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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

Secretary Paul McMahon

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).

Introduction

What is the International Criminal Court?

Overview

- 1.1 In July 1998, 120 nations attending a diplomatic conference in Rome agreed to establish an International Criminal Court (ICC). The Court is intended to be a permanent international criminal tribunal to prosecute those individuals who commit the most serious crimes of concern to the international community of nations. These crimes are described in the Statute of the ICC (the ICC Statute, also known as the Rome Statute) as being genocide, crimes against humanity, war crimes and, should a definition be agreed in the future, the crime of aggression.
- 1.2 Australia was one of the early signatories to the ICC Statute, having played a leading role in developing the text of the Statute.¹
- 1.3 As of 11 April 2002 139 nations had signed the ICC Statute and 66 nations had taken the additional step of ratifying the Statute,² thus formally agreeing to be bound to the terms of the Statute. The ICC will enter into force internationally on 1 July 2002. The first meeting of States Parties is likely to be held in September 2002.

1 The Australian Government signed the ICC Statute on 9 December 1998.

2 In a ceremony at UN Headquarters on 11 April 2002, the threshold of 60 ratifications required for the ICC to come into force was surpassed, with the total number of 66 ratifications. Cable, Department of Foreign Affairs and Trade, 11 April 2002, p. 1. See Appendix D for a list of signatories.

- 1.4 The ICC is proposed to stand as a third pillar beside the United Nations (UN) and the International Court of Justice (ICJ) in global efforts to promote peace and security. The ICC will complement the UN and the ICJ, which focus on the accountability of States, by calling to account those individuals who commit the most serious crimes of international concern.
- 1.5 Unlike the ICJ, which is one of the primary organs of the UN, the ICC will be established as an independent institution. While it will have a relationship with the UN, it will have its own statutory basis.

Key elements of the Statute

- 1.6 The ICC Statute is a comprehensive instrument which, according to a National Interest Analysis prepared by the Government, seeks to establish a new international criminal justice system, complementary to the national criminal justice systems of each State Party.³
- 1.7 The Statute, which is intended to operate as the constitution of the ICC, establishes the Court as a permanent institution (Article 1), to be in relationship with the UN (Article 2), and to be based at The Hague in the Netherlands (Article 3).

Officials of the Court

Judges

- 1.8 The ICC will consist of 18 judges to be elected by the Assembly of States Parties.⁴ The judges are to hold office for a period of 9 years and shall not be eligible for re-election (Article 36).⁵

3 The National Interest Analysis for the ICC Statute (NIA for the Statute) is available from the JSCOT Secretariat, or at: <http://www.austlii.edu.au/au/other/dfat/nia/2000/2000024n.html>. The text of the ICC Statute is available from the JSCOT Secretariat, or at: <http://www.un.org/law/icc/statute/romefra.htm>.

The description in this chapter of the key elements of the ICC is drawn from both the NIA for the Statute and the ICC Statute itself.

4 It is anticipated that the election of judges to the ICC will occur during the second meeting of the assembly of states parties which is likely to be in January 2003. Joanne Blackburn (Attorney-General's Department), *Transcript of Evidence*, 10 April 2002, p. TR 289.

5 Article 36 details the election process for judges.

36 (6)(a) states that: 'The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting'. Article 36(6)(b) states that: 'In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled'.

1.9 Article 36(3) describes the qualities to be possessed by judicial candidates in the following terms:

36(3) (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) have established credentials in criminal law and procedure, and the necessary relevant experience, whether as a judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.⁶

1.10 The ICC Statute also provides that the judges shall elect a President, who shall assign judges to an Appeals Division, a Trial Division and a Pre-Trial Division of the Court. Judges assigned to the Appeals Division shall serve in that Division for the entire term of their office (Article 39).⁷

1.11 The independence of the judiciary is described in Articles 40 and 41, which provide, *inter alia*, that:

Judges shall be independent in the performance of their functions.

Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

Judges required to serve on a full time basis ... shall not engage in any other occupation of a professional nature.

The first meeting of the States Parties in September 2002 is expected to discuss among other things, the procedures for the election of judges (Joanne Blackburn (Attorney-General's Department), *Transcript of Evidence*, 10 April 2002, p. TR 289).

6 Article 36(8) provides that in selecting judges for the ICC, the States Parties should take into account the need for representation of the principal legal systems of the world, equitable geographic representation, a fair representation of female and male judges and for expertise on specific issues, including, but not limited to, violence against women or children.

7 Judges assigned to the Trial or Pre-Trial Divisions may, at the discretion of the President, be temporarily transferred from one Division to the other should management of the Court's workload so require (Article 39(4)).

A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground.

- 1.12 Judges may be removed from office either for serious misconduct, serious breach of duty, or for inability to exercise their functions (Article 46).

The Prosecutor

- 1.13 The Office of the Prosecutor is a separate organ of the ICC, independent of the judiciary.
- 1.14 The Office of the Prosecutor is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court (Article 42(1)).
- 1.15 The Prosecutor and one or more Deputy Prosecutors are also to be elected by the Assembly of State Parties, shall hold office for no longer than 9 years and shall not be eligible for re-election. (Article 42(4)).
- 1.16 The Statute does not specify the number of Deputy Prosecutors to be appointed. This may be dependent on the work demands on the Court at a particular time. Under Article 42 (4) 'The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled'. Article 42 (2) specifies that the Prosecutor and the Deputy Prosecutors shall be of different nationalities.
- 1.17 Article 42(3) establishes that to be eligible for election the Prosecutor and the Deputy Prosecutors must be:
- ... persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases.
- 1.18 The Statute contains similar provisions relating to the independence, disqualification and removal of the Prosecutor as are provided for judges. (see Articles 42(5) to 42(8)).

Jurisdiction of the Court

- 1.19 Article 5 of the ICC Statute limits the jurisdiction of the Court to 'the most serious crimes of concern to the international community as a whole':
- the crime of genocide;

- crimes against humanity;
 - war crimes; and
 - the crime of aggression.
- 1.20 Each of these crimes (with the exception of the crime of aggression) is defined in the Statute. The crime of aggression has not yet been defined and the Court will not be able to exercise jurisdiction over this crime unless and until the States Parties adopt a provision defining the crime and setting out the conditions under which the Court's jurisdiction may be exercised (see Article 5(2)).
- 1.21 Adoption of an amendment to the Statute, which involved incorporating a definition of aggression, would require a two-thirds majority of States Parties (Article 121(3)). The next step would consist of a ratification or acceptance process outlined in paragraph 4 of Article 121, entailing the approval of seven-eighths of the States Parties. These amendments enter into effect for all States Parties at that point. As amendments have the potential to effect a major change in a State Party's relationship to the Court, any State Party not in agreement with a given amendment of this type has a right to withdraw from the Statute with immediate effect (Article 121(6)).
- 1.22 The definitions of genocide, crimes against humanity and war crimes appear at Articles 6, 7 and 8 of the ICC Statute.⁸ These primary definitions (which in the case of crimes against humanity and war crimes are themselves lengthy) are expanded upon considerably in the *Elements of Crimes*, a document drafted by the Preparatory Commission for the ICC.⁹
- 1.23 The crimes described in the ICC Statute and the *Elements of Crimes* are not new crimes, rather they reflect and codify international law that has developed over the last century. For example, the ICC definition of genocide is identical to that contained in the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*. Likewise, the definitions

8 A copy of the Statute can be obtained from the Treaties Secretariat, or from a link on the Committee's web site at: <http://www.aph.gov.au/house/committee/jsct/ICC/links.htm>

9 A copy of the draft *Elements of Crimes* adopted by the Preparatory Commission for the International Criminal Court on 30 June 2000 can be found at www.un.org/law/icc/statute/elements/elemfra.htm The *Elements of Crimes* will come into effect after they are approved by the Assembly of States Parties at its first meeting following the establishment of the ICC. See also Joanne Blackburn (Attorney-General's Department), *Transcript of Evidence*, 10 April 2002, p. TR289, '... the first meeting of the assembly [of parties] is likely to be held in September 2002. This assembly is expected to consider, and is likely to adopt, the rules of procedure and evidence for the ICC, the document setting out the elements of crimes and the court's first year budget.'

of crimes against humanity and war crimes draw heavily on customary international law (especially that established by the post-World War II Nuremberg Tribunal) and on the 1949 *Geneva Conventions* (as amended) and the 1984 *Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment*.

- 1.24 The Statute is clear in applying the Court's jurisdiction only to natural persons (Article 25) over the age of eighteen (Article 26) and in respect of crimes committed after the Statute enters into force (Article 11).
- 1.25 There are three ways in which the ICC's jurisdiction can be invoked:
- a referral to the Prosecutor by a State Party;
 - a referral to the Prosecutor by the Security Council of the United Nations; or
 - the initiation of an investigation directly by the Prosecutor (Article 13).
- 1.26 The Statute also establishes a pre-condition to be satisfied before the ICC can exercise its jurisdiction in relation to referrals by a State Party or investigations initiated by the Prosecutor, namely that:
- (a) the conduct in question occurred on the territory of a State Party;
 - (b) the person accused of the crime is a national of a State Party; or
 - (c) a non-State Party agrees to accept the Court's jurisdiction (Article 12).

Conduct of investigations and the complementarity principle

- 1.27 If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation into a matter (irrespective of how the matter was initiated), he must seek agreement from the Pre-Trial Chamber to commence the investigation (Article 15).¹⁰

¹⁰ If a crime appears to have been committed a referral to the Prosecutor can be made by a State Party (under Article 14), by the Security Council, acting under Chapter VII of the Charter of the United Nations. Under Article 15 the Prosecutor can initiate proceedings *proprio motu*. Under Article 15 (4), if the Pre-Trial Chamber, upon examination of the request and the supporting material, considers there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

- 1.28 A key factor to be considered in deciding whether an investigation should be commenced is whether the case is admissible under Article 17 of the Statute. This article gives force to the *principle of complementarity*, the foundation upon which the operation of the Court is predicated.
- 1.29 The principle of complementarity is first mentioned in the preamble to the Statute, which introduces the agreement by:
- Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,
... [and]
Emphasising that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.
- 1.30 The principle is also mentioned explicitly in Article 1 of the Statute, which states that the ICC ‘shall be complementary to national criminal jurisdictions’.
- 1.31 It is in Article 17 that the practical application of the principle is described. It provides that the ICC shall determine a case is inadmissible where:
- 17(1) (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is *unwilling or unable* genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the *unwillingness or inability* of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint and trial of by the Court is not permitted under Article 20 [see the first dot point in paragraph 1.38 below];
- (d) The case is not of sufficient gravity to justify further action by the Court.¹¹
- 1.32 The Statute goes on describe the matters the Court must consider in determining whether a State is *unwilling* or *unable* in a particular circumstance to genuinely carry out an investigation or prosecution.

11 Emphasis added.

- 1.33 In determining *unwillingness* the Court shall consider whether one or more of the following circumstances exist:
- 17(2) (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility ... ;
 - (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
 - (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
- 1.34 In order to determine *inability* the Court shall consider whether due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings (Article 17(3)).
- 1.35 The ICC's *Rules of Procedure and Evidence* (which, like the *Elements of Crimes*, have been drafted by the Preparatory Commission) set out further information the Court may consider in determining these matters. For example, a State may submit to the Court information showing that its national courts meet internationally recognised norms and standards for the impartial prosecution of similar conduct.¹²
- 1.36 The Statute and the *Rules of Procedure and Evidence* also establish processes by which the Court and a State can engage in dialogue about the progress of national proceedings (Article 18 and Rules 51-56 and 58).

Principles of law

- 1.37 Part 3 of the Statute describes the general principles of criminal law to be applied by the Court. These principles represent an attempt to meld the criminal law doctrines of different legal systems.
- 1.38 Some of the key principles underpinning the operation of the ICC are:

12 A copy of the draft *Rules and Procedures of Evidence* adopted by the Preparatory Commission for the International Criminal Court on 30 June 2000 can be found at www.un.org/law/icc/statute/rules/rulefra.htm. These rules describe in practical, operational terms how the ICC Statute will be applied. The *Rules of Procedure and Evidence* will come into effect after they are approved by the Assembly of States Parties at its first meeting following the establishment of the ICC.

- a person shall not be tried for crimes if they have already been convicted or acquitted by the ICC or by a national court, unless the proceedings in the other court were conducted for the purpose of shielding the person from the jurisdiction of the Court or were inconsistent with an intent to bring the person to justice (Article 20);
- the definition of a crime shall be strictly construed, shall not be extended by analogy and, in the case of ambiguity, shall be interpreted in favour of the person being investigated, prosecuted or convicted (Article 22(2));
- the Statute shall apply equally to all persons without any distinction based on official capacity and without regard to any immunities or special procedural rules that might otherwise apply to the official capacity of a person (Article 27);
- the crimes within the jurisdiction of the Statute shall not be subject to any statute of limitations (Article 29);
- a person shall be criminally responsible only if the material elements of the crime are committed with intent and knowledge (Article 30);
- a person shall not be criminally responsible if they can demonstrate any of the following circumstances: insanity, intoxication, self-defence or the defence of others, or duress (Article 31);
- the defence of acting pursuant to superior orders is not available unless the accused was under a legal obligation to obey the orders, the accused did not know the order was unlawful and the order was not manifestly unlawful (for the purposes of the Statute orders to commit genocide or crimes against humanity are manifestly unlawful) (Article 33);
- all accused persons shall be presumed innocent until proved guilty (Article 66);
- the onus is on the Prosecutor to prove guilt and, in order to convict, the Court must be convinced beyond reasonable doubt of the guilt of the accused person (Article 66); and
- an accused person is entitled to a fair public hearing conducted impartially and to a range of guarantees intended to ensure natural justice, including the right to appeal a decision of the Court and to apply for revision of a judgement or sentence in the light of new evidence (Articles 67, 81 and 84).

1.39 The Court may impose a term of imprisonment not exceeding 30 years or a term of life imprisonment, when justified by the extreme gravity of the

crime. In addition to imprisonment, the Court may order a fine and forfeiture of the proceeds of a crime (Article 77). Moreover, the Court may order reparations to victims, including restitution, compensation and rehabilitation (Article 75).

General obligations

- 1.40 The ICC Statute imposes on States Parties a general obligation to cooperate fully with the Court in its investigation and prosecution of crimes (Article 86).
- 1.41 In particular, States Parties are obliged:
- upon receipt of a request from the Court for provisional arrest, or for arrest and surrender, to take immediate steps to arrest a person, in accordance with its national laws and the ICC Statute (Article 59); and
 - to assist in the gathering, preservation and production of testimonial, physical and documentary evidence, the protection of witnesses and victims, the execution of searches and seizures, and the service of documents (Article 93).
- 1.42 Articles 89, 90 and 91 contain detailed provisions relating to the surrender of persons to the Court – describing, in particular, the relationship between the surrender procedures in the Statute, in domestic law, and in existing bilateral and multilateral extradition arrangements.
- 1.43 Among other matters, the Statute provides that requests for the arrest and surrender of a person shall be accompanied by:
- 91(2) (c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the request State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

Evolution of the Court

- 1.44 The creation of an international court to enforce the principles of international law has been canvassed for many, many years. Some academics trace the development of the Court back to 1874.¹³
- 1.45 The roots of the present proposal go back as far as the 1907 Hague Peace Conference and following the Versailles Peace Conference in 1919 where there had been discussion of establishing such a court.¹⁴ During the life of the League of Nations, further attempts were made to raise the issue but the Second World War overtook the process.
- 1.46 It was not until 1948 after the creation of the United Nations that any serious efforts were made to further the process. In resolution 260
- the General Assembly, 'Recognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required', adopted the Convention on the Prevention and Punishment of the Crime of Genocide.
- Article I of that convention characterizes genocide as 'a crime under international law', and Article VI provides that persons charged with genocide 'shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction . . .'
- In the same resolution, the General Assembly also invited the International Law Commission 'to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide . . .'¹⁵
- 1.47 At the conclusion of WWII, the London Charter created the Nuremberg Tribunal under which 'crimes against humanity' were for the first time defined. Under this charter criminal responsibility attached not just to States, but to individuals, its provisions stated that
- '.... crimes against international law are committed by men not abstract entities' and in determining individual responsibility the

13 See Timothy McCormack and Sue Robertson, 'Jurisdictional Aspects of the *Rome Statute* for the New International Criminal Court' in *Melbourne University Law Review*, Vol 23, No.3, 1999, p. 1

14 Justice Perry, *Submission 8*, 'The International Criminal Court', 4-10 July 1999, p. 2

15 International Criminal Court Home Page, *Overview*, United Nations 1998-1999, at <http://www.un.org/law/icc/general/overview.htm>, 7/05/01

Charter specified that superior orders would be no defence but would go in mitigation of penalty only.¹⁶

Another related issue arising from the Nuremberg Tribunal was that individuals had a duty to comply with international law, and that the duty transcends obligations of a nationalistic character, persuasion or motive.¹⁷

- 1.48 With the conclusion of the Nuremberg Tribunal in 1951, a proposal was circulated among members of the UN to create a permanent standing court which would be responsible for prosecuting grave crimes of international concern committed in armed conflict. In addition, a committee of the General Assembly was appointed to prepare proposals relating to the establishment of a court. A draft statute was prepared and revised in 1953. For the ensuing 3 decades, no further progress on the ICC was achieved.¹⁸
- 1.49 By the 1980's, international customary law had developed to the degree that it imposed on States and individuals certain universal minimum standards of civilised behaviour in war. These standards were reflected in international agreements like the Protocols to the Geneva Conventions and Convention against Torture and other Cruel, Inhumane and Degrading Treatment or Punishment.¹⁹ Although the principle of individual accountability had become well established, there was no progress in creating a mechanism to enforce that principle.²⁰
- 1.50 In 1989, Trinidad and Tobago raised the proposal to establish an international judicial body capable of dealing with crimes related to international drug trafficking.²¹ While the International Law Commission (ILC) began work drafting an ICC statute the UN established the two ad hoc tribunals to adjudicate on war crimes, crimes against humanity and genocide committed during the conflicts in Rwanda and Yugoslavia.
- 1.51 By 1994, the ILC had submitted a draft proposal to the UN that recommended that an international conference be convened to finalise a treaty. A preparatory committee was set up to undertake the negotiations

16 Amnesty International, *Submission No. 16*, November 2000, p. 3

17 Nicole McDonald, *Submission No. 10*, 29 November 2000, p. 4

18 International Criminal Court Home Page, *Overview*, United Nations 1998-1999, at <http://www.un.org/law/icc/general/overview.htm>, 7/05/01

19 Amnesty International, *Submission No. 16*, November 2000, p. 4

20 Lawyers Committee for Human Rights, *The International Criminal Court - 'The case for US Support'*: Executive Summary, p. 4

21 Dempsey G T, *Exhibit 14*, 'Reasonable Doubt - The case against the Proposed International Criminal Court', p. 2

with UN member states and non-government organisations (NGOs) on the text of a Statute. By 3 April 1998, a draft Statute was presented.

