3

Conclusions

3.1 The Committee acknowledges the seriousness of a number of the concerns raised in evidence to the inquiry. The ICC is a hybrid of legal traditions and will operate with control and accountability mechanisms that, in some respects, differ from those in the Australian judicial system.

3.2 Undoubtedly there are risks associated with the establishment of the Court – in particular, that the Court will be subject to pressure from those seeking to pursue their own agenda. But the importance of the Court's objective - bringing those who commit the most heinous of crimes to justice - is undeniable.

3.3 Moreover, the Committee considers that in relation to the concerns:

- ratification of the ICC Statute will not limit the rights of Australian citizens, or diminish the independence of Australia, or alter our internal system of government in any significant way;
- the risk that the domestic implementing legislation would be judged to be unconstitutional is minimal;
- the crimes in the ICC Statute are not novel and, with the passage of the Government's proposed implementing legislation, are defined with the same degree of detail as other domestic criminal offences;
- the ICC will not operate in exactly the same way as an Australian court, but it will be based on universally recognised principles of justice, many of which are derived from common law traditions;
- the ICC Prosecutor will be subject to controls and will have to justify and seek approval for investigations and prosecutions, although the systems of accountability are necessarily different from those applying to officials in our domestic judicial system; and

- the ICC will not inhibit ADF peacekeeping or other operations.

3.4 The Committee is also persuaded that there is more to be gained from establishing a permanent international criminal court than continuing to rely on the sporadic willingness of the international community to establish *ad hoc* tribunals to bring the perpetrators of atrocities to justice.

3.5 On this basis, the Committee recommends that the Government take early action to ratify the Statute of the ICC.

3.6 The Committee believes that the Government's proposed legislation does address most of the contentious issues that have been raised during the inquiry subject to the recommendations set out below. In particular, the Committee believes the legislation will provide further reassurance on the issue of the primacy of Australia's judicial system and, by defining the crimes of genocide, crimes against humanity and war crimes in a manner consistent with our legal traditions, will ensure that Australia will be in a position to try perpetrators of these crimes without recourse to the ICC.

3.7 As an additional safeguard, the Committee has recommended (see recommendation 6) that the Australian Government and Parliament closely monitor the operation of the ICC. This would include the Government tabling in Parliament annual reports on the operations of the ICC and its decisions. These reports should then be the subject of a public inquiry conducted by the Treaties Committee. Such a process would allow an evaluation of whether Australia's adherence to the Statute was consistent with expectations and the maintenance of the primacy of Australian law. The Committee has noted the existence under the Statute of a right of withdrawal (see the section "Withdrawal from the Statute" later in this Chapter).

Recommendation 1

3.8 **The Committee recommends that, subject to other recommendations incorporated elsewhere in this report, Australia ratify the Statute of the International Criminal Court.**

Aims of the Court

3.9 More than 50 years have passed since the international community of nations first contemplated creating an international criminal court to bring to justice those who commit heinous crimes of the type prosecuted at the post-World War II Nuremberg and Tokyo trials.

3.10 In that time, there has been a constant stream of atrocities committed, often against civilian populations, by people who were rarely held accountable for their acts. Genocide, ethnic cleansing and other crimes against humanity have been committed in countries such as the former Yugoslavia, Rwanda, Cambodia, Guatamala, El Salavador, Iraq, Liberia, Somalia, Sierra Leone, Burundi and East Timor.

3.11 Few argue that the world should ignore these crimes and allow those who commit them to go unpunished. But this is what has happened. National jurisdictions have, all too often, proved to be unable or unwilling to investigate prosecute, or punish the perpetrators of these crimes. Apart from the former Yugoslavia and Rwanda (where ad hoc criminal tribunals have been established), the perpetrators of these crimes have in most cases acted with impunity.

3.12 The aim of establishing a means by which the perpetrators of gross violations of human rights can be prosecuted is entirely laudable.

Impact on national sovereignty

3.13 The Committee does not believe that ratification of the ICC Statute would diminish in any significant way the rights of Australian citizens or undermine Australia's position as an independent nation.

3.14 While the Committee accepts that many of the concerns expressed about the impact of ratification on Australia's sovereignty are genuinely felt and derive from a strong sense of national pride, they are based on three fundamental misunderstandings.

3.15 The first misunderstanding is that ratification would involve giving away to the ICC judicial responsibility that Australian courts have traditionally exercised. This is not so.

- The ICC will cover initially only three crimes at international law: genocide, crimes against humanity and war crimes (described as the most serious crimes of concern to the international community). It will not cover matters that have been traditionally within the scope of domestic criminal jurisdictions.
- The ICC Statute is proposing to establish a new judicial mechanism – one that has not previously existed. Although the crimes of genocide, crimes against humanity and war crimes have long been established in international law, there have been few opportunities to prosecute individuals for these crimes. Moreover, national governments have not always had the necessary laws in place to prosecute such crimes within their own jurisdictions. For example, Australian law does not currently criminalise genocide nor does it deal comprehensively with crimes against humanity or war crimes.
- The proposed legislation, upon entering into force, will establish in Australian law those crimes listed in the Statute. More importantly, the legislation will allow Australia as a sovereign nation to bring to justice in Australia, any person who has committed such crimes. The legislation will ensure that these individuals will be tried in Australia with all the legal rights and protections of other citizens under the Australian court system.

