpose requirement for crime of torture

In defining torture as a war crime, the draft Bill imposes a restrictive purpose requirement.[24] In addition to the actus reus component, it must be shown that the perpetrator acted for the purposes of:

(i) obtaining information or a confession; or
(ii) a punishment, intimidation or coercion; or
(iii) a reason based on discrimination of any kind.

Though these requirements were previously adopted in the *Convention against Torture*[25], the Rome Statute specifically omits them. By broadening the crime's ambit, the Statute reflects a better

---

[23] The *International Criminal Court (Consequential Amendments) Bill* incorporates the ICC crimes at a domestic level.

[24] Clause 286.24 sets out the elements of torture as a war crime that is a grave breach of the Geneva Conventions and of Protocol I to the Geneva Conventions. Clause 268.72 sets out the elements of torture, as a war crime that seriously violates Article 3 common to the Geneva Conventions and is committed in the course of an armed conflict that is not an international armed conflict.

understanding of how and why acts of torture are committed. We recommend that the draft legislation follows this approach.

4.2.2 Minimum age for conscription should be eighteen years

With regard to the minimum age for recruitment into the armed forces, there is a discrepancy between the Statute (which sets the minimum age at 15 years) and the more progressive *Optional Protocol to the Convention on the Rights of the Child* (which sets it at 18 years).[26] Whereas the draft Bill sets the minimum age for conscription at 15 years[27], it is our recommendation that the approach of the *Convention on the Rights of the Child* be adopted.

5. Conclusion

At the beginning of the new millennium, Australia has the opportunity to join the international community in bringing to an end the free reign of those who commit the most extreme human rights abuses. The ICC represents a watershed in the development of international justice and in the creation of a more meaningful notion of global peace and security. Australia has long taken a stance on such matters and should continue to do so in ratifying the Rome Statute. Moreover, we urge JSCOT to recommend that the Government ratify with haste so that Australia may actively participate in and influence the direction of the ICC in its initial years of operation.

There are several concerns with ratifying the treaty, most of which are nullified by a close reading of the Statute itself and by understanding the intelligent approach the Attorney-General's Department has adopted in drafting proposed implementing legislation. Other concerns, which are highly legalistic in nature, require careful assessment.[28] At the same, however, legal considerations need to be placed in a political context:

- What is the likelihood that an ICC crime would be committed in Australia?
- If it were, what is the likelihood that the Australian criminal justice system would be unwilling or unable to conduct a bona fide prosecution?
- If the ICC unfairly determined that Australia had been unwilling or unable to investigate and prosecute, is it realistic that Australia would comply with requests to cooperate?

We consider that even if there could be a successful constitutional challenge to Australia's ratification of the Statute and subsequent enactment of implementing legislation, it is highly unlikely that the challenge would actually arise. Under these circumstances, we strongly advocate the Government's immediate ratification of the Rome Statute and entreat JSCOT to do the same.

---

[25] *Convention against Torture and other Cruel, inhuman or Degrading Treatment or Punishment*, UN Doc. No. A/39/51 (December 10, 1984).

[26] Article 2 of the *Optional Protocol to the Convention of the Rights of the Child on the Involvement of Children in Armed Conflict*, UN Doc No. A/RES/54/263 (May 25, 2000) [entered into force on 12 February 2002]. See *www.unhchr.ch/html/menu2/6/protocolchild.htm*

[27] Clauses 268.67 and 268.87 set out the war crime of conscripting, enlisting or using children.

[28] See our responses at 2.2 and 2.3.