- 1.52 At its fifty-second session, the General Assembly decided to convene the *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*. The conference was subsequently held in Rome in July 1998. Of the 160 states present, 120 voted in support of the Statute's final text, seven voted against and there were 21 abstentions. A list of signatories and parties to the ICC Statute is at Appendix D.²²

Australian involvement in developing the Court

- 1.53 Australian officials, non-government organisations, academics and legal practitioners have been closely involved in negotiating and drafting the text of the ICC Statute.
- 1.54 Australia chairs the 'Like-Minded Group' of over 60 nations (see Appendix C), dedicated to the establishment of the ICC. This Group was instrumental in the success of the Rome conference. Australian representatives continue to play a leading role in work of the ICC Preparatory Commission, which has been negotiating and drafting the related instruments necessary for the effective functioning of the Court (such as the Elements of Crimes and the Rules of Procedure and Evidence).

Purpose of this review

- 1.55 The Committee's review of the ICC Statute began on 10 October 2000, when the Government presented to Parliament the text of the ICC Statute, together with a national interest analysis describing the obligations, costs and benefits that would result should Australia ratify the Statute.
- 1.56 The Committee sought written submissions and took evidence at public hearings from members of the public, academics, community and non-

22 Justice Perry noted in his submission that, as the vote [to adopt the Statute] was taken by secret ballot, it is not possible to identify with confidence those who opposed the Statute's adoption (The Hon Justice Perry, *Submission No. 8*, p. 5). See also the homepage of the International Criminal Court for an up to date listing of signatures and ratifications at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>.

government organisations, and representatives of the Government on whether ratification of the Statute would be in the national interest.²³

- 1.57 On 30 August 2001 the Attorney- General referred the implementing legislation for the Statute to the Committee as part of its review. Two Bills were proposed, the *International Criminal Court Bill 2001* and the *International Criminal Court (Consequential Amendments) Bill 2001*. This legislation is designed to fulfil Australia's obligations under the Statute and allow Australia to ratify the Statute.
- 1.58 The International Criminal Court Bill 2001 sets out the procedures that allow Australia to cooperate with the ICC and covers a range of areas including arrest and surrender of suspects, obtaining evidence in Australia, serving documents in Australia and the confiscation of proceeds in Australia. The Bill also provides safeguards to protect Australia's national security interests.
- 1.59 The second Bill, the International Criminal Court (Consequential Amendments) Bill 2001, creates new crimes in the Commonwealth Criminal Code that cover all of the crimes in the ICC statute to ensure that Australia always has the ability to prosecute persons charged with offences within the jurisdiction of the ICC in Australian courts under Australian law.
- 1.60 There is a wide range of opinion within the community about the likely value and impact of the ICC. Strong opinions have been expressed in evidence both for and against the Court. These are expanded on in Chapter 2.

23 Appendix B contains a description of the inquiry process and lists the written submissions and exhibits received, and the witnesses who gave evidence at public hearings.

Issues raised in evidence

Introduction

- 2.1 There were five main concerns raised in the evidence presented to the Committee:
- the potential impact of ratification of the ICC Statute on Australia's sovereignty;
 - whether ratification would be unconstitutional;
 - the 'vagueness' with which the Statute defines the crimes within its jurisdiction and their definition if the proposed implementing legislation;
 - the role of the Prosecutor and the accountability of the Court; and
 - the potential impact of ratification on the ability of the Australian Defence Force to participate in peacekeeping and other operations.
- 2.2 While the Committee took a considerable amount of evidence on the Statute it was unable to review the proposed implementing legislation until quite late in its scrutiny process. On 31 August 2001 the Attorney-General referred two bills to the Committee designed to implement the Statute into Australian law. As with the Statute these bills have generated a considerable degree of debate on their impact and content. The proposed legislation will be discussed later in the Chapter.
- 2.3 In addition, there was some debate in the evidence the Committee received about whether it is preferable for the international community to establish a permanent international criminal court or to continue the practice of appointing *ad hoc* tribunals as the need arises.

- 2.4 Each of these issues, and a number of other matters, are explored in greater detail below. The conclusions the Committee has drawn on each issue are described in Chapter 3.

Impact on national sovereignty

- 2.5 Much of the debate in evidence to the review centred on the importance and meaning of national sovereignty in a rapidly changing global environment.
- 2.6 Specifically, many submissions, particularly from individual members of the public, expressed grave concern that ratification of the ICC Statute would diminish the control that Australians exercise over their own affairs by ceding judicial authority to a foreign court, over which Australia's citizens and governments would have no control.
- 2.7 The position put in many submissions was that ratification of the Statute would:
- ... licence an alien body to interfere directly and powerfully in Australia's domestic affairs, to the extent of being able to arrest, try and imprison Australian citizens for alleged crimes committed on Australian soil.¹
- 2.8 The National Civic Council (WA), made a similar point, arguing that judicial power is a key aspect of national sovereignty and that:
- ... a well-functioning, independent, sovereign democracy has no valid reason for surrendering its sovereignty ...
-

1 C J McCormack, *Submission No. 194*, p. 1 This view, and variations upon it, was also put in submissions from Jim Kennedy, Andrew Anderton, Carrie Barrick, Alan Barron, Dawn Brown, Klaus Clapinski, Stewart Coad, Patrick Healy, Allen Kingston, Anthony Grigor-Scott, Michael Kearney, Ken Lawson, Peter Murray, Marlene Norris, Valerie Staddon, National Civic Council (WA) and the Vigilance Committee. A similar sentiment was expressed by John Stone (see John Stone, *Transcript of Evidence*, 13 February 2001, p. TR87-90). June Beckett spoke in support of this view, citing correspondence she had received from a former Chief Justice of the High Court of Australia, Sir Harry Gibbs. Sir Harry is quoted as saying 'that if Australia ratifies the Treaty, the result will be that Australia would have surrendered part of its sovereignty.' (See June Beckett, *Transcript of Evidence*, 13 February 2001, p. TR76, and June Beckett, *Submission No. 11.2*, to which is attached two letters from Sir Harry Gibbs to Mrs Beckett (the first dated 19 January 2001 and the second 2 February 2001).) Professor George Winterton also referred to Sir Harry Gibbs in observing that while 'all treaties involve some surrender of 'sovereignty' (in the sense of national power to act autonomously) ... the [ICC] Statute would do so to a greater degree than most' (see *Submission No. 231*, p. 1).

In the judicial sphere Australia, as a functioning and free democratic nation, should be and is capable of exercising the judicial function without let or hindrance, and without assistance from any alien court.²

- 2.9 Some submitters described the ICC as a ‘supranational’ court, with universal jurisdiction, and claimed that:

The process [leading to the establishment of the ICC] reeks of an agenda of globalism and a world dictatorship of which we should have no part.³

- 2.10 The National Civic Council (WA) encapsulated the concerns of many when they concluded that ratification of the ICC Statute would not only be ‘unwarranted, unjustified, undemocratic and un-Australian’. They also said:

It appears to border on treason by the Executive Government against the people of Australia.⁴

- 2.11 On the other hand, the Committee received submissions from those who argued that ratification of the ICC Statute would neither diminish the rights of Australian citizens nor infringe upon Australia’s sovereignty.

- 2.12 In summary, those who hold this view argued that:

- establishment of the Statute would represent the cooperative exercise of independent sovereign power, enabling States to achieve collectively what no individual sovereign State can achieve on its own;⁵
- the crimes proposed to be within the jurisdiction of the ICC are not new crimes and the potential of Australian citizens being tried by foreign courts for war crimes has existed since 1949 when the *Geneva Conventions* were established;⁶

2 National Civic Council (WA), *Submission No. 1*, p. 3.

3 P J Keogh, *Submission No. 182*, p. 1. Similar views were expressed by Arthur Hartwig, Festival of Light, Howard Bates, W Mitchell, Julie Beare, Mr Peter McDonald, Bruce Mitchell, Gareth Kimberley and June Beckett.

4 National Civic Council (WA), *Submission No.1*, p. 3.

5 James Cockayne, *Submission No. 217*, pp. 1-2 and 5 See Sydney University Law School Amnesty Group, *Submission No. 224*, p. 1 for a similar view.

6 UNICEF Australia, *Submission No. 34*, pp. 1 and 8; the Hon Daryl Williams AM QC MP, *Speech to the Western Australian Division of the Australian Red Cross*, 21 April 2001, p. 4. The Attorney recently restated this point, saying: ‘In the last 52 years I have never heard anyone who thinks that adhering to the Geneva Conventions is an impost on our national sovereignty!’ (The Hon

- the ICC is a specialised form of international dispute settlement, albeit in relation to criminal matters, but not unlike the International Court of Justice and the dispute settlement system of the World Trade Organisation, neither of which have posed a threat to State sovereignty;⁷
- the ICC Statute recognises and respects national sovereignty by *obliging* State Parties to conduct their own investigations and prosecutions where it appears that their own nationals may have been involved in genocide, crimes against humanity or war crimes;⁸
- the principles underpinning the ICC Statute ensure that the Court will only ever be a ‘court of last resort’, whose jurisdiction is invoked only when a State Party is genuinely unable or unwilling to investigate and prosecute a crime;⁹ and
- ratification of the ICC Statute (like ratification of any other international agreement) is an expression of national sovereignty that can be withdrawn at any time.¹⁰

2.13 Justice John Perry, from the South Australian Supreme Court, offered another perspective on this issue by suggesting that there is no loss of sovereignty in establishing a court of last resort to try a person who might otherwise not be brought to justice.

If an act of genocide, a crime against humanity or a war crime, as defined in the statute, were to be committed by an Australian national abroad, it may be committed in circumstances in which Australian courts would exercise jurisdiction over that person, in which event our ability to do so would be completely unaffected by this statute. If on the other hand it was not justiciable in

Daryl Williams AM QC MP, *Speech to the ACT Division of the Australian Red Cross*, 9 August 2001, p. 4).

- 7 The Hon Daryl Williams AM QC MP, ‘The International Criminal Court – the Australian Experience’, an address to the International Society for the Reform of Criminal Law, 30 August 2001, pp. 8-9.
- 8 World Vision, *Submission No. 104*, p. 5 See also Chris Hodges (Ags), *Transcript of Evidence*, 30 August 1999, p. TR5.
- 9 See also submissions from Elizabeth Bennett (on behalf of a group of 12 university students), Helen Brady, Human Rights Watch, Australian Lawyers for Human Rights and the New South Wales Bar Association.
- 10 Graham Riches (Legacy Coordinating Council), *Transcript of Evidence*, 14 March 2001, p. TR146 This point was also made in Department of Foreign Affairs and Trade, *Australia and International Treaty Making: Information Kit*, July 2000, p. 9.

Australia ... we have not lost any national sovereignty by countenancing a situation in which some other country, if it is committed on the soil of that country, might prosecute or if the International Criminal Court might.¹¹

- 2.14 On a related point, James Cockayne submitted that every nation has the right, in accordance with its constitutional and legislative norms to transfer jurisdiction over an accused person to another jurisdiction. This type of jurisdictional transfer, known as extradition, is, it was argued, 'an entirely valid exercise of national sovereignty.'¹²
- 2.15 The Hon Justice John Dowd, President of the Australian Chapter of the International Commission of Jurists, referred to the international network of extradition agreements, agreements on mutual assistance in criminal matters and on the confiscation of assets as current examples of the type of arrangements proposed by the ICC Statute. Justice Dowd submitted that:
- The wheels have not fallen off Australia every time we have signed an extradition treaty or a mutual assistance treaty. These operated in our courts, before my court [that is, the NSW Supreme Court], all the time.¹³
- 2.16 The Attorney-General, on behalf of the Government, noted that all countries around the world are concerned to protect their national sovereignty and that the number of 'democratic nations that have committed themselves to the ICC should be of comfort to those concerned that the Court might interfere with national sovereignty.'
- One can safely assume that ensuring that the ICC does not threaten national sovereignty is of as much concern to Canada, New Zealand, France, Germany, South Africa and Italy. Those

11 Justice John Perry, *Transcript of Evidence*, 14 March 2001, p. TR161 Sydney Law School Amnesty Group made a similar point (see *Submission No. 224*, p. 1).

12 James Cockayne, *Submission No. 217*, p. 3. See also Sydney Law School Amnesty Group, *Submission No. 224*, p. 1.

13 The Hon Justice John Dowd (International Commission of Jurists), *Transcript of Evidence*, 13 February 2001, p. TR103-104. The Rt. Hon. Sir Ninian Stephen, a former judge of the Australian High Court, has stated that: 'if such a permanent international tribunal indeed comes into existence this will be a great step forward for the rule of Law internationally as regards war crimes and such other areas of international law as are placed within its jurisdiction. It will also necessarily involve to a degree some voluntary surrender, by nations who become parties to the convention, of exclusive criminal jurisdiction, a matter very much at the heart of sovereignty (Rt. Hon. Sir Ninian Stephen, 'Judging War Crimes', *Res Publice*, Vol. 7, No. 1, 1998, p. 5).

countries are clearly satisfied on that front and have ratified the Statute.¹⁴

- 2.17 At the core of the debate about the impact of the ICC Statute on national sovereignty are differing views about the effectiveness of the complementarity principle.

Effectiveness of the complementarity principle

- 2.18 As noted in Chapter 1, the complementarity principle is fundamental to the operation of the ICC.¹⁵

- 2.19 Supporters of ratification argued that the complementarity principle would ensure the primacy of national systems of law and of national courts.

- 2.20 Helen Brady submitted that:

Complementarity means that the country concerned ... will continue to have the primary duty to investigate alleged crimes (and prosecute, if the evidence supports charges). The ICC can only 'step in' if [the country concerned] ... fails to do so, or does so in a manner inconsistent with an intent to bring the person to justice or to shield the person from criminal responsibility.

Australia will be – *and indeed already is* – responsible for investigating and prosecuting these crimes. If Australia becomes a party to the ICC and if crimes of genocide, crimes against humanity or war crimes were in the future committed on Australian soil or by an Australian national, the Court will be *obliged* to defer to Australian national criminal proceedings ...

...

The Court could only assume jurisdiction where Australian ... authorities or courts decided not to prosecute *for the purpose of* shielding the person from criminal responsibility or in a manner inconsistent with an intent to bring the person to justice.¹⁶

- 2.21 The Australian Red Cross (through its National Advisory Committee on International Humanitarian Law) took a similar view, claiming that:
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14 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 4.

15 See paragraphs 1.27 to 1.36 of Chapter 1.

16 Helen Brady, *Submission No. 7*, pp. 4-5.

As long as proper judicial proceedings are followed and appropriate sentences awarded in any such case tried in Australian courts, the principle of complementarity guarantees that the International Criminal Court does not usurp the administration of Australian Criminal Law.¹⁷

- 2.22 Moreover, according to Justice Perry, once a properly conducted prosecution is completed in Australia (either with a conviction or an acquittal) that would be the end of the matter: ‘the ICC could not examine the authenticity of an acquittal or a conviction’. Justice Perry’s view was that ratification of the ICC Statute would keep Australia’s legal structure completely intact :

All our courts will still be there ... the High Court will still be our ultimate court of appeal. There could be no question of any case going from our High Court to the International Criminal Court.¹⁸

- 2.23 The Australian Government is also firmly of the view that the complementarity principle will secure the primacy of national courts. In a recent speech, the Attorney-General remarked that State Parties to the ICC Statute will have the primary opportunity and the primary obligation to prosecute war criminals within their jurisdiction.

This has always been the case – it is critical to understand that the ICC will not take away the responsibility of countries to carry their own prosecutions. If a crime falls under national law and it is being or has been investigated or prosecuted under that law, the Court is conclusively prevented from pursuing it.

The ICC will only act when a country is either unwilling or unable genuinely to act.

The sovereignty of countries will in no way be challenged by the ICC.¹⁹

17 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26*, p. 4. Similar submissions, endorsing the view that the ICC will neither replace, nor override national courts, have been received from the Law Council of Australia (International Law Section), Australian Lawyers for Human Rights and Sandy and Betty Reid.

18 Justice John Perry, *Transcript of Evidence*, 14 March 2001, p. TR161. A similar position was advanced by representatives of the NSW Bar Association – see Tim Game (NSW Bar Association), *Transcript of Evidence*, 13 February 2001, p. TR37.

19 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 3.