3.16 The second misunderstanding is that ratification would create a universal or 'supranational' court, capable of overturning decisions made by domestic courts, including the High Court of Australia. This is not so.

- The ICC will operate outside the realm of national court systems. The ICC Statute does not provide any role for the ICC in examining or reviewing the merits of a decision made by national courts.
- Under the principle of complementary national and international criminal jurisdictions (which is the cornerstone of the ICC Statute) will create an obligation upon States Parties to investigate and, where appropriate, prosecute allegations that their nationals have committed crimes within the jurisdiction of the ICC. The ICC will only prosecute as a court of last resort where the State is unwilling or genuinely unable to carry out the investigation or prosecution. Inability to prosecute presumably would mean that the judicial processes in a State Party have collapsed and are no longer functioning. The ICC could also prosecute where the domestic prosecution has been conducted in a manner clearly intended to shield an accused person from the ICC.

- In light of the comprehensive nature of the proposed legislation should an Australian court acquit a person accused of genocide, crimes against humanity or war crimes, or should an Australian court decide that there are insufficient grounds to proceed with a prosecution, it is reasonable to expect that will be the end of the matter.

3.17 The third misunderstanding is that ratification would *automatically* expose the nationals of State Parties to the jurisdiction of the ICC. This is not so.

- The ICC Statute confirms the primacy of national jurisdictions and provides that the ICC can act *only* if the State is unable or unwilling to prosecute.[1]
- The proposed legislation supports Australian jurisdictional primacy and if the Australian Government chooses to submit a Declaration relating to primacy of jurisdiction as part of its ratification process, as the Committee recommends, this will strengthen further the role of the Australian court system in covering these crimes.

3.18 Some submissions also assert that ratification should be resisted, as it is part of a sinister agenda to hand over national sovereignty to a global government run by the United Nations. The ICC will operate under its own unique Statute separate from the United Nations with a Draft Relationship Agreement between the Court and the United Nations, yet to be confirmed by the parties to the ICC Statute. The ICC has no other purpose than to ensure that those individuals who commit the most heinous of crimes cannot continue to escape justice.

3.19 There is no doubt that, in many cases, treaty making, otherwise deemed to be in the national interest, does involve making concessions or agreeing to act within a set of rules which may limit domestic policy options and potentially involve sanctions. For example:

- agreeing to membership of the World Trade Organisation involves an acceptance that domestic barriers to international trade should be reduced; and
- being party to international fishing agreements involves the acceptance of catch limits and conservation measures.

3.20 The ICC Statute is not seeking to limit or constrain the behaviour of national governments. Instead it is an example of independent nations choosing to act collectively to achieve a consensual objective that, history has shown, cannot otherwise be achieved.

1 Article 17(b) of the Statute.

3.21 Ratification of the ICC Statute would have considerably less impact on governance and policy in Australia than many other treaties. If the Government were to ratify the ICC Statute, Australia would be exercising its sovereign will in a way that:

- does not diminish its standing as an independent nation;
- does not alter the fundamental structures of government or our legal system within Australia in any way; and
- does not impose onerous burdens on Australian citizens.

3.22 The most that can be said about the burden of the Court is that it exposes the nationals of State Parties to a jurisdiction that is secondary and contingent. It is 'secondary' in that it never comes ahead of national jurisdictions and it is 'contingent' in that it is only activated if:

(a) the judicial system within a State has collapsed;

(b) the judicial system within a State operates in a way that is manifestly intended to shield a person from justice because the proceedings were not being conducted independently or impartially, and in a manner which, in the circumstances, that was inconsistent with an intent to bring the person concerned to justice.; or

(c) a State invites the ICC to exercise its jurisdiction.

3.23 The Committee agrees with those who submit that it is inconceivable that Australia's long established and highly regarded judicial system would be judged by the international community to be anything other than well functioning and of the highest integrity.[2] The circumstances in which the ICC would impose its jurisdiction are so unlikely to occur in Australia that it is reasonable to conclude that ratification of the ICC Statute will not expose Australian citizens to any other standard of justice than that administered by Australian courts.[3]

3.24 In the absence of a collapsed State, the only likely circumstances where the ICC might exercise jurisdiction over an Australian national are when the

2 The Committee noted that the ICC's *Rules of Procedure and Evidence* allow for States to bring to the Court's attention 'information showing that its courts meet internationally recognised norms and standards for the independent and impartial prosecution of similar conduct' (see Rule 51).

3 In this context, the Committee noted the argument that some have put forward that if Australia's system of government were to collapse to the point where governments and courts were unwilling or unable genuinely to prosecute individuals for genocide, crimes against humanity or war crimes, there would be valid grounds for the international community to intervene and ensure that justice is done.

government of the day invites the ICC to do so. For example, a future government may choose to relinquish its jurisdictional competence to the ICC if an Australian citizen serving overseas as a mercenary, in a conflict in which Australia was not involved, was alleged to have committed an ICC crime. Similarly, if a person immigrates to Australia and is subsequently indicted by the ICC for crimes committed in their country of origin, a future government may decide to relinquish its jurisdiction if it is considered to be in the national interest.

3.25 Both of these scenarios confirm the primacy of Australia's national jurisdiction and the sovereign power of governments to make decisions for, and in respect of, their citizens.

