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Report 45

The Statute of the International Criminal Court

Joint Standing Committee on Treaties

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Chair's Foreword

Over the last 100 years the international community has grappled with the consequences of armed conflict, and the need to strike a balance between what is militarily necessary to achieve national aims and the inherent inhumanity of war, particularly its impact on non-combatant civilians.

The idea of the establishment of an international court to impose international and humanitarian law was first raised at the Hague Peace Conference in 1907. It was discussed again after the Great War at the Versailles Peace Conference in 1919. At the end of World War II the Nuremberg and Tokyo Tribunals were established to try, for the first time, individuals for war crimes and crimes against humanity. Thereafter, the idea of a permanent international criminal court was taken up by the United Nations and by 1953 a constitution for such a court was drafted. However, tensions created by the Cold War led to a stalemate over the idea and there was little or no progress on the proposal until after the end of the Cold War.

In 1993 the International Law Commission submitted to the United Nations a draft proposal recommending an international conference be held to finalise a treaty. Subsequently in July 1998 a conference was held in Rome at which 120 States, including Australia, voted in favour of signing a draft Statute for the establishment of an International Criminal Court (ICC).

As at the date of tabling this Report, 66 States had ratified the Statute with the consequence that the ICC Statute will come into force as from 1 July 2002.

The aim of the ICC is to be a permanent international criminal tribunal to prosecute those individuals who commit, in the eyes of the international community, the most serious of crimes - war crimes, genocide and crimes against humanity.

The ICC Statute was referred to this Committee in October 2000. For the past 18 months the Committee has received a significant number of submissions on the Statute and its likely or perceived impact on Australian sovereignty, on our legal system, on our international obligations and on the operations of our defence forces.

The Committee has reviewed and analysed not only the text of the ICC Statute but also the proposed implementing legislation referred by the Attorney General which would incorporate into Australian law the crimes under the ICC Statute, with a view to creating within the Australian legal system a jurisdiction complementary to the ICC.

The consequences of ratification of the Statute are a matter of considerable interest within the community. There have been strong opinions expressed both in favour of and against the establishment of the ICC. While most submissions support the objectives of the ICC as laudable, a number believed that the proposed ICC is seriously flawed. The position of the United States, in its recent notification to the United Nations of its intention not to become a party to the ICC Statute, perhaps best summarises these views when it stated:

“ We believed that a properly created court could be a useful tool in promoting human rights and holding the perpetrators of the worst violations accountable before the world – and perhaps one day such a court will come into being. But the International Criminal Court that emerged from the Rome negotiations...will not effectively advance these worthy goals.”¹

Others expressed a strong view that ratification of the Statute would impact on Australia’s sovereignty to the extent that Australian law would be subverted and we would be surrendering to an international authority the right to detain and try Australian citizens.

The Committee recognises that Australia’s entry into any international treaty involves a degree of loss of sovereignty and therefore to ratify this Statute will necessarily involve a degree of voluntary surrender of exclusive criminal jurisdiction. However, the committee is also mindful of the benefits to Australia and its defence forces, prisoners of war and civilian population that could flow from the protection of an effective international instrument dedicated to upholding established principles of international law.

The constitutional validity of ratification of the ICC Statute was also challenged, with a number expressing the opinion that it would be inconsistent with Chapter III of the Constitution which provides for the Commonwealth judicial power to be vested in the High Court and other federal courts. The Committee notes that if there were a constitutional barrier to ratification, it has not been applied to

1 Marc Grossman, United States Under Secretary for Political Affairs, in a speech to the Centre for Strategic and International Studies, Washington DC, 6 May 2002
<http://www.state.gov/9949.htm>.

previous acts of ratification in similar circumstances, notably the establishment of the International Court of Justice.