- 2.24 In a written submission the Attorney-General and the Minister for Foreign Affairs noted that the ICC would not consider a State to be ‘unable’ unless its system of justice had ‘collapsed.’ In relation to determining whether a State is ‘unwilling’ to act, the Ministers submitted that:
- ... if a State’s national investigation and prosecution is carried out in good faith, expeditiously, in accordance with internationally accepted standards of due process, and recognising the seriousness of the offence then it is most unlikely that the ICC would seek to act itself. It is considered that Australian processes clearly meet these standards. On this basis there is very little scope for the ICC to act in a case being dealt with by Australia.²⁰
- 2.25 Some other submitters suggested that not only is it ‘highly unlikely’ that crimes of genocide, crimes against humanity and war crimes would ever be committed in Australia, or by an Australian national, but that it is ‘inconceivable’ that the ICC would not recognise that Australia’s judicial system functions well and with integrity.²¹
- 2.26 The Australian Red Cross argued that:
- Given Australia’s independent and well-functioning investigative, prosecutorial and judicial agencies and processes, any trial conducted according to our criminal justice system will always satisfy the inadmissibility tests in Article 17 of the Rome Statute precluding the ICC from overriding Australian jurisdictional competence. Similarly, a proper trial under Australian criminal law would preclude the ICC from dealing with the same case on the basis of the *ne bis in idem* [double jeopardy] protection for the accused in Article 20 of the Statute.²²
- 2.27 Moreover, the question has been put by some that if Australian society breaks down to the point where our judicial system seeks to ‘deliberately

20 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, pp. 8-9. In a recent speech the Attorney-General emphasised the limited scope for the ICC to intervene by saying: ‘It is true that the ICC would be able to act if Australia were shielding a war criminal from trial. But Australia has never – and will never – be in the business of protecting war criminals, so such a situation is not going to happen’ (The Hon Daryl Williams AM QC MP, *Speech to the ACT Division of the Australian Red Cross*, 9 August 2001, p. 4).

21 See submissions from Elizabeth Bennett, Helen Brady, NSW Bar Association, Human Rights Watch, Australian Red Cross (National Advisory Committee on International Humanitarian Law) and Australian Lawyers for Human Rights.

22 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.2*, p. 2.

shield a national from criminal responsibility then why, it may be asked, should international justice not intervene.’²³

- 2.28 The proposed legislation to implement Australia’s responsibilities under the Statute is intended to establish a significant degree of parity between Australia’s criminal law and the ICC Statute crimes, thereby affirming the primary role of Australian courts in trying ICC crimes.²⁴ This legislation will be discussed in more detail below.
- 2.29 Those opposed to ratification of the ICC Statute drew no comfort from the complementarity principle, suggesting that it is ‘naïve and unduly optimistic’ to expect that the principle will operate to protect Australia’s sovereign interests.²⁵
- 2.30 Dr Ian Spry QC argued that the ‘alleged protection [afforded by the principle] is largely illusory, since it is the ICC itself which would determine whether a State is unwilling or unable genuinely to carry out an investigation or prosecution.’

If the ICC on some slight or tenuous ground – such as the adoption of a local procedure which might in some respect differ from its own – held that Australian proceedings were not ‘genuinely’ carried out there would be no remedy for Australia. Australia would be required to arrest and extradite its own nationals.²⁶

- 2.31 Emeritus Professor Geoffrey Walker was similarly sceptical about the operation of the complementarity principle submitting that:

23 Amnesty International, *Exhibit No. 58*, p. 2, provided to the inquiry into Australia’s relationship with the United Nations conducted by the Joint Standing Committee on Foreign Affairs, Defence and Trade. See also submissions from Human Rights Watch, New South Wales Bar Association and Helen Brady, for similar comments. The Australian Red Cross’ National Advisory Committee on International Humanitarian Law remarked that if an Australian Government ever sought to shield an alleged war criminal the ICC should step in: ‘the Australian public would rightly demand that those responsible for such an atrocity be brought to account’ (see Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.2*, p. 3).

24 The joint media statement issued by the Attorney-General and the Minister for Foreign Affairs on 25 October 2000 stated that ‘the Government has taken an approach which recognises that it would be desirable to have the offence provisions [in Australian law] framed consistently with the Statute crimes. This will enable us to ensure the benefit of complementarity in specific cases’.

25 See Dr I C Spry QC, *Transcript of Evidence*, 14 March 2001, p. TR152. See also John Stone, *Transcript of Evidence*, 13 February 2001, p. TR89 and Council for the National Interest (WA), *Submission No.19*, p. 3.

26 Dr I C Spry QC, *Submission No. 18.2*, p. 2.

The ICC will have jurisdiction whenever it decides that the domestic institutions are not 'genuinely' prosecuting the accused. A no-bill based on insufficiency of evidence, or an acquittal or a light sentence in an Australian court, could easily be treated as showing ineffective domestic jurisdiction entitling the ICC to prosecute.²⁷

- 2.32 The National Civic Council (WA) was likewise suspicious of a principle it saw as being 'uncertain' in application.²⁸
- 2.33 The Council for the National Interest expressed similar concerns, stating that the principle is a 'beguiling falsehood' and suggesting that, as State Parties would be encouraged to ensure that their domestic legal regimes were consistent with the crimes described in the ICC Statute, the principle of complementarity would 'operate as an international supremacy clause instead of protecting national sovereignty.'²⁹
- 2.34 The same argument was presented by the Festival of Light, which concluded that 'the notion of complementarity is a legal shadow' that would force State Parties to amend their national law so that it was consistent with the terms and conditions of the ICC Statute. By this process, complementarity 'instead of being a shield, becomes a sword.'³⁰

Concerns about constitutionality

- 2.35 A number of those who expressed concern about the impact of ratification of the ICC Statute on Australia's sovereignty also argued that ratification would be unconstitutional.
- 2.36 A number of specific claims were made:

27 Professor Geoffrey de Q Walker, *Submission No. 228*, p. 5.

28 National Civic Council (WA), *Submission No. 1*, pp. 2-3.

29 See Council for the National Interest (WA), *Transcript of Evidence*, 19 April 2001, p. TR188 and Council for the National Interest (WA), *Submission No.19*, p. 3. In making this point, the Council referred to a *Manual for the Ratification and Implementation of the Rome Statute*. The Manual is not an official document of the Court. It has been prepared by a non-government organisation, the International Centre for Criminal Law and Criminal Justice Policy in Vancouver, Canada.

30 Festival of Light, *Submission No. 30*, p. 4. The Festival of Light, the Council for the National Interest (WA) and others developed this argument further to claim that the ICC will become a tool for 'social engineering', supplanting the policy decisions of democratically elected governments.

- that the ICC Statute, by prohibiting ‘official capacity’ as a defence against an ICC crime,³¹ is inconsistent with section 49 of the Constitution (which provides powers, privileges and immunities for members of Parliament);
- that ratification would be an improper use of section 51(xxix) of the Constitution (which empowers Parliament, subject to the Constitution, to make laws with respect to external affairs);
- that ratification would be inconsistent with Chapter III of the Constitution (which vests Commonwealth judicial power in the High Court of Australia and such other federal courts as Parliament creates and in such other courts as it invests with federal jurisdiction);
- that the ICC’s rules of procedure and evidence are not consistent with the implied rights to due process that recent judgements of the High Court have derived from Chapter III;
- that the failure of the ICC Statute to provide trial by jury is inconsistent with section 80 (which provides that trial on indictment of any offence against any law of the Commonwealth shall be by jury); and
- that the ICC Statute, by allowing the ICC scope to interpret and develop the law it applies and the Assembly of States Parties to amend the Statute,³² delegates legislative power to the ICC (in breach of section 1 which vests the Commonwealth’s legislative power in the Parliament).

2.37 Charles Francis QC and Dr Ian Spry QC submitted the argument in relation to section 49 of the Constitution, in a joint opinion. They argued

31 Article 27 of the ICC Statute provides that it ‘shall apply equally to all persons without any distinction based on official capacity’ and that ‘immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person’.

32 Article 21 of the ICC Statute provides that ‘the Court shall apply:

- (a) in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) failing that, general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.

Article 121 of the Statute provides that amendments, including amendments to the Statute crimes, may be made after 7 years of operation. This article also allows State Parties not to accept any amendments in relation to crimes committed by their nationals or on their territory and to withdraw from the Statute following any amendment (see Articles 121(5) and (6)).

that the ICC Statute is ‘clearly inconsistent’ with section 49, which is intended to:

... prevent legislators from being sued or prosecuted for carrying out their functions. Therefore ratification of the ICC’s attempted negation of this Constitutional protection is prevented by the Constitution.³³

- 2.38 Francis and Spry also submitted that ‘it is at least very doubtful’ that the external affairs power in section 51(xxix) could be relied upon to support ratification of the ICC Statute.

The range of the external affairs power has varied greatly according to changes in attitude amongst various High Court justices. Sir Garfield Barwick CJ, for example, accorded that power an extremely wide ambit, and his views have been followed generally by many other members of the Court. However, first, there have been a number of recent changes in the composition of the High Court, and it may well be that some of the new appointees do not favour the broader construction of the external affairs power, and, secondly, the ICC Statute represents a more extreme case than any comparable treaties that have been considered by the High Court.³⁴

- 2.39 The Festival of Light likewise argued that section 51(xxix) has been interpreted ‘so broadly in a series of judgements by the High Court that it has allowed Commonwealth legislation to override State legislation on matters otherwise outside Commonwealth power’. They called for the Constitution to be amended to restrict the capacity of the Parliament to make laws under the external affairs power.³⁵

33 Charles Francis QC and Dr I C Spry QC, *Submission No 18.2*, p. 1.

34 Charles Francis QC and Dr I C Spry QC, *Submission No. 18.2*, p. 2.

35 Festival of Light, *Submission No.30*, p. 4. The submission supports the proposal put by Dr Colin Howard (in Colin Howard, ‘Amending the External Affairs Power’ Ch1 in *Upholding the Australian Constitution*, Proceedings of the Fifth Conference of the Samuel Griffiths Society, Vol 5, April 1995, p. 3) that the following be added after the words ‘external affairs’ in the Constitution:

‘provided that no such law shall apply within the territory of a State unless:

- (a) the Parliament has power to make that law otherwise than under this sub-section; or
- (b) the law is made at the request or with the consent of the State; or
- (c) the law relates to the diplomatic representation of the Commonwealth in other countries or the diplomatic representation of other countries in Australia’.

- 2.40 A number of other submitters were sympathetic with this view, asserting that the enactment of legislation to give domestic effect to the ICC would be ‘another example’ of the Commonwealth Parliament abusing the external affairs power. Many of those who put this view also said that the ICC Statute should not be ratified until after it had been submitted to a referendum.³⁶
- 2.41 Concern that ratification of the ICC Statute would be in conflict with Chapter III was raised by a number of witnesses, including Geoffrey Walker, who submitted, among other points that:

Criminal jurisdiction over Australian territory pre-eminently forms part of the judicial power of the Commonwealth: Huddart Parker & Co. v Moorehead (1909) 8CLR 353, 366. That judicial power may only be invested in courts established under Chapter III of the Constitution: Re Wakim: ex parte McNally (1999) 198 CLR 511, 542, 556, 558, 575. The proposed International Criminal Court fails to meet that standard because its judges would not satisfy the requirements of s.72 of the Constitution in relation to manner of appointment, tenure and removal ...

Further, the ICC would not be a ‘court’ at all in the sense understood by the Constitution or the Australian people. It would have a full time staff of about 600 and would in fact exercise the powers of prosecutor, judge and jury. It would even determine appeals against its own decisions. ...

As there would be no separation of powers except at a bureaucratic level, the judges’ exercise of their functions would inevitably be affected by their close links with the investigation and prosecution roles of the ICC. ...

The requirements of s.72 and of the separation of powers would be fatal to the validity of any legislation purporting to give the ICC jurisdiction over Australian territory.³⁷

36 These views were put, in whole or in part, in submissions from Woolcroft Christian Centre, A & L Barron, Andrew Anderson, Nadim Soukhadar, Michael Kearney, David Mira-Batemen, Marlene Norris, Annette Burke, Stewart Coad, Nic Faulkner, Malcolm Cliff, Joseph Bryant, Valeria Staddon, Michael Sweeney and Ken Lawson. It was also suggested in some submissions that Australia’s treaty making power should be amended to require that all treaties be approved by a 75% majority of the Senate and by the Council of Australian Governments before ratification (see, for example, submissions from the Council for the National Interest (WA) and Gareth Kimberley).

37 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, pp. 2-3.

2.42 Francis and Spry also concluded that ‘Chapter III does not permit ratification of the ICC Statute’, asserting that:

There are clearly substantial arguments that Chapter III (and especially section 71) merely enables the Commonwealth Parliament to confer jurisdiction upon Australian or at least that it does not enable the Commonwealth Parliament to confer upon foreign courts such as the proposed ICC extensive jurisdiction over Australian nationals and extensive powers to over-ride Australian courts.³⁸

2.43 Professor George Winterton also expressed the view that any Commonwealth legislation seeking to implement the ICC Statute ‘may contravene Chapter III’. The main themes in his argument were that:

- the power to try a person for a criminal offence is an exercise of judicial power (see *Chu Kheng Lim v Commonwealth* (1992) 176 CLR 1, 27);
- if the ICC’s power to try offences under the ICC Statute is an exercise of the judicial power of the Commonwealth for the purposes of Australian law, it would contravene Chapter III because the ICC is neither a State court nor a federal court constituted in compliance with section 72 of the Constitution (see *Brandy v HREOC* (1995) 183 CLR 245);
- when the ICC tries a person charged with having committed an offence in Australia, it is arguably exercising ‘judicial functions within the Commonwealth’ because it is exercising judicial functions in respect of acts which occurred in Australia (see *Commonwealth v Queensland* (1975) 134 CLR 298, 328);
- while the argument advanced by Deane J (in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 627) that Chapter III would not apply to an international tribunal because it exercises the judicial power of the international community rather than the Commonwealth is ‘a plausible opinion which might commend itself to some current justices of the High Court’, it is:

... surely arguable that the ICC would exercise *both* the judicial power of the international community *and*, insofar as it applies to

38 Charles Francis QC and Dr I C Spry QC, *Submission No 18.2*, p. 2. Similar views are put in National Civic Council (WA), *Submission No. 1*, pp. 1-2; Richard Egan (National Civic Council (WA)), *Transcript of Evidence*, 19 April 2001, p. TR177; Dr I C Spry QC, *Transcript of Evidence*, 14 March 2001, p. TR155; and in submissions from Robert Downey, Catherine O’Connor and Davydd Williams.

offences committed in Australia, as a matter of Australian domestic law, the judicial power of the Commonwealth. Insofar as Australian law is concerned, the ICC would be exercising jurisdiction conferred by Commonwealth legislation implementing the Statute, just as would an Australian court trying a defendant for a crime specified in art. 5 of the Statute ... It would seem anomalous for two tribunals exercising the same jurisdiction pursuant to the same legislation to be regarded as exercising the judicial power of different polities *for the purposes of Australian domestic law*;

- in the event that the ICC exercises its jurisdiction where a person has been acquitted of the same or a similar offence by an Australian court, any action by the Executive to arrest and surrender the person to the ICC 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.³⁹

- 2.44 In submitting these views, Winterton admits to two caveats: first that the legal position will depend upon the specific terms of the legislation; and, second, that there is little or no direct legal authority in support of these arguments and that his observations are ‘necessarily somewhat speculative’.⁴⁰
- 2.45 Geoffrey Walker submits, as a separate claim, that one of the strongest trends in Australian constitutional law in recent years has been for the High Court to conclude that certain basic principles of justice and due process are entrenched within Chapter III and that the ICC’s rules of procedure and evidence are inconsistent with these principles.

39 Professor George Winterton, *Submission No. 231*, pp. 2-3. Nevertheless, Professor Winterton supported Australia’s ratification of the ICC Statute, believing that ‘international justice requires an International Criminal Court’. He was of the view that: ‘since it is extremely unlikely under foreseeable circumstances that the ICC would be called upon to exercise its jurisdiction in respect of an art. 5 crime committed in Australia, the Committee may well conclude that the risk that Ch. III would be successfully invoked is minimal’ (see *Submission No. 231*, p. 3).

40 Professor George Winterton, *Submission No. 231*, p. 3.

... procedural due process is a fundamental right protected by the Constitution, which mandates certain principles of open justice that all courts must follow ...

This constitutional guarantee raises further doubts about whether the Parliament could validly confer jurisdiction on the ICC.⁴¹

- 2.46 Walker, Francis and Spry raised the further possibility that the absence of trial by jury from the ICC's procedures could infringe against the safeguard of trial by jury provided for in section 80 of the Constitution.⁴²
- 2.47 Other constitutional issues raised by Geoffrey Walker concern the law-making capacity of the ICC and the Assembly of States Parties. Walker submitted that the provisions of the ICC Statute which allow the Court to apply general principles of law and 'principles as interpreted in its previous decisions' (see footnote 34 above) confer on the Court 'vast new fields of discretionary law making'.

This wholesale delegation of law-making authority to a (putative) court encounters serious objections stemming from the separation of powers. ... They are exemplified in the Native Title Act Case, in which the High Court struck down a provision of the NTA that purported to bestow on the common law of native title the status of a law of the Commonwealth ... [in this decision the majority concluded that] 'Under the Constitution ... the Parliament cannot delegate to the Courts the power to make law involving, as the power does, a discretion or, at least, a choice as to what the law should be' (Western Australia v Cth (1995) 183 CLR 373, 485-87).⁴³

- 2.48 Walker also expressed concern about the capacity of the Assembly of States Parties to amend the Statute crimes after a period of 7 years⁴⁴. In his assessment, to give effect to this mechanism the Parliament would need to:

41 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, pp. 6-7.

42 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, pp. 7-8 and Charles Francis QC and Dr I C Spry QC, *Submission 18.2*, p. 3. In his submission Professor Walker noted that the prevailing High Court opinion on section 80 is to limit the trial by jury guarantee to 'trial on indictment', a procedure which strictly speaking does not exist in Australia.

43 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, pp. 9-10.

44 Article 121 allows for amendments to be made by the Assembly of States parties or at a special review conference after 7 years. Adoption of amendments requires a two-thirds majority of States parties. If a State does not agree with the amendment the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory. Under Article 121(6) if an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from the Statute with immediate effect.

... delegate to the Assembly the power to make laws operating in Australian territory. That it cannot do: Parliament 'is not competent to abdicate its powers of legislation' or to create a separate legislature and endow it with Parliament's own capacity: Victorian Stevedoring and General Contracting Co. v Dignan (1931) 46 CLR 73, 121; Capital Duplicators Pty Ltd v ACT (no 1) (1992) 177 CLR 248; Re Initiative and Referendum Act (1919) AC 935, 945. This is because 'the only power to make Commonwealth law is vested in the parliament (Native Title Act case p 487).⁴⁵

- 2.49 The Attorney-General has rejected the claims that ratification of the ICC Statute would violate Chapter III of the Constitution, describing them as false and misleading.⁴⁶

The ICC will exist totally independently of Chapter III of Constitution, it will not have power over any Australian Court and will not in any way affect the delivery of justice in Australia.