3.26 To provide further reassurance on this point, the Committee believes there is merit in considering closely the suggestion made by the Australian Red Cross (through its National Advisory Committee on International Humanitarian Law) that the Government should assert explicitly the primacy of Australia's judicial system by:

- ensuring that the legislation it proposes to introduce to implement the ICC Statute provides that an Australian citizen or person ordinarily resident in Australia and engaged in an operation authorised by the Government shall be subject to Australian national criminal jurisdiction (thereby reflecting the complementarity principle); and
- at the time it ratifies the ICC Statute, depositing a Declaration of its understanding of the primacy of national criminal law and the secondary and contingent nature of the ICC's jurisdiction.

3.27 The Committee has been concerned throughout this inquiry to ensure that the complementarity principle will be workable and to ensure that Australia will have primacy of jurisdiction in all cases arising under the umbrella of the ICC Statute.

3.28 Both the ICC bill and the consequential amendments bill reflect this intent. Section 3 of the ICC bill 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.

3.29 The consequential amendments bill also reflects this under cl. 268.1 (2):

> It is the Parliament's intention that the jurisdiction of the International Criminal Court is to be complementary to the jurisdiction of Australia with respect to offences in this Division that are also crimes within the jurisdiction of that Court.

3.30 While the Committee acknowledges this emphasis on Australia's primary jurisdiction with respect to ICC crimes it considers that the term primary should be replaced by 'primacy' to emphasise that Australia will be well able to deal with specified offences within the Australian legal system without recourse to the ICC.

3.31 To this end the Committee recommends the following modifications to the ICC bill.

Recommendation 2

3.32 The Committee recommends that Clause 3 (2) of the International Criminal Court Bill be amended to read:

Accordingly, this Act does not affect the primacy of Australia's right to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC.

3.33 In the same context the Committee believes that the text of the consequential amendments bill should also reflect this stronger approach.

Recommendation 3

3.34 The Committee recommends that Section 268.1 (2) of the International Criminal Court (Consequential Amendments) Bill be amended to read:

(2)(i) It is the Parliament's intention that the jurisdiction of the International Criminal Court is to be complementary to the jurisdiction of Australia with respect to offences in this Division that are also crimes within the jurisdiction of that Court.

(ii) Accordingly, this Act does not affect the primacy of Australia's right to exercise its jurisdiction with respect to offences in this Division that are also offences within the jurisdiction of the ICC.

3.35 In proposing these amendments to the implementing legislation the Committee considers that this will clearly enunciate Australia's intent as a sovereign nation to apply its own laws, laws which mirror those of the ICC Statute, and apply them to any person residing in Australia who has been accused of committing genocide, crimes against humanity, or war crimes.

3.36 The suggestion by the Australian Red Cross, that Australia should lodge a declaration clarifying its understanding of the complementarity principle as part of its ratification process, is one which the Committee considers has merit also. Such a declaration may reflect the text in the following recommendation.

Recommendation 4

3.37 **The Committee recommends that the Government of Australia concur with the preamble of the Statute which notes that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes and that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.**

The Committee further recommends that, in noting the provisions of the Statute of the International Criminal Court, the Australian Government should declare that

- **it is Australia's right to exercise its jurisdictional primacy with respect to crimes within the jurisdiction of the ICC, and**
- **Australia further declares that it interprets the crimes listed in Articles 6 to 8 of the Statute of the International Criminal Court strictly as defined in the *International Criminal Court (Consequential Amendments) Bill*.**

3.38 It is also worth noting that Australia and Australian citizens have been exposed to the potential of trial before international courts for many years. The International Court of Justice has been in operation for over 50 years and more recently tribunals such as the International Tribunal for the Law of the Sea and the World Trade Organisation's Dispute Settlement Body have been established. At an individual level, Australia's extensive network of extradition arrangements means that a person accused of an

offence in another country can be surrendered to face trial in that country. Australian citizens have also been exposed to the prospect of trial by foreign courts for war crimes, in accordance with the 1949 Geneva Conventions. There have been few arguments over the years that any of these arrangements jeopardise our national sovereignty or judicial independence.

3.39 In the event that the ICC acts in a way that corrupts the complementarity principle, thereby compromising the primacy of national judicial systems, Australia, like any other signatory, could always exercise its sovereign right to withdraw from the Statute (see the section "Withdrawal from the Statute" later in this Chapter).

Concerns about constitutionality

3.40 The Parliament's capacity to enact legislation, pursuant to section 51(xxix), to give effect to international obligations is well-established in law and practice. Moreover, this power has been interpreted broadly by the High Court in a series of cases.[4]

3.41 Blackshield and Williams, in *Australian Constitutional Law and Theory*, noted that 'the view that s 51 (xxix) would authorise laws to implement the provisions of an international treaty has been expressed by constitutional authorities since the earliest years of federation.'[5]

3.42 Moens and Trone, in Lumb and Moens *The Constitution of Australia Annotated*, argued that recent decisions of the High Court have 'continued this expansive interpretation of the [external affairs] power', citing Mason J in *Commonwealth* v *Tasmania*:

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4 See Koowarta v. Bjelke-Peterson (153 CLR 168 (1982), discussing section 51 in relation to the *Racial Discrimination Act 1975*; Commonwealth v. Tasmania (158 CLR 1,172 (1983), 'As soon as it is accepted that the Tasmanian wilderness area is part of world heritage, it follows that its preservation as well as being an internal affair, is part of Australia's external affairs'; Polyukhovich v. Commonwealth (172 CLR 501, 528 (1991), 'Discussion of the scope of the external affairs power has naturally concentrated upon its operation in the context of Australia's relationships with other countries and the implementation of Australia's treaty obligations. However, it is clear that the scope of the power is not confined to these matters and that it extends to matters external to Australia.' (cited by Katherine Doherty and Timothy McCormack in 'Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation', *UC Davis Journal of International Law and Policy*, Vol 5, Spring 1999, No. 2, p. 157)

5 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory*, 2nd Edition, 1998, p. 685. Blackshield and Williams refer to decisions of the High Court in 1906, 1921 and 1936 and statements by Alfred Deakin as Attorney-General in 1902.