Without seeking to summarise all the objections, there were other concerns about the definitions of the crimes covered by the Statute, the likely operation of the Court, whether the rules of procedure and evidence will be of a standard equal to that in the Australian legal system, the likelihood of politically motivated prosecutions, the role of the Prosecutor and the overall accountability of the Court.

Those in favour of ratification of the Statute pointed to the undeniable fact that the international community has not previously come up with a means to ensure that those responsible for the atrocities that have been committed, often against civilian populations, have been brought to account for their crimes. The Nuremberg and Tokyo War Tribunals were as effective as they could be in the circumstances, given that they came into operation after the event. The ad hoc tribunals set up to deal with the crimes committed in the former Yugoslavia and Rwanda have also been effective, given the circumstances.

However, the supporters of the ICC point out that the crimes of genocide, ethnic cleansing and other atrocities have occurred in countries such as Cambodia, Guatemala, El Salvador, Iraq, Liberia, Somalia, Sierra Leone, Burundi and East Timor and those who have committed these crimes have often gone unpunished.

It is feared that if nothing is done on an international scale to bring to justice perpetrators of gross crimes against humanity, such as the establishment of a permanent criminal court, then such criminals will continue to act with impunity.

In weighing the arguments for and against ratification, the Committee was deeply conscious of the laudable objectives of the ICC. It is designed to hold accountable the perpetrators of the worst violations against humanity. Clearly, there is an expectation on the part of ratifying States that, if the ICC operates in a way such as to earn credibility and the respect of the international community, it should promote a greater commitment to human rights and international humanitarian law in the global context.

Undeniably, the establishment of such a court involves risks. It will be the first demonstration of the collective will of a number of States, to establish a permanent institution that will have the power to act in relation to the perpetration of war crimes, genocide and crimes against humanity, in circumstances where the State who otherwise would have jurisdiction to try such crimes is unwilling or unable to do so.

There are risks associated with how the ICC will evolve, in what circumstances it will claim jurisdiction, the manner by which cases are referred to the ICC, the impact on domestic legal systems and the impact on the rights of citizens.

The Committee recognises these risks, but believes that, with an appropriate level of monitoring and review of the ICC's operations, as recommended in this report, these risks can be minimised insofar as they impact upon Australia, our legal system and our citizens. There are numerous checks and balances inherent in the proposed process but the Committee acknowledges that only when it is established and fully functioning will those risks be completely assessable.

Therefore the Committee has in this report recommended to the Government that there be an annual review and detailed scrutiny by the Parliament of the ICC and its operations. This further check on the accountability of the ICC has persuaded a number of committee members that Australia will be able to retain an effective watching brief over our participation in and support for the ICC should it act or develop in a way adverse to Australia's national interest and contrary to the expectations of the maintenance of the primacy of Australian law.

Concerns have been expressed that the ICC will be an unaccountable supranational body with unfettered power able to initiate or preside over capricious or politically motivated prosecutions. There were concerns that our defence forces could be unfairly targeted by those opposed to Australia's interests. The Committee believes that if the Court were to entertain such prosecutions it would quickly lose the support of the international community. Ultimately under the terms of the Statute, Australia retains the right to withdraw from the treaty.

To put this concern in a broader context, Australia is one of the oldest continuous democracies in the world. It has a proud history of active involvement in world affairs. Our nation is party to hundreds of international treaties and instruments, which has had the consequence of engaging our nation in a process of internationalisation since the earliest days of Federation.

Over the past century we have as a nation, participated in a number of armed conflicts and peacekeeping missions. Our defence forces have served with distinction and in accordance with established principles of international law.

Our commitment to the rule of law, to human rights, to democratic principles and to open and accountable government is widely recognised and respected. Our legal system is well established, just and equitable. Australia should stand proud as an example of a country dedicated to international peace and security.

The likelihood of Australia being targeted in a malicious or politically motivated way by the ICC or its officers is remote.