Australia has been subject to the International Court of Justice for over 50 years and this has not violated our constitutional or judicial independence. The ICC will not have any effect on our constitution or interfere in any way with the independence of our judiciary.⁴⁷

- 2.50 At the Committee's request, the Attorney-General's Department sought advice from the Office of General Counsel of the Australian Government Solicitor on a number of the constitutional concerns raised in submissions to our inquiry. The advice, issued with the authority of the acting Chief General Counsel, was as follows:

The ICC will not exercise the judicial power of the Commonwealth when it exercises its jurisdiction, even when that jurisdiction relates to acts committed on Australian territory by Australian citizens. Ratification of the Statute will not involve a conferral of the judicial power of the Commonwealth on the ICC. Nor would enactment by the Parliament of the draft ICC legislation involve such a conferral.

45 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, p. 10. Walker noted that the Government's proposed implementing legislation might seek to address this issue (see *Submission No. 228*, p. 10).

46 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 5.

47 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 5.

... The judicial power of the Commonwealth cannot be vested in a body that is not a Chapter III court. However, the draft ICC legislation does not purport to confer Commonwealth judicial powers or functions on the ICC. The legislation has been drafted on the basis that the powers and functions of the ICC have been conferred on it by the treaty establishing it.

... The judicial power exercised by the ICC will be that of the international community, not of the Commonwealth of Australia or of any individual nation state. That 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 a party to matters before both of these international judicial institutions.

... Numerous respected United States commentators have considered the alleged unconstitutionality of ratification of the ICC Statute by the United States and, in relation to those arguments which are relevant in the Australian context, have resoundingly concluded that there is no constitutional objection to ratification. For example, Professor Louis Henkin (*Foreign Affairs and the United States Constitution* (2nd Ed) 1996 at p.269) has written that the ICC would be exercising international judicial power. It would not be exercising the governmental authority of the United States but the authority of the international community, a group of nations of which the United States is but one.

Decisions of the ICC would not be binding on Australian courts, which are only bound to follow decisions of courts above them in the Australian court hierarchy. However, decisions of courts of other systems are often extremely persuasive in Australian courts. It is a normal and well established aspect of the common law that decisions of courts of other countries, such as the United Kingdom are followed in Australian courts. Similarly, were an Australian court called upon to decide a question of international law, it could well find decisions of international tribunals to be persuasive.⁴⁸

2.51 Having reviewed this matter the Attorney-General reported that:

48 Office of General Counsel, 'Summary of Advice', pp 1-2, attached to Attorney-General's Department, *Submission No. 232*.

The Government has satisfied itself that ratification of the Statute and enactment of the necessary legislation will not be inconsistent with any provision of the Constitution.⁴⁹

- 2.52 Justice John Dowd, on behalf of the International Commission of Jurists, agreed that the ICC ‘would not exercise Commonwealth judicial power’ and would, therefore, operate independently of Chapter III of the Constitution.

[Chapter] III applies to Australian courts. The foreign affairs power applies to foreign affairs. What we are doing is setting up something extra-Australian in the power vested in the Commonwealth to do that. The Commonwealth uses that power in a whole range of matters and treaties for the protection of the world. Chapter III deals with our court system....

Chapter III ... is to ensure that the [court] system in Australia has integrity and probity, it does not govern an international treaty [such as would establish] extradition and the International Criminal Court.⁵⁰

- 2.53 Further argument in response to the constitutional concerns was put in written and oral evidence received from government officials, the Attorney-General and the Minister for Foreign Affairs. The key elements of this argument are reproduced below:

- ‘the ICC is not going to be a domestic tribunal of Australia; it does not fit within the Constitution. It is an international tribunal established by the international community to try international crimes ... it operates within its own sphere, just as our courts operate within their own spheres’;⁵¹ and
- ‘the ICC will have no authority over any Australian court and in particular will not become part of the Australian court system and will have no power to override decisions of the High Court or any other Australian court. As an international court, the ICC will not be subject to the provisions of Chapter III of the Constitution, which governs the exercise of judicial power of the Commonwealth. The High Court has

49 The Hon Daryl Williams AM QC MP, ‘The International Criminal Court – the Australian Experience’, an address to the International Society for the Reform of Criminal Law, 30 August 2001, p. 7.

50 The Hon Justice John Dowd, *Transcript of Evidence*, 13 February 2001, p. TR 107.

51 Mark Jennings (Attorney-General’s Department), *Transcript of Evidence*, 30 October 2001, p. TR25.

stated (in the Polyukhovich case) that Chapter III would be inapplicable to Australia's participation in an international tribunal to try crimes against international law. In this regard the ICC will be akin to the International Court of Justice or the International Criminal Tribunals for the former Yugoslavia and Rwanda.⁵²

- 2.54 The Australian Red Cross (through its National Advisory Committee on International Humanitarian Law) also argued firmly against those who claim ratification would be beyond the Commonwealth's constitutional authority. It referred to such claims as being 'manifestly flawed' and as 'being entirely devoid of legal substance'. The Red Cross submitted that:

Those who make such naïve arguments fail to mention existing Commonwealth legislation such as the *International War Crimes Tribunals Act 1995* which, on the basis of the same argument must be ultra vires Commonwealth legislative competence - this of course, despite the fact that the validity of that particular legislation has never been challenged. It should also be noted that the *Extradition Act 1998* is predicated upon the notion that the Commonwealth Parliament is constitutionally competent to legislate in respect of the transfer of Australians, and others within our territorial jurisdiction, to foreign courts.

Quite apart from the existence of valid Commonwealth legislation which exposes the fallacy of the argument, the High Court's interpretation of the scope of the External Affairs Power in Section 51(xxix) of the Constitution extends to both the abovementioned Act as well as to any new legislation in respect of the Rome Statute.⁵³

52 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 10. The advice from the Office of General Counsel mentioned above also cites the Polyukhovich case, saying Justice Deane concluded that international tribunals trying crimes against international law would be exercising international judicial power: 'Chapter III of the Constitution would be inapplicable, since the judicial power of the Commonwealth would not be involved' (see Office of General Counsel, 'Summary of Advice', p1, attached to Attorney-General's Department, *Submission No. 232*). Amnesty International endorses the view that Justice Deane's comments in the Polyukhovich case are relevant and aptly cited by the Government witnesses (see Amnesty International, *Submission No. 16.2*, p. 3). Geoffrey Walker noted that Justice Deane's remarks were *obiter dicta*; that is, were said by the way, rather than as part of the essential legal reasoning of the case before him at the time (see Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, p. 3).

53 Australian Red Cross (National Advisory Committee on International Humanitarian Law) *Submission No. 26.1*, pp. 1-2.

- 2.55 As the Australian Red Cross pointed out, if the arguments about constitutional invalidity are correct, then they should apply to Australia's involvement in other War Crimes Tribunals. That argument made by the RC was not countered in evidence put to the Committee.

The proposed implementing legislation and the ICC crimes

- 2.56 On 31 August 2001, the Attorney-General referred the following draft legislation to the Committee:

- *International Criminal Court Bill 2001*, (the ICC bill); and
- *International Criminal Court (Consequential Amendments Bill 2001*, (the consequential amendments bill).

The Committee then sought further public submissions from all parties who had previously had input to its review of the Statute to comment on any aspect of the proposed legislation.

- 2.57 As a result, a number of issues were raised concerning the proposed legislation. As with views on the Statute, there are a range of competing opinions relating to the impact and coverage of the legislation.

- 2.58 Organisations like the Australian Red Cross, the Australian Institute for Holocaust and Genocide Studies, the Castan Centre for Human Rights Law, Human Rights Watch and Amnesty International, who favour Australia's ratification of the Statute, indicated that in their view the legislation would be sufficient for the purpose of fulfilling Australia's obligations under the Rome Statute. In fact, Human Rights Watch contended that:

By virtue of the comprehensive nature of this Bill, the likelihood of the ICC ever asserting jurisdiction in a case over which Australia would ordinarily exercise jurisdiction, is now extremely remote.⁵⁴

- 2.59 The Australian Red Cross considered that while in several areas the legislation may need minor modifications:

It is the general view of ARC that the Bills as drafted comprehensively provide for the national implementation of

54 Human Rights Watch, *Submission No. 23.1*, pp. 1-2.

Australia's relationship with the new International Criminal Court if and when Australia chooses to ratify the *Rome Statute*.⁵⁵

- 2.60 The Australian Red Cross also raised a number of concerns about several aspects of the legislation: the use of the term 'primary' in referring to Australia's national jurisdictional competence; the repealing of Part II of the *Geneva Conventions Act 1957*; the definition of crimes of a sexual nature; and the repetition of certain war crimes found in Subdivision H of the consequential amendments bill.
- 2.61 To avoid the situation exhibited with the two ad hoc tribunals, which have primacy over national jurisdictions, clause 3 of the ICC bill acknowledges the fundamental rejection in the *Rome Statute* of the model of interaction between the International Criminal Tribunals for the Former Yugoslavia and Rwanda and their respective relevant national criminal jurisdictions.⁵⁶ Clause 3 (1) emphasises that the jurisdiction is complementary to the jurisdiction of Australia; however, the Australian Red Cross stated that Clause 3 (2) does not convey the pre-eminence of Australian jurisdiction, and should be rephrased in the following manner:
- “Accordingly, this Act does not affect the primacy of Australia's right to exercise its national criminal jurisdiction with respect to crimes within the jurisdiction of the ICC.”⁵⁷
- 2.62 In this context, the Australian Red Cross was of the view that clause 268 (2) of the consequential amendments bill should also be strengthened in the same manner with the inclusion of the same wording.⁵⁸
- 2.63 The Red Cross's National Advisory Committee on International Humanitarian Law suggested that the Government should 'deposit a Declaration of Australia's understanding of the interpretation of preambular paragraph 9 and Article 1 [of the ICC Statute, which establish

55 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.3*, p. 1.

56 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.3*, p. 2.

57 The Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.3*, p. 2. Section 3 (2) in the Bill currently reads: 'Accordingly, this Act does not affect the primary right of Australia to exercise its national criminal jurisdiction with respect to crimes within the jurisdiction of the ICC'.

58 Clause 268 (2) of the consequential amendments bill currently states: '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'.

the complementarity principle].’ Such a declaration, to be made upon ratification of the Statute, would:

... not alter Australia’s position at law – that is, the Declaration would not increase Australia’s primacy of jurisdiction in respect of acts committed in its own territory or by one of its own nationals. However, the Declaration would constitute a clear statement to other States and to the ICC itself of the level of Australia’s resolve to insist on its primary national jurisdiction in specified situations.⁵⁹

2.64 The Australian Red Cross was also concerned about the proposed amendment to the *Geneva Conventions Act 1957*, involving the repeal of Part II of the Act, which will occur as a result of the passage of the ICC legislation. The Australian Red Cross was concerned that:

the jurisdictional competence of Australian Courts in respect of grave breaches of the Geneva Conventions will continue in respect of the period from 1957 until the enactment of the *International Criminal Court (Consequential Amendments) Bill* and subsequent repeal of Part II of the *Geneva Conventions Act 1957*.

[The Australian Red Cross therefore recommends:]....

If this interpretation is correct, that the *Explanatory Memorandum* to accompany the legislation explicitly indicate this interpretation of Section 8(b) of the *Acts Interpretation Act 1901*.⁶⁰

2.65 A third area of concern for the Australian Red Cross was that the consequential amendments legislation should reflect more closely the crimes of rape as laid out in the *Elements of Crimes* in relation to the victim’s lack of consent. The Australian Red Cross suggested that

The proposed Sections 268.13 (crime against humanity of rape); 268.58 (war crime of rape in an international armed conflict); and 268.81 (war crime of rape in a non-international armed conflict), for example, restrict sexual penetration for the purposes of the definition of rape to certain specified body parts of the victim –

59 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.1*, p. 3. The Red Cross argued that, while the ICC Statute prohibits the making of Reservations, a Declaration of this type would be ‘entirely consistent with the treaty’s [that is, the ICC Statute’s] terms – it would be, in effect, an affirmation of one of the treaty’s existing provisions’.

60 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26.3*, p. 3.

namely the genitalia, anus or mouth. In contrast, the Elements of Crimes defines rape to include ‘...penetration, however slight, of any part of the body of the victim *or of the perpetrator* with a sexual organ...’ (Article 7(1)(g)-1; Article 8(2)(b) (xxii)-1; and Article 8(2)(e)(vi) – 1). This definition in the Elements of Crimes envisages the possibility that the victim might be forced against their will to engage in the sexual penetration of another person – whether or not that other person is consenting to the penetration. The proposed Australian definition of rape simply does not include that possibility.⁶¹

2.66 Human Rights Watch also raised this issue and recommended that consideration should be given to harmonising these provisions according to the *Elements of Crimes* paper and includes a less restrictive definition for rape in the consequential amendments bill.⁶² Human Rights Watch also believed that Sections 268.63 and 268.86 should reflect more closely the terminology used in the *Elements of Crimes* paper Articles 8(2)(b)(xxii) and 8(2)(e)(vi).⁶³

2.67 The Australian Red Cross also highlighted inconsistencies under Section H of the consequential amendments bill dealing with grave breaches of Protocol I of the Geneva Convention. It contended that, while Sections 268.96 and 268.47 enumerated 5 similar elements of the specific offence, those elements are not identical and such:

inconsistency in specifying elements could easily cause problems, as future defendants would justifiably raise objections if they were charged with a specific war crime appearing twice in the legislation with the prosecution choosing the specific offence with the less onerous elements.⁶⁴

2.68 The Australian Institute for Holocaust and Genocide Studies in recommending ratification of the Statute also suggested that:

Given the fact that pre-existing legislation is insufficient in prohibiting and punishing the international crimes that the ICC purports to cover ... implementation of the *International Criminal*

61 Australian Red Cross (National Advisory Committee on International Humanitarian Law), Submission No. 26.3, p. 4.

62 Human Rights Watch, Submission No. 22.1, pp. 3-4.

63 Human Rights Watch, Submission No. 22.1, pp. 4-5.

64 Australian Red Cross (National Advisory Committee on International Humanitarian Law), Submission No. 26.3, p. 6.

Court Bills is an ideal way of strengthening Australia's legislative and definitional framework for the apprehension and prosecution of persons committing genocide, war crimes and crimes against humanity.⁶⁵

2.69 In addition, the Institute argued that, while the crimes encompassed under the proposed legislation will allow prosecutions after it comes into force, because the laws do not currently exist in Australia, retrospective antigencide legislation should be considered. Such legislation should operate from the time that genocide acquired the status of international customary law – 11 December 1946.⁶⁶

2.70 In supporting strongly the establishment of the ICC, the Castan Centre for Human Rights Law suggested that the legislation sets out thoroughly and precisely Australia's obligations under the Statute and further that:

The definitions given to the ICC crimes are highly progressive, often duplicating 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.⁶⁷

2.71 The Castan Centre suggested several minor amendments to the proposed legislation. These are summarised below:⁶⁸

- there should be time constraints on issuing arrest warrants – cl 21 and 22 of the Statute Bill are deficient because they do not impose time limitations like those under Article 59 of the Statute;⁶⁹
- that cl 102 be amended to extend privileges and immunities to ICC officials not named in Article 48(2) of the Statute;
- that the legislation should articulate a position on the statute of limitations and immunities attaching to official capacities, as sought under Articles 27 and 29 of the Statute. The Castan Centre saw the possibility arising that application of these barriers might lead the ICC

65 The Australian Institute for Holocaust and Genocide Studies, Submission No. 46, p. 27.

66 The Australian Institute for Holocaust and Genocide Studies, Submission No. 46, p. 10.

67 The Castan Centre for Human Rights Law, Submission No. 239, p. 4.

68 The Castan Centre for Human Rights Law, *Submission No. 239*, p. 6.

69 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.

to determine that under Article 17, Australia was unwilling to investigate a case itself;

- 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; and
- 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.

2.72 In recommending that the Committee endorse the legislation, Amnesty International recognised that some improvements could be made. They were particularly concerned about the coverage of Article 27 of the Statute under the draft legislation.⁷⁰ Amnesty suggested that the legislation as currently drafted, does not reflect the intent of Article 27 which provides that the official capacity of a government official shall not exempt that person from criminal responsibility under the Statute.

2.73 In Amnesty's view:

The government, in omitting Article 27 from the legislation, may take the view that, because the statute renders the crimes specified in it enforceable, they could not be characterised as official acts. This may be so but it is undesirable for that aspect to be left in doubt—but it would, in any event, leave an official immune by virtue of his status, and thus exempt from liability whilst he remains an official. We say it is far too late in the day for some future Hitler to extend his cover of immunity by some future enabling law. The quintessential feature of these crimes is that they are committed by or authorised by government officials. In our view, there should be no immunity, and Article 27 should be introduced into the legislation.⁷¹

70 See also Human Rights Watch supplementary submission which also commented on Article 27 and recommended: 'it would be best to explicitly provide that immunities and other barriers to prosecution do not apply to crimes covered in the ICC Crimes Bill, either in relation to arrest and surrender of persons to the ICC or for the purpose of prosecution of the ICC Crimes Bill offences in Australian Courts. Both bills should be amended to include a provision expressly excluding the application of the immunities in the *Foreign States Immunities Act 1985* and the *Diplomatic Privileges and Immunities Act 1961* (Submission No. 22.1, p. 3).