> … it conforms to established principle to say that s 51(xxix) was framed as an enduring power in broad and general terms enabling the Parliament to legislate with respect to all aspects of Australia's participation in international affairs and of its relationship with other countries in a changing and developing world and in circumstances and situations that could not be easily foreseen in 1900.[6]

3.43 Lane, in *Commentary on the Australian Constitution*, summarised the effect of the High Court's interpretation as being that the subject of the Executive's international undertakings is 'virtually limitless' and that the test for validity of such action and its domestic implementation is simple:

> … the simple test for validity is, is there a Commonwealth Government international commitment on any kind of matter, followed by the Commonwealth Parliament's action under s 51(xxix)? That is all.[7]

3.44 The Committee agrees with the conclusion drawn by Doherty and McCormack that it is:

> … clear that the Federal Parliament has the requisite constitutional competence to introduce legislation to bring the *Rome Statute* crimes into Australian criminal law should it choose to do so.[8]

3.45 The remaining Constitutional arguments are, to varying degrees, plausible, but are not persuasive.

3.46 The most complete argument presented is that ratification of the ICC Statute would be inconsistent with Chapter III of the Constitution, which provides that Commonwealth judicial power shall be vested in the High Court of Australia and such other federal courts as the Parliament creates. However, the Committee accepts as reasonable the Attorney-General's submission (relying upon advice from the Australian Government Solicitor and referring to Justice Deane's dicta in Polyukhovich) that the ICC will not exercise the judicial power of the Commonwealth, even if it were to hear a case relating to acts committed on Australian territory by Australian citizens. The judicial power to be exercised by the ICC will be that of the international community, not of the Commonwealth of Australia. As noted by the Attorney, the international community's

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6 Gabriel Moens and John Trone, Lumb and Moens *The Constitution of the Commonwealth of Australia Annotated*, 6th Edition, 2001, p. 144

7 PH Lane, *Commentary on the Australian Constitution*, 2nd Edition, 1997, p. 301

8 Doherty and McCormack, 'Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation', *UC Davis Journal of International Law and Policy*, Vol 5, Spring 1999, No. 2, p. 161

judicial power has been exercised on previous occasions, for example in the International Court of Justice and the International Tribunal for the Law of the Sea. Australia has been party to matters before both these tribunals.

3.47 In summary, the Committee's view is that:

- while acknowledging that some of the evidence received presents an arguable case, the Committee is not persuaded that the High Court would find the Government's proposed implementing legislation to be invalid;
- it is reasonable for Parliament to proceed on the basis of properly considered advice from the Attorney-General that the proposed implementing legislation will not be in breach of the Constitution; and
- it is extremely unlikely that the matter will ever be tested by the High Court, as there is very little chance that an Australian national will ever be charged with a Statute crime for an offence committed in Australia *and* that the Australian judicial system will show itself to be unwilling or unable genuinely to carry out the investigation or prosecution.

3.48 The Committee does not accept that the legislation is likely to contravene the Constitution. In any case, the new laws could be tested in accordance with usual practice if there were any constitutional concerns.

3.49 It is of considerable importance that Australia be at the first assembly of the States Parties to take place after the Statute comes into force on 1 July 2002. That first meeting is likely to be held in September 2002 and is expected to settle the rules of procedure and evidence, the *Elements of Crimes* document, the timing and procedure for the election of judges, and the first annual budget. To participate in the first meeting of State Parties, Australia needs to deposit its instrument of ratification by 2 July 2002.[9] The Committee was advised by the Attorney-General's Department that ratification should not proceed until domestic legislation is in place. The Committee has carried out a thorough examination of the draft legislation during the course of this inquiry.

Recommendation 5

3.50 **The Committee recommends that the *International Criminal Court Bill* and the *International Criminal Court (Consequential Amendments) Bill***

9 Joanne Blackburn, *Transcript of Evidence*, 10 April 2002, p. TR289.

be introduced into Parliament as soon as practicable subject to consideration of recommendations elsewhere in this report.

The proposed implementing legislation and the ICC crimes

3.51 It is important to ensure there is no conflict between the intent and operation of the Australian legislation and the operation of the ICC. To guard against this possibility the Committee believes that the issues concerning the legislation, raised below, need to be considered carefully by the Attorney-General when final drafting of the legislation is undertaken, and during its passage through the Parliament. There should be little difference between key definitions of crimes in the Statute, the *Elements of Crimes* document and the Australian legislation.

Definitions of ICC crimes

3.52 The Committee acknowledges the view put in some submissions that the crimes of genocide, crimes against humanity and war crimes, as defined in the ICC Statute, seem to be capable of wide interpretation. The Committee does not, however, share the conclusion drawn by some that the crimes are so ill-defined as to allow the ICC to 're-engineer social policies throughout the world.'