Further, upon ratification of the ICC Statute and the passage of the implementing legislation, Australia will recognise at law the crimes of genocide, war crimes and crimes against humanity. Australia will have primary jurisdiction to deal with perpetrators of these crimes on our territory, or if the unthinkable were to occur, by Australian citizens on the territory of another State.

The ICC Statute has no retrospective application, but will come into force as of 1 July 2002.

The Committee believes that upon ratification, Australia should seek to play a significant role with other like-minded States in the development of the Court, including the nomination process for Judges and Prosecutors as well as the establishment of the rules of procedure and evidence.

The 20th Century will be remembered for its unprecedented social and economic progress and the astounding advances in science and technology. It was also a century marred by armed conflicts so unprecedented in their scale and intensity that it may well be remembered as the most violent and bloody century in recorded history.

At the beginning of the 21st century, the international community is prepared to take a significant step forward in pursuit of international peace and security. Given international support, the ICC has the potential to be a valuable and effective instrument in that pursuit.

The Committee has been ably assisted in its deliberations by the Secretariat and wishes to place on record our gratitude to the staff who have served the Committee in both the current and the previous Parliaments.

The Committee is also grateful for the assistance from those who provided written submissions and gave oral evidence at the public hearings.

Julie Bishop MP
Committee Chair



Membership of the Committee

Chair Ms Julie Bishop MP

Deputy Chair Mr Kim Wilkie MP

Members The Hon Dick Adams MP

Mr Bob Baldwin

Mr Kerry Bartlett MP

Mr Steven Ciobo MP

Mr Martyn Evans MP

Mr Peter King MP

The Hon Bruce Scott MP

Senator Andrew Bartlett

Senator Barney Cooney

Senator Joe Ludwig

Senator Brett Mason

Senator Julian McGauran

Senator the Hon Chris Schacht

Senator Tsebin Tchen

Committee Secretariat

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Inquiry Secretary Robert Morris

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Terms of reference

On 10 October 2000 the Government presented to Parliament the text of the Statute of the International Criminal Court and a national interest analysis summarising the objectives of the Court and the costs and benefits to Australia of ratifying the Statute.

The Treaties Committee ordinarily reviews proposed treaty actions and reports back to Parliament within 15 sitting days of the text and national interest analysis being presented to Parliament.

In this instance the Committee resolved that the Government's proposal to ratify the Statute, warranted comprehensive examination. Accordingly, on 2 November 2000 the Chair of the Committee wrote to the Minister for Foreign Affairs advising that:

Ratifying the Statute would be a significant treaty action for Australia and there are many matters to be considered before the Committee can report to Parliament on whether such action would be in the national interest. ...

When dealing with a treaty action like this, with potentially wide ramifications, we believe it is important to offer the opportunity to comment to as many people in the community who wish to comment. We intend to facilitate this process by placing advertisements in the national press inviting written submission from interested parties.

A full description of the Committee's inquiry process can be found at Appendix B.

Copies of the Statute of the International Criminal Court and of the national interest analysis are available through the internet site

<http://www.aph.gov.au/house/committee/jsct/ICC/links.htm> .



Recommendations

Recommendation 1

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

Recommendation 2

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 (Paragraph 3.32).

Recommendation 3

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 (Paragraph 3.34).

Recommendation 4

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* (Paragraph 3.37).

Recommendation 5

The Committee recommends that the *International Criminal Court Bill* and the *International Criminal Court (Consequential Amendments) Bill* be introduced into Parliament as soon as practicable subject to consideration of recommendations elsewhere in this report (Paragraph 3.50).

Recommendation 6

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 (Paragraph 3.57).

Recommendation 7

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 (Paragraph 3.60).

Recommendation 8

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 (Paragraph 3.63).

Recommendation 9

The Committee recommends that the Attorney-General ensure that the *International Criminal Court (Consequential Amendments) 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 (Paragraph 3.65).

Recommendation 10

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 (Paragraph 3.68).

Recommendation 11

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 (Paragraph 3.70).