71 Amnesty International Australia, *Transcript of Evidence*, 10 April 2002, p. TR273.

- 2.74 Amnesty also highlighted their view that the implementing legislation enhances Australia's sovereignty by conferring on Australian courts the jurisdiction to try persons accused of crimes subject to the Statute, in circumstances where Australian courts would previously have lacked the power.⁷²
- 2.75 Several submissions expressed strong reservations, not only about the possible ratification of the Statute, but also about aspects of the legislation. Organisations including the Council for the National Interest (WA) (CNI), the National Civic Council (WA) (NCC) and the Australian Patriot Movement (APM) were of the view that to ratify the Statute and implement the proposed legislation would endanger Australia's sovereignty.⁷³
- 2.76 CNI was 'implacably' opposed to ratification of the Statute and considered that Australia would find its law being circumvented by the ICC. CNI believed that the implementing legislation, although closely modelled on the Statute crimes, would only ensure 'total compliance' with all requests of the ICC and that complementarity is only 'an exercise in semantics'. CNI further suggested that the legislation is 'unconstitutional, undemocratic and an abrogation of Australia's sovereignty'.⁷⁴
- 2.77 CNI was also critical of a number of the definitions of crimes in the consequential amendments bill which it suggested are written in vague and imprecise terms and could leave the way open for future initiatives in international law to be inserted into Australian law without the approval of the Australian Parliament.⁷⁵ CNI cited as examples of this problem in the definitions of crimes such as 'causing serious mental harm'; and 'causing great suffering'; and 'serious injury to physical health'. CNI suggested that:

The offence of persecution, "severely deprives, contrary to international law, one or more persons of fundamental rights" and "on grounds that are universally recognised as impermissible under international law". This would appear to open the way for

72 Amnesty International Australia, *Submission No. 16.4*, p. 6.

73 Australian Patriot Movement, *Submission No. 241*, p. 1.

74 Council for the National Interest, *Submission No. 19.2*, p. 2.

75 Council for the National Interest, *Submission No. 19.2*, p. 2

future initiatives in international law to be inserted into Australian law without the approval of the Australian Parliament.⁷⁶

- 2.78 Similar views about the legislation were expressed by the NCC in relation to ‘absolute compliance’. The NCC went further in suggesting that under the ICC bill the ICC could be seen as a superior court because of its capacity to issue binding directives to the Attorney General.⁷⁷ The NCC was also critical of the consequential amendments bill in its definitions of two offences that they believed could lead to quite frivolous charges - namely ‘genocide by causing mental harm’ and ‘persecution by severely depriving’. Like the CNI, the NCC believed that inclusion of the latter offence in the federal criminal code would create:

.. an open-ended means of importing developments in international law into Australian criminal law without any parliamentary debate.⁷⁸

Definition of ICC crimes

- 2.79 Many of those who argued against ratification of the ICC Statute expressed concern about the manner in which the crimes proposed to be within the ICC’s jurisdiction are defined. It was suggested that the definitions are too vague and thereby open to wide interpretation and, potentially, abuse.
- 2.80 Dawn Brown suggested that the definitions of genocide, war crimes and crimes against humanity are ‘so breath-takingly elastic and wide open to manipulation’ that the ICC will become not just a war crimes tribunal but a human rights court.⁷⁹
- 2.81 The Festival of Light likewise referred to the ‘elastic terms’ and ‘sweeping language’ of the Statue in doubting that the Court will ultimately restrict its activities to the most serious crimes of international concern. In commenting on the crime of genocide (the definition of which refers, in

76 Council for the National Interest, *Submission No. 19.2*, p. 2. See also comments from James Crockett who raised similar terminological issues with the draft legislation, *Submission No. 174.1*, p. 2. The Australian Patriot Movement voiced similar sentiments towards the legislation and cited a number of clauses which it considered might lead to unforeseen outcomes if passed into Australian law. Australian Patriot Movement, *Submission Nos. 241 and 241.1*.

77 National Civic Council (WA), *Submission No. 1.1*, p. 1.

78 National Civic Council (WA), *Submission No. 1.1*, p. 1.

79 Dawn Brown, *Submission No.21*, p. 2.

part, to ‘causing serious mental harm to a members of a national, ethnic, racial or religious group’) the Festival asked whether:

those Australians who were involved in helping care for Aboriginal children a generation ago [a practice which the 1997 Human Rights and Equal Opportunities Commission report *Bringing Them Home* described as causing mental anguish akin to genocide] ... [could] find themselves transported to The Hague to be prosecuted in the International Criminal Court for the crime of genocide?⁸⁰

2.82 The Festival of Light also questioned the language used to define some aspects of crimes against humanity.

These crimes [being murder, extermination, enslavement, forcible transfer of population, torture, sexual slavery, persecution and other inhumane acts] certainly *sound* terrible but the ICC Statute gives very little guidance as to what these words *actually proscribe*.

For example, the crime of ‘persecution’ as set out in the Statute and as further defined in the recently issued ‘*Elements of Crimes*’, condemns the ‘severe deprivation’ of a group’s ‘fundamental rights’. The crime of ‘inhumane acts’ criminalises the infliction of ‘great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.’ What do these terms proscribe? At present it is impossible to say definitively.⁸¹

2.83 Geoffrey Walker shared some of these concerns, submitting that the ‘list of offences punishable by the court extends to acts that are not normally regarded as major crimes, such as “outrages upon personal dignity”’. Moreover, the provisions are:

... capable of expansion to cover conduct far beyond anything most people would regard as the ‘most serious crimes of international concern’. The range of acts that could be treated as constituting an attempt to commit ‘cultural persecution’ (Art.7(1)(k)) or an attempt to outrage human dignity might be limited only by the imagination of the prosecutors and their NGO-supplied helpers.⁸²

80 Festival of Light, *Submission No. 30*, pp.5-6. See also Dr I C Spry QC, *Submission No.18.2*, p. 2 and June Beckett, *Submission No. 11*, pp. 3-5; Australian Family Association (Mildura Branch) *Submission No. 210*, p. 1.

81 Festival of Light, *Submission No. 30*, p. 6.

82 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, p. 8.

- 2.84 The ‘imprecise’ manner in which these crimes are defined allows for the possibility, according to the Festival of Light and many other submitters, that the ICC could be used to ‘re-engineer social policies throughout the world.’ The Festival of Light was especially concerned about what it saw as the potential for the Court to be used to force changes to national family, gender and abortion policies.⁸³
- 2.85 The Council for the National Interest (WA) endorsed these concerns, suggesting that the language in the Statute is ‘so vague that at some point down the track – maybe 10 to 15 years out – other interpretations will be placed on that language.’⁸⁴
- 2.86 June Beckett mentioned also that whatever definition is ultimately agreed for the crime of aggression ‘must necessarily be loose, open-ended and wide open to criminal misinterpretation.’⁸⁵
- 2.87 In response to these concerns the Committee received submissions from a number of individuals including the New South Wales Bar Council, Justice Perry, Human Rights Watch, Nicole McDonald and others arguing that the crimes within the jurisdiction of the ICC are, in fact, comprehensively defined and draw on long established principles of law.⁸⁶
- 2.88 For example, the NSW Bar Association submitted that, read together, the ICC Statute and the accompanying *Elements of Crimes*:
- Codify existing customary international law and incorporate the provisions of treaties including the Genocide Convention, the
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83 Festival of Light, *Submission No.30*, pp. 6-7. These argument were presented in a number of other submissions, including those from Fay Alford, Council for the National Interest (WA), Endeavour Forum, Richard Gellie, Arthur Hartwig, National Civic Council (Isaacs Federal Electorate Group), Catharina O’Connor, Youth Concerned and Davydd Williams. All of these submissions drew heavily on a paper entitled *Doing the Right Thing: The International Criminal Court and Social Engineering* prepared by Professor Wilkins, who is the Director of the World Family Policy Centre at Brigham Young University, USA. George Winterton also sees merit in Wilkins’ argument that the ‘sweeping language’ of the Statute is ‘limited largely by the imagination of international lawyers and the judicial restraint (or lack of it) that will be exhibited by the judges on the ICC’ (see GeorgeWinterton, *Submission No. 231*, p. 1).

84 Denis Whitely (Council for the National Interest (WA)), *Transcript of Evidence*, 19 April 2001, p. TR200.

85 June Beckett, *Submission No. 11*, p. 4.

86 See the submissions from the NSW Bar Association, the International Commission of Jurists, UNICEF Australia, Justice John Perry, Helen Brady, Phillip Scales, Nicole McDonald, Australian Red Cross, Australian Lawyers for Human Rights, World Vision and Ben Clarke.

Apartheid Convention, the Torture Convention and the Geneva Conventions are 'strictly, rather than broadly defined.'⁸⁷

2.89 Further, and by way of example, the NSW Bar Association referred to the various elements of the proposed definition of 'genocide by killing', concluding ultimately that the 'definition is anything but broad':

... 'genocide by killing ... contains the following elements, each of which must be proved. These are: the perpetrator must kill more than one person; the persons must belong to a 'particular national, ethnical, racial or religious group'; the perpetrator must have intended to destroy in part or in whole that 'national, ethnical, racial or religious group'; and the conduct must have taken 'place in the context of a manifest pattern of similar conduct directed against that group or was the conduct that could itself effect such destruction'.

... It is clearly directed to conduct such as 'ethnic cleansing' and the events in Kosovo obviously are within this proposed definition. The offence is strictly rather than broadly defined.⁸⁸

2.90 Helen Brady emphasised that the definitions contained in the Statute must be read in conjunction with the further descriptions contained in the *Elements of Crimes*.

87 NSW Bar Association, *Submission No. 20*, p. 6. The International Commission of Jurists noted that 'These offences already exist in the international calendar.' (*Submission No. 24*, p. 6). Justice Perry likewise noted that all of the ICC crimes are 'based upon definitions already established in international law' (*Submission No. 8.3*, p. 4). UNICEF Australia noted that the 'jurisdiction of the ICC goes no further than that already in existence and already endorsed by Australia including:

- the Convention on the Rights of the Child;
- the International Covenant on Civil and Political Rights (particularly Articles 23 and 24);
- the International Covenant on Economic, Social and Cultural Rights (particularly Article 10);
- the Convention on the Elimination on All Forms of Discrimination Against Women; and
- the Geneva Conventions and their additional protocols. (*Submission No 34*, p. 8).

Many elements of the crimes within the ICC's jurisdiction, although not all, have been offences under Commonwealth law for many years – see the *War Crimes Act 1945* (as amended in 1988), the *Geneva Conventions Act 1957*, the *Defence Force Discipline Act 1982* and a series of related laws which outlaw the use of weapons which may, in certain circumstances, offend the ICC's war crimes provisions, including: the *Chemical Weapons (Prohibition) Act 1994*, the *Crimes (Biological Weapons) Act 1976*, the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* and the *Anti-personnel Mines Convention Act 1998*.

88 NSW Bar Association, *Submission No. 20*, p. 6.

The Elements of Crimes paper sets out each of the crimes and their elements. They are designed to assist and guide the Court ... The extensive definitions of the crimes ensure that both the Prosecutor and the defence will be clearly aware of the exact elements of the crimes.⁸⁹

- 2.91 Justice Perry agreed that while the definitions contained in the ICC Statute itself might not be fully prescriptive, the definitions contained in the *Elements of Crimes* are sufficiently detailed to overcome any concerns.⁹⁰
- 2.92 The ICC crimes are defined comprehensively in the Government's proposed implementing legislation discussed later in this Chapter. In a recent speech to the International Society for the Reform of Criminal Law, the Attorney-General stated that the legislation will 'result in the enactment of all the crimes within the Court's jurisdiction as crimes in Australian law ... [to] be contained in a new Division of the Criminal Code'.⁹¹
- 2.93 The Australian Red Cross and others noted that, as the jurisdiction of the ICC is prospective (see Article 11), claims that those involved in the policies which lead to the 'stolen generation' of aboriginal children might be exposed to prosecution for genocide are 'completely unfounded'.⁹²
- 2.94 The Attorney-General was dismissive of claims that the ICC would be used as an instrument of 'social engineering', describing them as 'totally false and absurd ... to suggest otherwise is to engage in deliberate scare mongering'.⁹³
- 2.95 In relation to the crime of aggression, advice from the Attorney-General and the Minister for Foreign Affairs was that the crime has not yet been defined and that it cannot be added to the Court's jurisdiction until a

89 Helen Brady, *Submission No. 7*, p. 11. See also the *Elements of Crimes* paper which states that the elements of crimes will assist the court in the interpretation and application of Articles 6, 7 and 8, consistent with the Statute. The *Elements of Crimes* paper focuses on the conduct, consequences and circumstances associated with each crime. (*Elements of Crimes*, United Nations, PCNICC/2000/1/Add.2, p. 5). See also comments in Chapter 1, paragraph 1.27.

90 Justice John Perry, *Submission No. 8.3*, p. 4.

91 The Hon Daryl Williams AM QC MP, 'The International Criminal Court – the Australian Experience', an address to the International Society for the Reform of Criminal Law, 30 August 2001, p. 9.

92 Australian Red Cross (National Advisory Council on International Humanitarian Law), *Submission No. 26*, p.5. See also Nicole McDonald, *Submission No. 10*, p. 4 and Helen Brady, *Submission No.7*, p. 1.

93 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 5.

definition is adopted by the State Parties. The earliest that the crime could be added to the Court's jurisdiction is 7 years after the establishment of the Court. At this time, a State Party may decline to accept the definition, in which case the Court may not exercise jurisdiction over that crime when committed by the nationals of that State Party or on its territory.⁹⁴

Role and accountability of the Prosecutor and Judges

2.96 Some of those opposed to ratification of the ICC Statute pointed to the differences between the judicial system described in the Statute and the common law traditions in Australia and claimed that the ICC's standard of justice will be both 'alien' and 'inferior'.

2.97 Some of the particular concerns raised were that the Statute:

- by requiring that State Parties take into account a 'fair representation of female and male judges' and 'legal expertise on specific issues, including ... violence against women and children' when selecting judges, encourages the selection of 'ideological' judges;
- by allowing the Prosecutor to initiate investigations without governmental oversight or control and accept 'gratis personnel offered by State Parties, intergovernmental organizations or non-governmental organizations', allows for the possibility that the Prosecutor will be supported and influenced by 'well-funded international NGOs who are hostile to religion and traditional values';
- by providing that the one institution will investigate crimes, prosecute, pass judgement, sentence and hear appeals, concentrates rather than separates power and ignores the 'hard-won safeguards of our common law system and instead adopts trial by inquisition, which is common in European countries and dictatorships'; and
- removes or modifies some of the important features of our common law system of justice, such as the right to trial by jury, the inadmissibility of hearsay evidence and the right of an accused to know and confront his or her accusers.⁹⁵

94 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 9.

95 Festival of Light, *Submission No. 30*, pp. 7-10. Some or all of these concerns were shared by the Council for the National Interest (WA), National Civic Council (Isaacs Federal Electorate Group), National Civic Council (WA), Alan Barron, Stewart Coad, Richard Gellie, Mary

- 2.98 According to the Festival of Light, reliance on an inquisitorial system and the absence of some common law safeguards means that ‘opportunities for collusion and corruption abound’ and that ‘the innocent will suffer.’⁹⁶ The Council for the National Interest suggested that ‘the broad prosecutorial power [provided for by the Statute] may be particularly subject to ... corrosive kinds of political influence.’⁹⁷
- 2.99 On the other hand, the Committee received evidence from Justice Perry, Nicole McDonald, Phillip Scales and others arguing that the ICC Statute contains sufficient safeguards to prevent politically motivated prosecutions, to ensure that judges are of the highest calibre and integrity and to protect the rights of the accused.
- 2.100 The NSW Bar Association was satisfied that the Statute and its draft *Rules of Procedure and Evidence* provide ‘probably the most sophisticated and comprehensive codified right to a fair trial of any court system in the world.’

The Statute contains fundamental rights for the accused common to common law countries, including a presumption of innocence (art 66); the right to a speedy trial; a right of silence; a right to make an unsworn statement; the right to legal assistance if the accused lacks sufficient means to pay for legal representation (art 67). It mandates important procedural rights during the trial. The prosecutor must also disclose exculpatory material to the defence (art 67(2)).

The Statute also provides victims with significant rights, including some rights of participation in the trial process (art 68) (which is closer to the civil rather than common law model) and empowers the Court to make reparation orders against accused persons (art 75) – common to both systems.

...

The draft rules [of procedure and evidence] also contain highly sophisticated rules for the acceptance of evidence in the new Court, which are consistent with Australia’s own procedures. The Court too has a comprehensive appeals mechanism, the Court’s

Hertzog, Michael Kearney, Jim Kennedy, Brenda Lee, David Mira-Batemen, Marlene Norris, Dr I C Spry QC, Valerie Staddon, and Davydd Williams.

⁹⁶ Festival of Light, *Submission No. 30*, p. 9.

⁹⁷ Council for the National Interest (WA), *Submission No. 19*, p. 4.

Appeals Chamber. The main difference between the world's common law and civil law systems is the right under Article 81 of the prosecutor to appeal and acquittal.

A major right, missing from our own system, is an enforceable right to compensation for unlawful arrest or detention or an acquittal on appeal on the grounds of a miscarriage of justice after the discovery of new evidence unknown at the time (art 85 and Chapter 10 of the rules).⁹⁸

- 2.101 The Committee also received lengthy submissions from Helen Brady and from the Attorney-General and the Minister for Foreign Affairs on the safeguards contained in the ICC Statute to prevent politically motivated prosecutions.

If the Prosecutor wishes to initiate an investigation, ... the three judge Pre-Trial Chamber must authorise the investigation. The Pre-Trial Chamber can only do so if it believes there is a reasonable basis to proceed with the investigation and the case appears to fall within the jurisdiction of the court.

After that ... the Court must inform countries that would normally exercise jurisdiction. If a country informs the Court that it is investigating or has investigated, its nationals or others within its jurisdiction for criminal acts which may constitute crimes in the Court's jurisdiction, the Prosecutor *must defer* to that countries national proceedings, unless the Pre-Trial Chamber authorises the Prosecutor to commence the investigation on the basis that the country is unable or unwilling genuinely to proceed. The State (and the Prosecutor) may appeal this decision.

...