3.53 It is important to recognise that the crimes within the jurisdiction of the ICC are not new, in that the definitions of these crimes draw upon long established principles of law. The definitions codify both customary international law and the provisions of treaties including the 1948 Genocide Convention, the 1949 Geneva Conventions and the 1984 Torture Convention, elements of which have been incorporated into Australian domestic law over the years.

3.54 In addition:

- it is not uncommon for international treaties to use language which expresses broad intent and for individual nations to incorporate these intentions with more precise language in their domestic law;
- the definitions in the ICC Statute need to be read in conjunction with the amplification contained in the draft *Elements of Crimes*;
- considerable further refinement is provided in the implementing legislation the Government intends to introduce to ensure that

Australia's domestic criminal law mirrors the full range of crimes described in the ICC Statute; and

- the interpretation and practical application of laws is a matter of daily business for Australian courts.

3.55 The Committee is confident that the ICC bill and the consequential amendments bill provide a thorough and effective coverage of Statute crimes which are defined in a manner, and with a level of detail, consistent with Australia's legal traditions. While there are some issues in relation to how crimes under the Statute are reflected in the legislation, the Committee is confident that the legislation will meet Australia's responsibilities under the Statute and ensure that there should be very little possibility that any Australian citizen will face ICC crimes outside the Australian legal system. The Committee notes that New Zealand, the United Kingdom and Canada, countries with a similar legal heritage, have also incorporated the ICC crimes into their national criminal jurisdictions.

3.56 Some submissions have expressed concern that when the ICC comes into operation it may begin to develop its own particular brand of jurisprudence which may not in all cases be appropriate to application under the Australian legal system. The Committee is confident that the Statute and the implementing legislation will provide adequate protection for Australian citizens. However, the Government should acknowledge these concerns and monitor the general operation of the ICC and the application of the complementarity principle, with particular reference to jurisprudence that may be developed by the ICC and its potential impact on the Australian legal system and citizens of Australia.

Recommendation 6

3.57 **The Committee recommends that:**

- **the Australian Government, pursuant to its ratification of the Statute, table in Parliament annual reports on the operation of the International Criminal Court and, in particular, the impact on Australia's legal system; and that**
- **these annual reports stand referred to the Joint Standing Committee on Treaties, supplemented by additional Members of the House of Representatives and Senators if required, for public inquiry.**

The Committee envisages that, in conducting its inquiries into these

annual reports, it would select a panel of eminent persons to provide expert advice.

3.58 Implementation of the above recommendation would allow the Government and the Parliament to evaluate whether Australia's adherence to the ICC Statute was consistent with their expectations and the maintenance of the primacy of Australian law. The Committee notes that, ultimately, any State Party has the right to withdraw.

The definition of rape

3.59 The Committee concurs with the opinion presented by the Australian Red Cross that the definition of rape in the consequential amendments legislation should reflect more closely the crime of rape as laid out in the *Elements of Crimes,* in relation to the victim's lack of consent. While the current coverage of rape may fall within the provisions of the draft legislation on 'sexual violence'[10] the Committee agrees with the contention that if a person was being charged with a war crime or crimes against humanity, the court should be given the option of looking at the question of the coercive environment, which might make the particular individual victim's consent or lack of it, irrelevant to the prosecution of the crime. The text of the legislation should reflect this point in law.

Recommendation 7

3.60 **The Committee recommends that the Attorney-General review clauses 268.13 and 268.58 pertaining to the crime of rape in the International Criminal Court (Consequential Amendments) Bill 2001 and harmonise the definitions with the approach taken in the *Elements of Crimes* paper in a manner consistent with Commonwealth criminal law.**

10 See clauses 268.1, 268.63 1 and 268.86 of the consequential amendments bill. (Attorney-General's Department, *Submission No. 232.2*, p. 2). See also as an example *Elements of Crimes,* Article 7(1)(2)(g)(1) 2 which states: 'The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent'.

Exemption on the basis of official capacity

3.61 The Committee received evidence which claimed that the legislation, as currently drafted, does not reflect the intent of Article 27 of the Statute, which provides that the official capacity of a government official shall not exempt that person from criminal responsibility under the Statute. The Attorney-General's Department informed the Committee that the draft Bills do not repeat the provisions of Article 27, because under customary international law an international tribunal may deal with a person alleged to have committed an international crime, regardless of the person's official capacity. However, if as the Attorney-General's Department submission suggested, there are limitations on Australia's arrest and surrender of a person with official capacity to an international tribunal in certain circumstances,[11] the Committee believes that there should be a review of the relevant provisions to determine whether they can express more effectively the position.

3.62 An additional aspect relating to Article 27 of the Statute, raised by the Castan Centre, was that the legislation should articulate a position on the statute of limitations and immunities attaching to official capacities in order to avoid the possibility arising that application of these barriers might lead the ICC to determine that, under Article 17, Australia was unwilling to investigate a case itself.

Recommendation 8

3.63 **The Committee recommends that the Attorney-General review the legislation to ensure that the responsibilities required under Article 27 of the Statute are fully met either in the proposed bills or in current applicable legislation.**

11 '…. there are limitations on Australia's arrest and surrender of a person with official capacity to an international tribunal in certain circumstances. This is recognised in Article 98.1 of the Statute, which provides that the Court may not proceed with a request for arrest and surrender which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of the person or property of a third State, unless the Court can first obtain a waiver of that immunity from the third State. Article 98.1 is reflected in clause 13 of the draft International Criminal Court Bill 2001' (Attorney_General's Department, *Submission No. 232.2*, p. 1).