In deciding whether to initiate an investigation or prosecution the Prosecutor must consider whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; the case is or would be admissible (ie,

98 NSW Bar Association, *Submission No. 20*, p. 5. Human Rights Watch also submitted that the 'Rome Statute guarantees the highest international standards for fair trial and the protection of the rights of accused persons. The guarantees are ... comprehensive and extensive' (*Submission No. 23*, p. 3). The International Commission of Jurists (Australian Section) submitted that the 'legal tests to be met in the course of proceedings are the most stringent tests extracted from both common law and civil law systems' (*Submission No. 24*, p. 5). James Cockayne submitted that the ICC's proceedings will be consistent with 'internationally established norms and standards for judicial process, including common law standards' (*Submission No. 217*, p. 4).

complementarity does not stand in the way); and interests of justice factors do not militate against proceeding. To issue an arrest warrant the Court must be satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.

The confirmation proceedings are a further filter. The Pre-Trial Chamber must determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.⁹⁹ If it is so satisfied, the charge or charges are sent to trial. At trial, the onus is on the Prosecutor to prove the guilt of the accused. To convict, the Court must be convinced of the accused's guilt beyond reasonable doubt. Both the Prosecutor and the accused can appeal against the decision of conviction or acquittal and against any sentence imposed.¹⁰⁰

2.102 In Ms Brady's opinion, these features make it 'almost impossible for the Prosecutor to even *begin* an investigation or prosecution that is not without great merit'.¹⁰¹

2.103 The Attorney-General has acknowledged that the ICC will be, of necessity, a blend of different legal systems. Nevertheless, he was confident that it will apply the standards of justice that Australians expect from a court.

... the Court will respect the basic legal principles that are applied in Australia and throughout the world. The presumption of innocence, the need to establish guilt beyond reasonable doubt and the observation of due process will all apply at the ICC.

The ICC won't operate in exactly the same way as an Australian Court, but ... it will operate in a completely fair and just way.¹⁰²

2.104 The Attorney-General also argued that the rigorous processes to be followed for the selection of judges will ensure that only persons of the highest quality will be appointed.

The composition of the benches of the Tribunals for the former Yugoslavia and Rwanda suggests that persons of the highest

99 Under Article 58 of the Statute the Pre-Trial Chamber can only issue an arrest warrant if there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.

100 Helen Brady, *Submission No. 7*, pp. 6-7.

101 Helen Brady, *Submission No. 7*, p. 7.

102 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, pp. 4-5.

calibre are likely to be selected. For example, Australia has been represented at these Tribunals by Sir Ninian Stephen and Justice David Hunt.¹⁰³

2.105 Justice John Perry argued in a similar vein, stating that:

There is no reason to suppose that the bench of the International Criminal Court will be composed of judges who are any less eminent and qualified for the role expected of them than is the case with judges of the International Court of Justice, which decides civil disputes arising between States and has sat successfully for many years at The Hague.¹⁰⁴

Impact on the Australian Defence Force

2.106 Some witnesses were concerned also about the potential impact of ratification of the ICC Statute on the ability of the Australian Defence Force (ADF) to participate in peacekeeping and other operations.

2.107 Ian Spry QC submitted that the ICC Statute, if ratified, would place the ADF 'under reasonable threat of constraint'. This point was supported by Bruce Ruxton, Victorian State President of the Returned and Services League:

Ratification would ham-string our Defence Force, who would be prevented from acting effectively by the threat of false and contrived crimes.¹⁰⁵

2.108 Ian Spry argued that the 'uncertainty' attaching to the definitions of genocide, crimes against humanity and war crimes (an issue discussed

103 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 5. In its submission the NSW Bar Association noted that 'Australian judges, lawyers and investigators have been prominent in both the current ad hoc tribunals and the post-World War II War Crimes Tribunals. Presently in the [ICTY] ... the Deputy Prosecutor Graeme Blewitt and senior appeals chamber judge, Justice David Hunt, are Australian. A former AFP officer is the head of investigations. The NSW Bar Association has two members working as senior prosecutors at the tribunal' (*Submission No. 20*, p. 2).

104 Justice John Perry, *Submission No. 8.3*, p. 3. The Hon Justice John Dowd submitted that the qualifications for the selection and election of ICC judges are 'a lot more comprehensive' than the requirements for appointment as judge to an Australian court (see Hon Justice John Dowd (International Commission of Jurists), *Transcript of Evidence*, 13 February 2001, p. 100).

105 Mr Bruce Ruxton, *Submission No. 250*, p. 1.

above) is particularly troublesome for an ADF member required to engage in armed combat, pursuant to orders.

The threat of proceedings in the ICC would be capable of constituting a significant inhibiting factor in relation to the use of Australia's armed forces, and in relation to particular actions by members of those armed forces. The existing strains of warfare would be added to by the further important consideration in the mind of ADF members that they might be subjected to prosecution in an ICC.

This matter is made worse because, in effect, any defence of superior orders would be effectively ruled out. The defence of superior orders would not apply to prosecutions for 'genocide' or 'crimes against humanity', and it would be extremely limited in other cases.¹⁰⁶

2.109 Ian Spry also suggested that the threat of making false charges against Australian citizens and 'complaints to the ICC against Australian forces would be a powerful weapon, and would be particularly relevant where peacekeeping operations are concerned.'¹⁰⁷ These concerns were endorsed by Major-General Digger James and by the Returned Services League of Australia.¹⁰⁸

2.110 Similar concerns were expressed in a letter from five retired senior military officials published in the *Australian Financial Review* on 13 March 2001. The letter argued that the 'wide jurisdiction of the ICC 'and the 'ambiguity of its provisions' means that:

... Australian servicemen would not be protected against charges which could not be sustained under the provisions of the Australian Defence Force Discipline Act.¹⁰⁹

2.111 The Government is of the view that ratification of the ICC Statute will potentially be of benefit to the ADF when deployed into environments

106 Dr I C Spry QC, *Submission No. 18*, p. 2. See also Dr I C Spry QC, *Transcript of Evidence*, 14 March 2001, pp. TR151-4.

107 Dr I C Spry QC, *Submission No. 18.2*, p. 2.

108 See Major-General WB (Digger) James, *Submission No. 9*, p. 1 and Dr I C Spry QC, *Transcript of Evidence*, 14 March 2001, p. TR151.

109 Major-General DM Butler (rtd), Major-General WB (Digger) James (rtd), Air Vice Marshall JC (Sam) Jordan (rtd), Rear Admiral PGN Kennedy (rtd), Major-General KJ Taylor (rtd), 'International court will limit our freedom' (letter to the Editor), *Australian Financial Review*, 13 March 2001. Support for this letter was expressed in a number of submissions, including those from Fay Alford and Robert Doran.

where effective law enforcement and judicial systems do not exist (as was the case in Somalia).

[Ratification] ... will ensure that the UN or multinational force to which we contribute does not have to fill the vacuum and assume responsibilities involved in bringing to justice the perpetrators of war crimes and crimes against humanity.¹¹⁰

2.112 Ratification will also afford protection for ADF personnel who may be the victims of war crimes. In such instances, the ICC may be able to investigate and prosecute these crimes if the State of the perpetrator is unwilling or unable to do so.¹¹¹

2.113 The Attorney-General and the Minister for Foreign Affairs were confident also that the principle of complementarity (underwritten by the Government's proposed implementing legislation)¹¹² would ensure that:

... the Australian Government will retain full jurisdictional authority over the activities of the ADF abroad and therefore always be able itself to investigate and, if necessary, prosecute allegations of the commission of Statute crimes by such personnel.¹¹³

2.114 Admiral Chris Barrie, the Chief of the Defence Force, was reported in the *Army* newspaper (dated 7 June 2001) as having welcomed moves by the Government to ratify the ICC Statute, stating that it would 'provide Australia with a mechanism to hand over alleged war criminals.' Admiral Barrie also endorsed the complementarity principle and stated that:

110 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 1. The Australian Red Cross made the same point in relation to the ADF's deployment in East Timor claiming that 'the ADF was forced to allocated substantial resources to the detention of alleged criminals pending their proper trial. It would have been much less expensive, less dangerous and more efficient for ADF personnel to have transferred custody of individuals to the ICC ... The ICC will substantially reduce the responsibilities of militaries such as the ADF in Peace Operations' (Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26*, p. 2).

111 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 1.

112 Section 3 of the Exposure Draft of the of the *International Criminal Court Bill 2001* states:
S3(1) It is the Parliament's intention that the jurisdiction of the ICC is to be complementary to the jurisdiction of Australia.

S3(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.

113 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 2.

The ADF will always investigate and, where necessary, prosecute any serving member of the ADF accused of committing genocide, crimes against humanity.¹¹⁴

- 2.115 In evidence to an inquiry by the Joint Standing Committee on Foreign Affairs, Defence and Trade, representatives of the ADF reported that the Defence Organisation had been ‘an active participant in the Government’s efforts to establish the ICC’. They advised that ratification would ‘not have any effect [on ADF operations] because we will be asserting national jurisdiction over our servicemen’.

It is not a threatening issue for members of the Australian Defence organisation and all members of the defence organisation who operate in accordance with the Defence Force Discipline Act and the normal acceptable law of the country.¹¹⁵

- 2.116 The Australian Defence Association and the Australian Legion of Ex-Servicemen and Women both support ratification of the ICC Statute, with the Australian Defence Association stating that it ‘perceives no aspect of the Statute upon which we would have reservations’.¹¹⁶
- 2.117 The Legacy Coordinating Council also supported ratification, although it admitted to some reservations about aspects of the ICC definition of war crimes.¹¹⁷ In oral evidence, Graham Riches, on behalf of the Council, discussed some of the definitional problems in the context of his military service in Vietnam as a legal officer. While expressing some reservations, Mr Riches noted that ‘these sorts of definitional problems are faced all the time by courts and judges around the world’ and that the principle of complementarity means that any allegations involving Australian servicemen would be investigated and prosecuted by Australian authorities. Mr Riches concluded that:

114 ‘Australia courts international war crimes statute’ in *Army: the newspaper for soldiers*, 7 June 2001. On 12 December 1999, the then Minister for Defence, the Hon John Moore MP, issued a press release (jointly with the Minister for Foreign Affairs and the Attorney-General) saying, in part, ‘I am confident that the ICC will prove to be an effective instrument for the enforcement of international humanitarian law.’

115 Shane Carmody (Department of Defence) and Group Captain Ric Casagrande (Department of Defence), *Transcript of Evidence*, 22 March 2001, pp. FADT517 and 520. This evidence was presented to the inquiry into Australia’s relationship with the United Nations, recently conducted by the Joint Standing Committee on Foreign Affairs, Defence and Trade.

116 See Australian Legion of Ex-Servicemen and Women, *Submission No. 147*; and Australian Defence Association, *Submission No. 167*.

117 Legacy Coordinating Council, *Submission No. 32*, p. 1.

Certainly the rights of our defence force must be protected. The best protection they can have is proper training and instruction ... so that they do understand right from wrong and for our legal criminal system to be such that it can cope with these situations.¹¹⁸

Other issues

Permanent vs ad hoc

- 2.118 Many of those opposed to ratification argued that the creation of a permanent international criminal court was unnecessary, as the United Nations' had demonstrated the capacity to establish *ad hoc* tribunals to prosecute violations of international humanitarian law.
- 2.119 The Festival of Light, the Council for the National Interest, Ian Spry and others argued that the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have not only been successful, but that they display the following advantages over a permanent court:
- their mandate is limited to specific purposes and circumstances;
 - their mandate is defined and sanctioned by the United Nations' Security Council; and
 - they will cease to exist when their task is completed.¹¹⁹
- 2.120 Rupert Sherlock suggested that the flexibility of ad hoc tribunals also allows different cultural values to be accommodated:

An ad hoc committee could accommodate different levels of values according to the nation in which the matter they are dealing with occurs. For instance, if an ad hoc committee were set up to

118 Graham Riches (Legacy Coordinating Council), *Transcript of Evidence*, 14 March 2001, p. TR150.

119 See Festival of Light, *Submission No. 30*, p. 10; Denis Whitely (Council for the National Interest (WA)), *Transcript of Evidence*, 19 April 2001, p. 197; Dr I C Spry, *Transcript of Evidence*, 14 March 2001, p. 156. In a subsequent written submission the Council for the National Interest (WA) proposed that a permanent 'War Crimes Unit' should be established under the auspices of the Security Council of the United Nations and that this be activated 'as and when the need emerges subject only to the final approval of the Security Council' (Council for the National Interest (WA), *Submission No. 19.1*, p. 2).

See www.un.org/icty and www.un.org/icttr for information about the record of the Tribunals in relation to indictments, convictions and sentences passed.

deal with a problem in Africa, it need not in any way concern China or Canada. In dealing with the matter of an offence committed on African soil, a different set of values from ours should be accommodated.¹²⁰

- 2.121 Those who advocated the establishment of a permanent court acknowledged the success of the ICTY and the ICTR, but noted that on only two occasions since World War II had the Security Council agreed to establish such tribunals. In that time the world has seen:

a myriad of atrocities in other parts of the world ... and a litany of ineffective prosecutions, cover-ups, token enquiries and court martial and often pathetically lenient sentences. Judicial processes have been followed in a small minority of cases.¹²¹

- 2.122 The Attorney-General and the Minister for Foreign Affairs noted that establishing *ad hoc* tribunals can be a time consuming and costly process, with the consequence that evidence may be destroyed, witnesses may no longer be available and victims may be forced to wait longer for justice.

Generating the international political will and support to establish the ad hoc tribunals to investigate and prosecute atrocities in the former Yugoslavia and Rwanda was a very difficult task.

To take a topical example, the UN has been concerned about war crimes committed in Cambodia by the Khmer Rouge and was considering setting up an ad hoc Tribunal. The Cambodian Government negotiated with the UN and it was decided that Cambodia should set up its own Tribunal under UN auspices. However, after two years of difficult negotiations between the UN and Cambodia, the Cambodian national legislation necessary to set up the tribunal has not yet been passed.¹²²

120 Rupert Sherlock, *Transcript of Evidence*, 19 April 2001, p. 204.

121 Australian Red Cross (National Advisory Committee on International Humanitarian Law), *Submission No. 26*, p. 3. Similar views were expressed by Human Rights Watch, Amnesty International, Elizabeth Bennett (on behalf of a group of 12 university students) and Ben Clarke.

122 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 4. John Greenwell (on behalf of Amnesty) emphasised the selective nature of ad hoc tribunals by suggesting that 'one might say it was largely because the atrocities got on the television screens of certain countries that [the ICTY and the ICTR] were established' (John Greenwell (Amnesty International), *Transcript of Evidence*, 13 February 2001, p. TR11). The United Nations pulled out of negotiations in February 2002 after failing to reach agreement with the Cambodian Government concerning the modalities and structure of the tribunal.

- 2.123 In addition, the following arguments have been advanced in support of a permanent court rather than *ad hoc* tribunals:
- because *ad hoc* tribunals are created retrospectively, their deterrent effect is diluted;¹²³
 - because *ad hoc* tribunals are established by the Security Council of the United Nations, political and diplomatic influences irrelevant to the prosecution of war crimes and crimes against humanity are brought to bear,¹²⁴ whereas under the ICC the Security Council must initiate actions through the prosecutor and the Pre-Trial Chamber; and
 - a permanent court will facilitate the development and application of consistent judicial standards and procedures, and allow for the efficient administration of justice.¹²⁵

Victor's justice

- 2.124 The suggestion that *ad hoc* tribunals can be perceived as lacking impartiality can give rise to accusations of 'victor's justice' – or the strong and powerful declaring who the criminals are and escaping prosecution themselves.
- 2.125 An example cited in some submissions was that neither the American President nor the British Prime Minister had been charged for war crimes committed during the NATO campaign in Kosovo, yet former Yugoslav President Slobodan Milosovic is currently being prosecuted before the ICTY.
- 2.126 Advocates of the ICC argued the establishment of a permanent court, to apply widely accepted principles of law in a consistent manner without political influence from the powerful nations, is the best way of avoiding

123 Amnesty International, *Submission No. 16*, p. 5 and Sydney University Law School Amnesty Group, *Submission No. 224*, p. 2.

124 See Tim Game (NSW Bar Association), *Transcript of Evidence*, 13 February 2001, p. TR31; Justice John Perry, *Submission No. 8.1*, p. 3; Sydney University Law School Amnesty Group, *Submission No. 224*, p. 2 and John Greenwell (Amnesty International), *Transcript of Evidence*, 13 February 2001, p. TR11.

125 International Commission of Jurists (Aust), *Submission No. 24*, p. 5; International Commission of Jurists (QLD), *Submission No. 219*, p. 1, Amnesty International, *Submission No. 16*, p. 2; Elizabeth Bennett, *Submission No. 204*, p. 1; Benjamin Clarke, *Transcript of Evidence*, 19 April 2001, p. 211. Nicole McDonald referred to the advantages of a 'permanent body with administration and support apparatus, unlike the somewhat reactionary and *ad hoc* tribunals in Rwanda and the former Yugoslavia' (Nicole McDonald, *Transcript of Evidence*, 13 February 2001 pp. TR57-8).

accusations of ‘victor’s justice’. The chances of any one nation abusing the process of the Court are minimal as all State Parties have exactly the same rights and obligations and none of the State Parties will be involved in the day to day operation of the Court.

- 2.127 The Sydney University Law School Amnesty Group argued that the structure of the ICC will help ensure its impartiality and effectiveness, limiting the extent to which it could be manipulated for political ends:

The establishment of a standing Court as opposed to further ad hoc tribunals will lessen the degree to which prosecutions are seen to be politicised and selective dispensers of ‘victor’s justice’.

- 2.128 The Secretary-General of the United Nations addressed this point when speaking at the Rome conference which endorsed the ICC Statute:

Until now, when powerful men committed crimes against humanity, they knew that as long as they remained powerful no earthly court could judge them.

Even when they were judged – as happily some of the worst criminals were in 1945 – they could claim that this is happening only because others have proved more powerful, and so are able to sit in judgement over them. Verdicts intended to uphold the rights of the weak and helpless can be impugned as ‘victor’s justice’.

Such accusations can also be made, however, unjustly, when courts are set up only ad hoc, like the Tribunals in The Hague and in Arusha, to deal with crimes committed in specific conflicts or by specific regimes. Such procedures seem to imply that the same crimes, committed by different people, or at different times and places, will go unpunished.

Now at last ... we shall have a permanent court to judge the most serious crimes of concern to the international community as a whole: genocide, crimes against humanity and war crimes.¹²⁶

126 United Nations Press Release L/ROM/23, ‘Secretary-General says Establishment of International Criminal Court is Major Step in March Towards Universal Human Rights Rule of Law’, 18 July 1998 (at www.un.org/icc/pressrel/lrom23.htm).

The international position

- 2.129 Of the 19 NATO member countries, 12 have ratified the Statute, while of the 15 members of the Security Council, 6 members have ratified and 4 others signed it, including the United States of America. Of the permanent members of the Security Council the USA, China and Russia have not ratified the Statute while the United Kingdom and France have ratified.
- 2.130 The position of the USA has changed since the Committee commenced its inquiry. On 6 May 2002, in a letter to the Secretary-General of the United Nations, the USA provided notification that it will not become a party to the ICC, effectively reversing its previous decision to become a signatory.
- 2.131 The Under Secretary for Political Affairs, Marc Grossman, indicated that the USA had taken this action for several reasons:
- ...the ICC undermines the role of the United Nations Security Council in maintaining international peace and security...;
 - ...The Rome Statute creates a prosecutorial system that is an unchecked power...;
 - ...The ICC asserts jurisdiction over citizens of states that have not ratified the treaty. This threatens US sovereignty...; and
 - ...the ICC is built on a flawed foundation. These flaws leave it open for exploitation and politically motivated prosecutions.¹²⁷
- 2.132 The Secretary of Defense, Donald Rumsfeld, reiterated the above points and said:
- These flaws would be of concern at any time, but they are particularly troubling in the midst of a difficult, dangerous war on terrorism. There is the risk that the ICC could attempt to assert jurisdiction over U.S. service members, as well as civilians, involved in counter-terrorist and other military operations -- something we cannot allow. ...
- 2.133 The ICC's entry into force on July 1st means that our men and women in uniform -- as well as current and future U.S. officials -- could be at risk of prosecution by the ICC. We intend to make clear, in several ways, that the United States rejects the jurisdictional claims of the ICC. The United States will regard as illegitimate any attempt by the court or state parties to the

¹²⁷ Under Secretary for Political Affairs, Marc Grossman, *Remarks to the Center for Strategic and International Studies*, Washington DC, May 6 2002, p. 1, URL: www.state.gov/p/9949.htm.

treaty to assert the ICC's jurisdiction over American citizens. ...¹²⁸The Secretary of State, Colin Powell, is quoted in a transcript of an interview released by the State Department as saying on 5 May 2002:

But the ICC, where prosecutors and a court beholden to no higher authority, not beholden to the Security Council, not beholden to anyone else, and which would have the authority to second guess the United States after we have tried somebody and take it before the ICC, we found that this was not a situation that we believe was appropriate for our men and women in the armed forces or our diplomats and political leaders.¹²⁹

- 2.134 There are arguments for and against each of these stated reasons and, although there are differences in the debate occurring in the USA and Australia, the arguments are essentially as outlined in this report.
- 2.135 Amnesty International directly addressed the concerns raised about the impact of the ICC Statute on peacekeeping operations, arguing that the Statute clearly differentiates war crimes from activities which might arise in peacekeeping operations. In discussing the definition of war crimes at Article 8(2)(b)(ii), Amnesty noted that the definition refers to 'intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects', but then goes on to specify that such action must 'be clearly excessive in relation to the concrete and direct overall military advantage anticipated'.

The offence thus applies where a military advantage is anticipated. In that event the prosecutor is required to prove not merely ... [the attack, the intention, knowledge that it will cause incidental loss of life or injury etc. to civilians but] the anticipated military advantage and that the loss of life etc. was 'clearly excessive' in relation to its attainment. This is a very heavy evidentiary threshold for any prosecution to meet.¹³⁰

128 United States Department of Defense News Release, *Secretary Rumsfeld Statement on the ICC Treaty* 6 May 2002, www.defenselink.mil/news/May2002/b05062002_bt233-02.html.

129 Secretary of State, Colin Powell, Interview on ABC's *This Week* program, 5 May 2002, www.state.gov/secretary/rm/2002/9941pf.htm.

130 Amnesty International, *Submission No. 16.2*, p.2.

Application to non-State parties

- 2.136 Another issue of concern that has arisen in the USA debate about ratification is the potential reach of the ICC – its application not just to State parties.¹³¹
- 2.137 Professor Richard Wilkins, from the World Family Centre at Brigham Young University, argued that the ‘jurisdiction claimed by the ICC is unquestionably novel – not since the Treaty of Westphalia in 1648 has a treaty ever purported to bind parties who are not signatories to the treaty. The ICC Statute, however, does just that’.¹³²
- 2.138 A number of submissions drew on Wilkins’ analysis in stating that ‘by asserting that the ICC can claim jurisdiction over a non-signatory state and its citizens, the ICC Statute makes an unabashed claim of international supremacy over the actions of domestic policy makers’.¹³³
- 2.139 Geoffrey Walker also raised concerns about the proposed application of the ICC Statute to non-State parties. He submitted that there is a strong argument to say the Statute is ‘void’ because it offends one of the recognised norms of international law:
- A fundamental rule of international law, enshrined in Art. 34 of the Vienna Convention, is that a treaty does not create obligations or rights for a state without its consent. Obligations can only be accepted by a third state in writing (art. 35). The rule that a treaty cannot violate the rights of a third state without its consent rests firmly on the sovereignty and independence of states, which is the whole basis for international relations.¹³⁴
- 2.140 In response to these concerns, the Attorney-General and the Minister for Foreign Affairs submitted that the ICC Statute does not impose any obligations on States not party to it, unless such a State voluntarily accepts

131 The position of the current administration in the United States was explained by witnesses from the Department of Foreign Affairs and Trade in the following terms: ‘Basically, the United States wishes to ensure that, as a non-state party, there will be provision for non-state parties which will guarantee them that none of their nationals engaged in official acts will be brought before the court without the consent of the non-state party. In other words, they are seeking an exemption from the jurisdiction of the court – a tightening of the complementarity regime’ (see Richard Rowe (DFAT), *Transcript of Evidence*, 30 October 2000, p. TR14).

132 Professor Richard Wilkins, *Doing The Right Thing: the International Criminal Court and Social Engineering* p. 5.

133 See Festival of Light, *Submission No. 30*, p. 3 and Council for the National Interest (WA), *Submission No. 19*, p. 2.

134 Geoffrey de Q Walker, *Submission No. 228*, p. 12.

the Court's jurisdiction over a particular case, in writing. However, the Court can, in certain circumstances, seek to prosecute the nationals of non-State parties.

Nationals of non-State parties may be liable for prosecution by the Court if they commit Statute crimes in the territory of a State party or in the territory of a non-State party that has recognised the Court's jurisdiction over the case in writing. ...

The only exception to this is referrals by the [UN] Security Council. The Security Council can refer matters to the Court even if they were committed by a national of a non-State party in the territory of a non-State party. The Security Council has always had this power ... so in this respect the Statute is not conferring on the Court a power that is not already binding on all States.¹³⁵

- 2.141 The Ministers make the additional point that non-State parties are protected by the complementarity principle in the same way as State parties: 'the Court is not able to hear a case if it has already been legitimately heard by a State, even if that State is not a Party to the Statute.'¹³⁶
- 2.142 The Law Council of Australia and the Australian Red Cross (through its National Advisory Committee on International Humanitarian Law) also submitted that the ICC Statute does not impose obligations on non-State parties, but rather that it may be applied to the nationals of non-State parties who commit Statute crimes.¹³⁷
- 2.143 Furthermore, both the Law Council and the Red Cross took issue with the view that the ICC Statute violates fundamental norms of international law, with the Law Council stating that:
- the House of Lords held in the Pinochet case that the 1984 Torture Convention confers universal jurisdiction;¹³⁸

135 The Minister for Foreign Affairs and the Attorney-General, *Submission No. 41*, pp. 11-12.

136 The Minister for Foreign Affairs and the Attorney-General, *Submission No. 41*, p. 12.

137 Professor Tim McCormack, *Transcript of Evidence*, 14 March 2001, p. TR130 and the Law Council of Australia, *Submission No. 29*, p. 6.

138 Law Council of Australia, *Submission No. 29*, p. 6. This refers to the action taken by the Spanish Government for the extradition of General Pinochet, former ruler of Chile, to face charges relating to crimes allegedly committed in Chile. Refer to *Reg v Bow Street Magistrate, Ex parte Pinochet Ugarte* (No. 3) (1999) 2 WLR 827.

- the United States has exercised universal jurisdiction in applying the 1970 Hijacking and 1979 Hostage Conventions to a Lebanese citizen accused of hijacking a Jordanian aircraft in the Middle East;¹³⁹ and
- the 1949 Geneva Conventions impose an obligation on all parties to prosecute war crimes, regardless of nationality.¹⁴⁰

2.144 Some witnesses considered that the ICC Statute falls short of its full potential because it allows for the possibility that nationals of non-State parties might evade the jurisdiction of the Court – in other words, it fails to establish universal jurisdiction. On the other hand, the Committee also received evidence from a number of human rights organisations arguing that the ICC Statute is deficient because it does not propose universal jurisdiction for genocide, crimes against humanity and war crimes.

2.145 Amnesty International, for example, argued that:

The restrictions imposed by Article 12 are not consistent with the principles of jurisdiction under international law. International law prescribes that jurisdiction for war crimes and crimes against humanity is universal ... not confined to offences committed on the territory of or by the nationals of a State.¹⁴¹

2.146 The practical consequence of limiting jurisdiction in the manner contemplated by the ICC Statute is that by ‘remaining in or moving to jurisdictional “safe havens” offenders can evade justice. Amnesty suggested that this ‘area of impunity’ is significant because the nations ‘most disposed to commit or allow crimes against humanity are the least likely to ratify the Statute’. To overcome this problem, Amnesty called upon the Government to ensure that the legislation:

... confers universal jurisdiction upon Australian courts in respect of the ICC offences. New Zealand has done so ... [and such a provision in Australia’s implementing legislation] would be in line with the provisions of the Crimes (Torture) Act 1988 which confers jurisdiction upon our Courts in respect of ‘any person present in

139 Law Council of Australia, *Submission No. 29*, p. 7. Note: the US District Court in *US vs Yunis*, 924 F2d 1086 (D.C. Cir. 1991).

140 Law Council of Australia, *Submission No. 29*, p. 6. See also Professor Tim McCormack, *Transcript of Evidence*, 14 March 2001, pp. TR129-130. We note that Richard Wilkins described the ‘concept of inherent or universal jurisdiction’ as ‘highly questionable’ (see Richard Wilkins, *Doing The Right Thing: the International Criminal Court and Social Engineering* p. 6).

141 Amnesty International, *Submission No. 16.1*, p. 1.

Australia' alleged to have committed extraterritorial torture as provided in the Act.¹⁴²

- 2.147 On the issue of universal jurisdiction, witnesses from the Attorney-General's Department confirmed that the proposed consequential amendments legislation will, under cl 268.123, under the heading of 'Geographical Jurisdiction', provide such universal coverage for the crimes under the Statute.¹⁴³

Extradition

- 2.148 In August 2001 the Committee tabled in Parliament *Report 40, Extradition: a review of Australia's law and policy*. In this report it was noted that international extradition arrangements (involving the formal surrender by one State, on request of another, of a person accused or convicted of a crime in the requesting State's jurisdiction) are extremely common - dating back to ancient times. Australia has an extensive network of extradition arrangements, including: arrangements inherited from the United Kingdom upon Federation; bilateral agreements negotiated pursuant to the *Extradition Act 1988* (which replaced the *Extradition (Foreign States) Act 1966*); and 12 multilateral conventions which contain extradition obligations for offences described in the conventions. The multilateral conventions with extradition provisions include: the *1929 Counterfeit Currency Convention*; the 1970 and 1971 *Hijacking Conventions*; the 1988 *Illicit Drugs Trafficking Convention*; and the 1984 *Torture Convention*.
- 2.149 As well as legislating to give effect to the extradition arrangements in these conventions, the Commonwealth has enacted the *International War Crimes Tribunal Act 1995* which, in part, allows for the arrest and surrender, to the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, of persons in respect of whom the Tribunals have issued an arrest warrant. The Committee notes that the *War Crimes Amendment Act 1988* contained

142 Amnesty International, *Submission No. 16.1*, p. 2.

143 Geoff Skillen (AG) and Joanne Blackburn (AG), *Transcript of Evidence*, 10 April 2002, p. 293/
See also Section 268.123 entitled - Geographical jurisdiction

(1) Section 15.4 (extended geographical jurisdiction—Category D) applies to genocide, crimes against humanity and war crimes.

(2) Section 15.3 (extended geographical jurisdiction—Category C) applies to crimes against the administration of the justice of the International Criminal Court. (*International Criminal Court (Consequential Amendments) Bill 2002*).

specific provisions referring to the arrest and surrender of persons accused of committing war crimes in Europe during World War II. These provisions were repealed in 1999 to bring the extradition procedures for alleged war criminals into line with the standard arrangements described in the Extradition Act.

- 2.150 In *Report 40, Extradition: a review of Australia's law and policy* the Committee reported to Parliament that it did not favour the continuation of the 'no evidence' approach to extradition. The Committee concluded that Australia's model extradition arrangements should be amended to require a higher standard of proof before extradition is sanctioned. Should the Government accept the recommendations of that report on this matter, the Committee considers that the new, higher standard of proof should also be applied to requests for surrender from the ICC.
- 2.151 This would be consistent with the ICC Statute which provides that '[surrender] requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court' (Article 91(2)(c)).
- 2.152 Raising the standard of proof and applying it equally to requests from extradition partners and from the ICC will:
- ensure further protection against false accusations; and
 - provide assurance that the ICC will operate in a manner consistent with Australian law and practice in this area.

'Opt out' clause

- 2.153 A number of human rights organisations have objected to the provision in the ICC Statute (Article 124) that allows State Parties to:
- ... declare that, for a period of seven years after the entry into force of this Statute ... it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory.
- 2.154 UNICEF stated that this article has the potential to 'suspend the jurisdiction of the court, as it applies to the specific category of war crimes,

for up to seven years'.¹⁴⁴ The Australian Red Cross also believed that the 'opt out' clause is a great weakness in the Statute and hoped that Australia would not take advantage of it.¹⁴⁵

- 2.155 UNICEF, along with World Vision, also recommended that the Government lobby other signatories to ensure they do not 'opt out', thereby delaying the jurisdiction of the ICC and extending impunity for the perpetrators of genocide, crimes against humanity and war crimes.¹⁴⁶

The ICC and the United Nations

- 2.156 Many submissions were critical of the proposed ICC because, in the words of Gareth Kimberley, they considered it to be another element of the United Nations, an organisation that is 'bloated, incompetent ... [and] riddled with graft and nepotism'.¹⁴⁷

- 2.157 The Isaacs Branch of the National Civic Council contended that:

It is also already established that international agencies, especially within the United Nations umbrella, have increasingly promoted the political claims of social groups (groups based on ethnicity, or gender, or age, or socio-economic position), under the banner of 'human rights'. There is no reason why these groups and their supporters in the international agencies will not explore every opportunity to use the authority of the ICC to enforce their claims.¹⁴⁸

- 2.158 As noted in Chapter 1, the ICC will not be part of the United Nations organisation, it will have independent legal personality (Articles 1 and 4).

- 2.159 The Attorney-General and the Minister for Foreign Affairs in describing the relationship between the two organisation noted the following elements:

- the Security Council of the United Nations will be able to refer a situation to the ICC Prosecutor (Article 13(b)) and to request the Court not to commence or proceed with an investigation or prosecution (Article 16); and

144 UNICEF Australia, *Submission No. 34*, p. 7.

145 Australian Red Cross, *Submission No. 25*, p. 3.

146 See World Vision, *Submission No. 104*, p. 2 and UNICEF, *Submission No. 34*, p. 7.

147 Gareth Kimberley, *Submission No. 36*, p. 2.

148 Gerard J Flood, *Submission No. 203*, p. 4.

- the ICC may also be funded by the United Nations, subject to the approval of the General Assembly of the UN, in particular in relation to expenses incurred as a result of Security Council referrals to the ICC (Article 115(b)).¹⁴⁹

2.160 Further details of the relationship are to be provided in a *Relationship Agreement between the United Nations and the International Criminal Court*, a draft of which has been prepared by the Preparatory Commission for consideration by the Assembly of States Parties when the Court begins operation.¹⁵⁰

Timing of ratification

2.161 Most of those who made submissions in support of ratification of the ICC Statute also urged that Australia aim to be one of the first 60 countries to ratify the Statute.

2.162 Justice John Dowd suggested that early ratification would allow Australia to participate in the first meeting of the Assembly of States parties, meaning that:

Australia will be able to nominate candidates for judge, Prosecutor and Deputy Prosecutor. It will be able to be involved, through Australian nationals, in the work of the Court at all levels from its inception (in judicial, prosecutorial, investigatory and various support capacities – counsellors, psychologists, administrators, interpreters etc.)¹⁵¹

2.163 The Minister for Foreign Affairs and the Attorney-General suggested that ‘the States that will exercise the most influence over this process [that is, the process of determining the principal officers and administrative arrangements for the Court] will naturally be those States that have ratified the Statute. States that have signed, but not ratified the Statute will have a lesser role.’¹⁵²

149 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 5. See also Helen Brady, *Submission No. 7*, p. 8 who noted that the ICC ‘is not a UN body and will not be a subsidiary organ of the UN’.

150 A copy of the draft *Relationship Agreement between the United Nations and the International Criminal Court* adopted by the Preparatory Commission for the International Criminal Court on 9 August 2000 can be found at www.un.org/law/icc/prepcomm/mar2001/english/rev1ad1e.pdf. The agreement will come into effect after it is approved by the Assembly of States Parties at its first meeting following the establishment of the ICC.