Breaches of the Geneva Conventions

3.64 One of the intentions of the consequential amendments bill is to bring together under the *Criminal Code Act 1995* all crimes of international concern within the jurisdictional competence of the ICC. The Committee concurs with this approach. However, as the Australian Red Cross pointed out there may be a potential problem with the proposed repeal of Part II of the *Geneva Conventions Act 1957* which criminalises grave breaches of the Geneva Conventions 1949 and of Additional Protocol I. It is important that the jurisdictional competence of Australian Courts not be affected for the period from 1957 to the date of commencement of the new legislation, by the repeal of Part II. It is possible that Section 8(b) of the *Acts Interpretations Act 1901* may cover this problem.

Recommendation 9

3.65 **The Committee recommends that the Attorney-General ensure that the *International Criminal Court (Consequential* A*mendments) Bill* does not limit the jurisdiction of Australian courts with respect to crimes under Part II of the *Geneva Conventions Act* 1957, for the period between 1957 and the commencement of the proposed legislation. The Committee further recommends that the *Explanatory Memorandum* for the proposed legislation state clearly how coverage of these crimes for the intervening period is to be provided.**

Subdivision H of the consequential amendments bill

3.66 Evidence presented to the Committee from the Australian Red Cross suggested a problem arises in subdivision H because some of the war crimes offences are repeats of offences already covered in subdivisions D or E of the legislation.[12]

12 'Proposed Section 268.96, the war crime of 'medical or scientific experiments' repeats the same offence as proposed Section 268.47 (in Subdivision E). Both Sections 268.96 and 268.47 enumerate 5 similar elements of the specific offence but those elements are not identical. For example, Section 268.96(l)(c) incorporates an objective test for evaluating the perpetrator's conduct such that the conduct is not 'consistent with generally accepted medical standards that would be applied under similar medical circumstances to persons who are nationals of the perpetrator...'. Since Section 268.47 contains no such explicit reference to an objective standard of conduct, it is arguable that the prosecution may be required to prove a subjective standard — that is, that the accused themselves knew that their conduct was unjustified by the medical condition of the victim. Such a subjective standard may be more difficult to prove

3.67 The Committee understands why this approach was adopted, but it would be possible for future defendants to raise objections if they were charged with a specific war crime appearing twice in the legislation if the prosecution were to choose the specific offence with the less onerous burden of proof.

Recommendation 10

3.68 **The Committee recommends the Attorney-General review Subdivisions H, D and E of the *International Criminal Court (Consequential Amendments) Bill* to ensure consistency in the definition of offences.**

Additional legislative issues

3.69 A number of other issues were raised in evidence, which are presented here with the purpose of alerting the Attorney-General's Department to these issues, when it reviews the proposed legislation before its presentation to the Parliament. These were:

- there should be time constraints on issuing arrest warrants – cl 21 and 22 of the ICC Bill are deficient because they do not impose time limitations like those under Article 59 of the Statute;[13]
- that cl 102 be amended to extend privileges and immunities to ICC officials not named in Article 48(2) of the Statute;
- that in defining torture as a war crime the consequential amendments bill has the effect of broadening the crimes ambit rather than following the approach in the Statute;
- the need for consideration of Australia's commitment to the minimum age for conscription, which is set at 15 under the Statute and the consequential amendments bill, although Australia's commitment under the Convention on the Rights of the Child sets the age at 18 years.

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beyond reasonable doubt in some circumstances than an objective test of 'generally accepted medical standards'. Disparity in the specific elements of the same crime referred to in two different Subdivisions of the draft legislation cannot be helpful' (Australian Red Cross National Advisory Committee on Humanitarian Law, *Submission No. 18.4, p. 4).*

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

- that there is adequate protection in the legislation to ensure persons are not held on remand for unduly long periods when they are charged for ICC crimes;
- that there is adequate provision under the legislation for legal aid within Australia and some similar provision under the Statute where a case is heard by the ICC; and
- that the passage of legislation relating to the proceeds of crime (the *Proceeds of Crime Bill 2002* and the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002)* currently before the Parliament, will not have a major impact on complementary clauses in the final ICC legislation.

Recommendation 11

3.70 **The Committee recommends that Attorney-General review the *International Criminal Court Bill* and *the International Criminal Court (Consequential Amendments) Bill* in relation to the matters listed in paragraph 3.67 of this report.**

Accountability of the Prosecutor and Judges

3.71 There is no doubt that the ICC will be a blend of different legal cultures. There will be some elements of the proposed regime which, from an Australian common law perspective, seem unfamiliar.

3.72 The Committee is sympathetic to the observation made by many witnesses that not all of the nations subscribing to the ICC share Australia's long-standing regard for the rule of law and proud history of judicial independence and competence. Not all judicial systems, are of equal standing. Nevertheless, 'different' does not equate to 'worse'.

3.73 The important issue is not the differences between the Australian legal tradition and the regime proposed for the ICC, but whether the checks and balances in the ICC's regime are sufficient to ensure the integrity of the process overall.

3.74 In procedural terms, many of the checks and balances are familiar and sound:

- an accused person has rights comparable to those available in common law countries (including the presumption of innocence and the right to a speedy trial);
- victims have rights (including the rights to participate in proceedings and to receive compensation);
- the rules of evidence are consistent with those applying in Australian courts; and
- there are rights of appeal to a separate chamber of the ICC, constituted by judges who only hear cases on appeal.

3.75 It is the role and accountability of the Prosecutor which is most problematic. In the common law tradition the roles of investigator and prosecutor are carefully separated and performed by officials answerable to different ministers in the Executive Government. In the ICC model the role of investigator and prosecutor are combined and operate without Executive oversight. This is not to say the ICC Prosecutor will be able to operate in an unfettered manner.

3.76 The ICC Statute and the *Rules of Procedure and Evidence* establish a decision making and accountability structure to be followed by the Prosecutor when seeking to initiate an investigation. First, the Prosecutor must conclude that there is a reasonable basis to proceed, then he or she must seek the authority to investigate from three judges sitting as a Pre-Trial Chamber (Article 15(3)).[14] Article 53 further provides that in considering whether there is a reasonable basis to proceed the Prosecutor must consider whether:

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14 Article 57 of the Statute provides that orders or rulings of the Pre-Trial Chamber must be by a majority of the judges, where those orders or rulings relate to

- Article 15 – requests by the Prosecutor to initiate an investigation
- Article 18 – application by the Prosecutor to initiate an investigation, despite a request by a State that the Prosecutor defer to the State's own investigation
- Article 19 – challenges to the jurisdiction of the Court or the admissibility of a case
- Article 54, para 2 – authorising the Prosecutor to conduct investigations on the territory of a State, where the Pre-Trial Chamber has determined (under Article 57(3)(d)) the State "is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request…"
- Article 61, para 7 – pre-trial hearings to confirm (or decline to confirm) the charges on which the Prosecutor intends to seek trial
- Article 72 – determinations re protection of information of possible national security importance.

Unless otherwise provided for in the Rules of Procedure and Evidence, or by a majority of the Pre-Trial Chamber, "in all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in [the] Statute.." (Article 57(2)(b)).

(a) the information available provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed;

(b) the case would be admissible under Article 17 (that is, the complementarity principle does not stand in the way); and

(c) taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

3.77 Before authorising the commencement of an investigation the Pre-Trial Chamber must likewise assess whether there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court (Article 15(4)).

3.78 At any time during an investigation the Prosecutor may apply to the Pre-Trial Chamber for an arrest warrant to be issued. In considering whether to issue a warrant, the Pre-Trial Chamber must be satisfied that there are reasonable grounds for believing that the person has committed a crime within the jurisdiction of the Court and that the arrest of the person appears necessary (Article 58(1)).

3.79 Before proceeding to trial the Prosecutor must provide the Pre-Trial Chamber with sufficient evidence to establish that there are substantial grounds to believe the accused has committed a crime within the jurisdiction of the ICC. If the Pre-Trial Chamber determines that there are such grounds it shall confirm the charges and commit the person to trial (Article 61(7)).

3.80 At the trial, the onus is on the Prosecutor to prove guilt and, in order to convict, the Court must be convinced of the person's guilt beyond reasonable doubt (Article 66).

3.81 While these steps seem to provide a rigorous and transparent means of checking the propriety of investigations and the merits of a prosecution, they do rely to a significant degree on the competence and integrity of the Prosecutor and, importantly, of the judges of the Court.

3.82 In this regard, there is no reason to conclude that the judges and officials appointed to the ICC will be less able than those appointed to the International Court of Justice or the Tribunals for the former Yugoslavia and Rwanda, some of whom have been Australian jurists and officials of the highest calibre. In coming to this view, the Committee notes that the criteria and procedures described in the Statute for the selection of judges and officials are more transparent than those used to select judges for Australian courts.

3.83 In summary, the Committee's view is that:

- the ICC will operate in accordance with widely recognised legal principles;
- there are sufficient checks and balances in the ICC regime to ensure that it highly unlikely that a Prosecutor could pursue unjustified or politically motivated prosecutions under the influence of third parties; and
- there is no reason to conclude that the judges of the Court will be less eminent or qualified than those that have been appointed to other international tribunals.

3.84 If at any time the Prosecutor or the judges of the Court were to act in a manner inconsistent with the standards expected of the Court and prescribed in the Statute, they would be censured not only by the Assembly of State Parties, but also by the wider international community.

3.85 For Australia, along with other State Parties, the ultimate response to a dysfunctional Court would be to withdraw from the Statute.

Withdrawal from the Statute

3.86 As mentioned previously, some of those who made submissions to the inquiry were concerned about what would happen if the ICC developed over time into an institution operating in a manner which failed to meet the ideals expected of it by its current proponents. The concern was that Australia might well come to regret ratifying the Statute. It should be borne in mind that States becoming Parties to the Statute have the power to reverse their decision.

3.87 Article 127 of the Statute sets out the right of States to withdraw from adherence to the Statute, by way of written notification to the Secretary-General of the United Nations. The withdrawal would take affect one year after receipt of the notification, unless the notification specified a later date.

3.88 Withdrawal would not absolve a State Party from obligations that arose while it was still a Party. For example, withdrawal would not effect the obligation to cooperate with the ICC in relation to criminal investigations and proceedings that were commenced before the date on which the withdrawal became effective.

Impact on the Australian Defence Force (ADF)

3.89 Claims that ratification of the ICC Statute would inhibit the deployment of ADF forces warrant careful examination. It clearly would not be in the national interest to jeopardise Australia's capacity to contribute to international defence or peacekeeping operations, or to expose ADF members to increased risks while engaged in such operations.

3.90 The Committee was reassured, however, by advice that at the highest ranks of the ADF there is support for the establishment of the ICC. The Committee is also confident that the complementarity principle will ensure the continued primacy of Australia's civilian and military systems of criminal justice. This confidence is reinforced by Article 98(2) of the ICC Statute, which obliges the ICC to defer to national justice systems where peacekeeping forces are supported by bilateral 'status of forces' agreements. Such agreements are commonplace.

3.91 The Committee notes claims that establishment of the ICC would relieve ADF peacekeepers of the burden of acting as law enforcement and judicial authorities while on peacekeeping operations.

3.92 The Committee understands that while no specific provisions concerning the role of the ADF are included in the Government's proposed implementing legislation the ADF's existing military justice laws and the new laws under the proposed ICC bills will not be in conflict. Nevertheless, it is important that the scope and impact of the new laws are communicated promptly and effectively to all ADF personnel. Such measures will help preserve the ADF's enviable record in promoting and protecting international human rights.

3.93 It was suggested to the Committee that ratification of the ICC Statute would expose ADF members to the risk that false charges of war crimes could be made against them[15]. In the Committee's view, the risk of false charges would be no greater following the establishment of the ICC than it is at present.

15 Digger James, *Submission No. 9,* p. 1: ' the new International Criminal Court would expose Australian servicemen to great dangers of unfounded prosecutions and would hamstring our armed services'.

Permanent court *vs. ad hoc* tribunals

3.94 The Committee acknowledges the important work being done by the ICTY and the ICTR and accepts that, in some ways, the narrowness of their mandate is a key element of their success.

3.95 On the other hand, the Committee is of the view that generally *ad hoc* tribunals are a poor substitute for a permanent international criminal court. The fact that only two *ad hoc* tribunals have been established since the post-World War II tribunals is ample demonstration that the establishment of such tribunals is subject to international political influence and that the vagaries of such influence cannot be relied upon to bring to account the perpetrators of those atrocities to which the ICC is directed.

3.96 The strongest arguments in support of a permanent court are that it:

- would help ensure that consistent judicial standards and procedures are developed and applied; and
- may help reduce the influence of international politics in decisions about what crimes to investigate and prosecute, thereby minimising the risk of 'victor's justice'.

Application to non-State parties

3.97 It has been argued that the ICC Statute breaches a fundamental principle of international relations by seeking to impose obligations on non-State parties. A distinction must be drawn between:

- application to non-State parties (which can occur *only* with the consent of the non-State party); and
- application to the *nationals* of non-State parties (which can, in certain circumstances, occur even when consent is denied).

3.98 The ICC Statute clearly provides that the Court's jurisdiction can extend to the nationals of non-State parties if either:

- a national of a non-State party has committed a Statute crime in the territory of a State party; or

- the UN Security Council refers a matter to the Court (such a matter could involve the commission of a Statute crime by the national of a non-State party in the territory of a non-State party).

3.99 The Committee acknowledges that there is a distinction between application to non-State parties and application to the nationals of non-State parties, but the principle of universal application of international human rights law, regardless of nationality, is not without precedent.

3.100 In this instance, the Committee acknowledges that a significant proportion of the international community has agreed that extending the Court's jurisdiction to cover the nationals of non-State parties, in the circumstances described above, is an appropriate element of the new international criminal justice system the ICC Statute proposes to establish.

'Opt out' clause

3.101 The Committee recognises the concern that has been expressed about the provision in the ICC Statute that allows State Parties to 'opt out' of the ICC's jurisdiction in relation to war crimes for a period of seven years. This clause does permit delayed application of the ICC's jurisdiction and can be seen as a weakness in the Statute.

3.102 On the other hand, the existence of this clause may encourage some nations emerging from periods of conflict to consider ratifying without the risk of immediately exposing their nationals to prosecution. While some perpetrators of atrocities may, as a result, escape justice, future crimes may be deterred or punished.

3.103 The Committee notes that the 'opt out' clause is described as a 'transitional provision', to be reviewed 7 years after the ICC Statute enters into force (Articles 124 and 123).

Timing of Ratification

3.104 On balance, the Committee agrees that there would have been merit in Australia seeking to be one of the first 60 nations to ratify the ICC Statute. This, however, has not been possible owing to the fact that the exposure draft of the legislation was not received until 31 August 2001, the prorogation of the Parliament for the 2001 election and the reconstitution of the Treaties Committee for the 40th Parliament not occurring until

March 2002. Nevertheless, it is important that Australia be a State party at the inaugural meeting of the Court if this is at all possible.

3.105 Australian Government and non-government representatives have played a leading role in advocating the creation of the ICC and in preparing the ICC Statute, the draft *Elements of Crimes* and the draft *Rules of Procedure and Evidence*. It would be in Australia's interests if the Government were to play a similar role leading up to, and at, the first meeting of the Assembly of State Parties.

3.106 It is in this period that the administrative arrangements for the ICC will be established and the principal officers of the Court (that is the judges, prosecutors and registrars) will be selected. Decisions on these matters will greatly influence the initial culture, method of operation and professional standing of the Court.

Julie Bishop MP
Committee Chair

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