151 International Commission of Jurists, *Submission No. 24*, p. 2.

152 The Minister of Foreign Affairs and the Attorney-General, *Submission No. 41*, p. 4.

- 2.164 The Sydney University Law School Amnesty Group submitted that by being actively involved in the early stages of the ICC, Australia can help 'ensure that it complies with the high and impartial standards of justice for which Australia is generally known.'¹⁵³
- 2.165 Another reason for early ratification expressed by the Australian Red Cross was
- The new Court will only be able to deal with alleged crimes which arise after the Court has been established. This limiting principle is one key reason for encouraging Australian ratification as soon as possible and for pushing for early entry into force of the Rome Statute. Each new atrocity perpetrated somewhere in the world prior to the establishment of the Court and which goes unpunished reconfirms the urgency of the need for an effective international criminal court.¹⁵⁴
- 2.166 On the other hand, some of those who opposed ratification argued that claims concerning the benefits of early ratification are greatly exaggerated. Geoffrey Walker was sceptical of Australia's capacity to influence the establishment of the ICC, saying:
- Given ... [the] apparent inability [of the Australian delegation] to secure recognition of basic Australian constitutional democracy and the rule of law values to date, it would be naïve to expect that with only one vote in the Assembly, and a maximum of one judge on the Court, Australian representatives could bring about any significant improvement.¹⁵⁵
- 2.167 As circumstances transpired with the late receipt of legislation and the intervention of a federal election, Australia was not in a position to be one of the first 60 parties to ratify the Statute. Nevertheless, as indicated in Chapter 3, if Australia is able to finalise all its local requirements before July 2002, it should still be able to participate in the initial meetings of the Court.

153 Sydney University Law School Amnesty Group, *Submission No. 224*, p. 2.

154 [UNICEF argued along the same lines, suggesting that 'failure or delay in ratification means that current perpetrators of atrocities against children may never be brought to justice' (see, *Submission No. 34*, p. 56).

155 Geoffrey Walker, *Submission No. 228*, p. 13.

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, Guatemala, El Salvador, 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
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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*:

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

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 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.**

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.

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 is 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 effect 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 them¹⁵. 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

May 2002



Appendix A – Additional comments

While we endorse the principles and intent of the International Criminal Court, we do have reservations about the way in which its jurisprudence and practice may evolve.

These involve three inter-related areas of concern.

1. The lack of precision in the definition of some crimes, particularly ‘crimes against humanity’, creates the possibility that the ICC’s jurisdiction might become broader than was intended. Rather than focusing on the most serious international crimes, it could start to pursue cases that are properly within the jurisdiction of the domestic courts of member states.
2. The pattern of jurisprudence that develops will partly depend on the composition of the Court and the elected panel of judges. Thus the potential exists for it to be used to promote a particular international political or ideological agenda.
3. A combination of these two creates the possibility that the operation of the ICC might evolve in a way that is inconsistent with Australia’s national interest. The possibility exists that the principle of complementarity, rather than providing protection for member states, could lead to intervention by the ICC in some cases where the executive or judicial process of member states has resulted in a failure to prosecute, the dismissing of an action or an acquittal.

As a consequence, our support for the majority view of the Committee recommending ratification is highly qualified. Specifically, it is conditional upon the adoption of all other recommendations, particularly :

- a) Recommendations 2, 3 and 4 declaring the primacy of Australia’s jurisdiction;

- b) Recommendation 4 interpreting the crimes strictly according to the definitions defined in the International Criminal Court (Consequential Amendments) Bill; and
- c) Recommendation 6 establishing a process to regularly monitor and report to Parliament on the operations of the ICC.

With regard to Recommendation 6, it is further recommended that Australia's continued participation in the ICC be conditional on the sound development of the ICC's jurisprudence and practice. The review process must be satisfied that the ICC is not evolving in a way which is contrary to Australia's national interest, specifically that the interpretations of the listed crimes remain consistent with those defined by Australian legislation and that the application of the principle of complementarity does not compromise Australia's sovereignty over its domestic criminal jurisdictions and social policy. **It is further recommended that if such developments do occur, Australia exercise its right of withdrawal under Article 127.**

Kerry Bartlett MP

Senator Julian McGauran

Steven Ciobo MP

Senator Tsebin Tchen

Senator Brett Mason



Appendix B – Inquiry process, submissions, exhibits and witnesses

Inquiry process

On 10 October 2001 the National Interest Analysis (NIA) and the text of the Statute of an International Criminal Court were tabled in the Parliament as part of a batch of 8 treaties. On 14-15 October 2001 details of the Committee's inquiry into these treaties was advertised in *The Weekend Australian* and on the Committee's web site.

The Committee conducted an initial hearing in Canberra on 30 October 2000 at which the Department of Foreign Affairs and Trade, Attorney-General's Department and the Department of Defence presented evidence regarding the Statute. After considering the evidence given at this hearing, the Committee concluded that there was a need to extend its investigation of this treaty.

On 4 November 2001 the Committee placed a further advertisement in *The Weekend Australian* calling for submissions to an Inquiry into the Statute of an International Criminal Court and the web site was updated to reflect the extended inquiry. In addition, the Chair wrote to the Attorney-General asking that the legislation proposing to harmonise domestic law with the requirements of the ICC Statute be referred to the Committee. On 17 January 2001 the Committee received a letter from the Attorney-General and the Foreign Minister agreeing that the legislation to implement the Statute should be considered by the Committee in conjunction with its consideration of the National Interest Analysis. It was not until 30 August 2001 that exposure drafts of the International Criminal Court Bill 2001 and the International Criminal Court (Consequential Amendments) Bill 2001 were provided.

The Committee received 252 written submissions. All copies of submissions received electronically have been placed on the web site www.aph.gov.au/house/committee/jsct/. Hard copies of submissions are

available from the Committee Secretariat. The submissions and exhibits are listed below.

The Committee took evidence at public hearings on 13 February 2001 in Sydney, 14 March 2001 in Melbourne, 19 April 2001 in Perth, 24 September 2001 in Canberra, 9 April 2002 in Sydney and 10 April 2002 in Canberra. The names of the witnesses appearing at these hearings are listed below. Transcripts of the evidence taken at the hearings are available from the Committee's internet site or by contacting the Committee Secretariat.

Submissions

1	National Civic Council (WA)	18.1	Dr Ian Spry Q.C.
1.1	National Civic Council (WA)	18.2	Dr Ian Spry Q.C.
2	Scales and Partners	18.3	Dr Ian Spry Q.C.
2.1	Scales and Partners	19	Council for the National Interest
3	Mr Davvyd Williams	19.1	Council for the National Interest
4	Mrs Babette Francis	19.2	Council for the National Interest
5	Mr Arthur Hartwig	20	New South Wales Bar Association
6	Mr & Mrs E L & EE Knight	21	Mrs Dawn Brown
7	Ms Helen Brady	22	Australian Lawyers for Human Rights
8.2	Hon Justice John Perry	23.1	Australian Lawyers for Human Rights
8.3	Hon Justice John Perry	23	Human Rights Watch
8.1	Hon Justice John Perry	23.1	Human Rights Watch
8	Hon Justice John Perry	24	International Commission of Jurists
9	Maj Gen Digger James	25	Australian Red Cross (National)
10	Ms Nicole McDonald	26	Australian Red Cross (National Advisory Committee on International Humanitarian Law)
11.1	Ms June Beckett	198.1	Australian Red Cross (National Advisory Committee on International Humanitarian Law)
11.2	Ms June Beckett	198.1	Australian Red Cross (National Advisory Committee on International Humanitarian Law)
11	Ms June Beckett	198.1	Australian Red Cross (National Advisory Committee on International Humanitarian Law)
12	Mr Frank Devitt	198.1	Australian Red Cross (National Advisory Committee on International Humanitarian Law)
13	Supreme Court Adelaide	27	Mr Robert Williams
14	Adelaide Christian Centre International	28	Ms Eliana Freydel Miller
15	Mr Bob Redfern	29	Law Council of Australia
16	Amnesty International Australia	30	Festival of Light (SA)
16.1	Amnesty International Australia		
16.2	Amnesty International Australia		
16.3	Amnesty International Australia		
16.4	Amnesty International Australia		
17	Coalition for an International Criminal Court		
18	Dr Ian Spry Q.C.		

198.1	Festival of Light (SA)	66	Mr Robert Halliday
31	United Nations Association of Australia Inc.	67	W R Emerton
32	Legacy Coordinating Council Inc	68	Mrs Helen Harrison
33	Professor Hilary Charlesworth	68	Mr Doug Harrison
34	UNICEF Australia	69	Ms Jean Eykamp
35.1	Mr Ben Clarke	70	Ms Jennie Goldsack
35	Mr Ben Clarke	71	Mr Kevin Connors
36	Mr Gareth Kimberly	72	M C Turner
37	Refugee Council of Australia	73	Mr Tom Fraser
38	Mr R H Gustard	73	Mrs Jeanette Fraser
39	Mr John Stone	74	Mr Michael Sweeney
40	Confidential	75	Mr Ken Lawson
41	Attorney-General & Foreign Minister	76	Mr Arthur Hine
42	Mr & Mrs Michael & Jo Renehan	77	Mr J Edwin Pink
43	Dr Glenister Sheil	78	Mr Rod Evans
44	Mr George Bradney	79	Ms Valeria Staddon
45	Mr A Drury	80	Mr Richard Bryant
46	Mr R Barnett	81	Mr Malcolm Cliff
198.1	Mr R Barnett	82	Mr Nic Faulkner
47	National Party of Australia (Pioneer)	83	Ms Margaret Gardner
48	Mr Alf Lelia	84	Mr Peter Friis
49	Ms Caroline Ransom	85	Mr Henry Eiler
50	Dr Peter Ferwerda	86	Mr Stewart Coad
51	Mr Lawrence Haggerty	87	Mrs Annette Burke
52	Mr Frederick Howie	88	Ms Marlene Norris
53	Mr Ian Schultz	89	Mr David Mira-Bateman
54	Mrs Francis Chester	90	Mr Michael Kearney
55	Mr Athol Chester	90.1	Vigilance Committee
56	Mr Bill Trevillian	91	Mr Doug Howard
57	Mr William Blain	92	Mrs S Howard
58	Mrs L Bell	93	H Morrow
59	Mr Francis Cole	94	Marsh Family
59	Ms Jennifer Cole	95	Mr Anthony Grigor-Scott
60	Mr Shane Flynn	96	Deir Yassin Remembered
61	Mr Jim Shanks	97	Ms Barbara Cliff
62	Mr Kevin Thompson	98	Mrs Val Wicks
63	Ms Bindi Mira-Batemen	98	Mr Graeme Wicks
64	Mr Bob McGregor-Skinner	99	Ms Anne Russell
64	Mrs Sophie McGregor-Skinner	100	Mr M Salmon
65	Mr Robert Connors	100	Mrs J Salmon
		101	Mrs M Skinner
		102	B Nelson
		103	Ms Joan Michie

104	World Vision Australia	140	Mr W Mitchell
105	Mr Brian Branch	141	Mrs Julie Bates
106	Mrs Joan Watson	141	Mr Howard Bates
107	Mrs D Reynolds	142	Clr Nadim Joukhadar
108	Mr Stan Stanfield	143	Mrts E Brown
109	Mr John Stewart	144	Mr Allen Kingston
110.1	Mr Rupert Sherlock	145	Mr Andrew Anderton
110	Mr Rupert Sherlock	146	Mr Reg Macey
111	Mr J E Spraggon	147	Australian Legion of Ex-Servicemen and Women
112	Mr' Theo Hettershield	148	Br James Ward
113	Mrs M C Mercer	149	Mr Alan Barron
114	Mrs Eve Drinkald	149	Mrs Lyn Barron
114	Mr Ken Drinkald	150	Mr Peter Davis
115	Mr M W James	151	Youth Concerned
115	Mrs D M James	151	Youth Concerned
116	Mr Ray Allen OAM	152	Mr Michael Fawcett
117	Mr Maurice Shaya	153	Mr Rod Sullivan
118	Mr Denis McCormack	154	Mr Ces Clark M.I.I.A.
119	Dr I B Cameron	155	Mr Gary Ryan
120	Wallace Binnie	156	Mrs Mary Sexton
121	Mrs Everdina Slee	157	D O'brien
122	Mrs Evonne Moore	158	Mrs Gordana Duvnjak
123	Ms Jeanette Moods	159	Saltshakers
124	Ms Carole Christianson	159	Saltshakers
125	Ms Karen Mackinnon	160	Mr Jim Kennedy
126	Mr James Boc	161	Mrs R Boyce
126	Mrs Tracey Boc	161	Mr N Boyce
127	Ms Wendy Norden	162	Mrs Betty McPhee
128	Mr Bruce Ford	163	Mr Richard Gellie
128	Mrs Betty Ford	164	B W Diggles
129	Confidential	165	Mr Greg Willson
130	Mrs Janice O'Brien	166	Mrs Margaret Dixon
131	Mr Bernard O'Brien	167	Australian Defence Association
132	Mr Barry Lidner	168	Mrs J J Morrissey
133	Mr Graham McGowan	168	Mr John Morrissey
134	Mr Douglas Beaumont	169	Ms Julie Arthur
135	Mrs Mary Beaumont	170	Dr Jerome Mellor
136	Ms Julie Beare	171	Mr Edmund Cahill
137	R E Schmidt	172	Mrs Forwan
137	A T Schmidt	173	Mr Michael Sobb
138	Mrs Catherine O'Connor	174	Mr James Crockett
139	Ms Isabel Bell MACE	198.1	Mr James Crockett
140	Mrs Agnes Mitchell		

175	Mr Charles Scichuna	211	Ms Faye Alford
176	Mr K O'Gorman	212	Mr Alexander Reid
177	Mr Phillip Brabin	213	Ms Mary Hertzog
178	Mr John Casanova	214	Mr Peter Murray
179	Mr Tom king	215	Mr Klaus Clapinski
179	Mrs Margaret King	216	Ms Brenda Lee
180	J F McCormack	217	Mr James Cockayne
181	Mrs Maureen Jongebloed	218	Mr Patrick Healy
198.1	Mrs Maureen Jongebloed	219	International Commission of Jurists (QLD Branch)
182	Mr Peter Keogh	220	Mr Kevin McLaughlin
183	Ms Isobel Gawler	221	Mr John McCormack
184	Ms Wendy Lehmann	222	Mr Robert Doran
185	Mr Peter McDonald	223	Mrs Marie Barwick
186	Ms Trudy Lancaster	224	Sydney University Law School Amnesty Group
187	G F Tonge	225	Mr & Mrs Peters
188	Bartle Kempster	227	Mr Klaus Clapinsky
189	Australian Council of Trade Unions (ACTU)	228	Professor Geoffrey Walker
190	Australian Bahai Community	229	The Presbytery of Benalla
191	Mr Bernard Rusterholtz	230	Mr David Kane
191	Mrs Winsome Rusterholtz	231	Professor George Winterton
192	Mr John Gibbons	232	Attorney-General's Department
193	Parliament of Victoria	232.1	Attorney-General's Department
194	Mr C J McCormack	233	Br John Moylan
195	Mr Leo McManus	234	Mr Gerald Ackerman
196	V W Hickey	235	Ms Catherine Sullivan
197	Laurie Marantelli	236	Mr Robert Atkins
198	Mr Robert Downey	237	Ms Ursula Bennett
198.1	Mr Robert Downey	238	Mr Peter Davis
199	Mrs Mary Cudmore	239	Caston Centre for Human Rights Law
200	Our Lady of the Rosary Parish	240	Br John Moylan
201	Mr Des O'Callaghan	241	Australian Patriot Movement
202	Ms Tina Lesses	241.1	Australian Patriot Movement
203	National Civic Council (Vic - Isaacs)	242	Mr Laurie Marantelli
204	Ms Elizabeth Bennett	243	Mr Leo Wirquans
205	Ms Jane Munro	244	Australian Red Cross
206	Mrs E Arundell	245	Mr Tim Webb
207	Mrs A B Buchan	246	The Australian Institute for Holocaust and Genocide
208	Mr Gerald Ackermann	247	Department of Foreign Affairs and Trade
209	Mr David Plevin	248	Law Institute of Victoria
210	Australian Family Association (Mildura)		

249	Professor G Wilkins	252	United Nations Association of Australia (WA Division)
250	Mr Bruce Ruxton		
251	Mr Barry Gatwick		

Note: In addition, the Committee also received identical letters from eight individuals as part of an organised letter writing campaign. They all expressed opposition to the ICC Statute.

Exhibits

- 1 Mrs Babette Francis (National and Overseas Coordinator, Endeavour Forum), Professor Richard C Wilkins, Professor of Law Brigham Young University, *'Doing the Right Thing: The International Criminal Court and Social Engineering*.
- 2 Foreign Affairs, Defence and Trade Committee (House of Representatives), New Zealand), *Report on International Treaty Examination of the Rome Statute of the International Criminal Court*, 4 May 2000.
- 3 Professor Timothy McCormack (Chair, National Advisory Committee on International Humanitarian Law, Australian Red Cross), Doherty K & McCormack T, *Journal of International Law and Policy*, UC Davis International Law and Policy, Vol 5, Spring 1999, No. 2.
- 4 Professor Timothy McCormack (Chair, National Advisory Committee on International Humanitarian Law, TLH McCormack & S Robertson, *Jurisdictional Aspects of the Statute of the New International Criminal Court*, Melbourne University Law Review, Volume 23, Number 3, 1999, pp. 636– 667.
- 5 Maj Gen Digger James, I C F Spry, Legal Notes, *A Proposed International Criminal Court*, National Observer, Spring 2000, Number 46.
- 6 Mr John Stone, Paper delivered by John Stone to the 12th Conference of the Samuel Griffith Society, *Setting the Sovereignty Scene: Use and Abuse of Treaty Power*, Sydney, 11 November 2000.
- 7 Ms Joanne Lee (Research Associate, International Centre for Criminal Law Reform and Criminal Justice Policy), *International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute*, Joint Project of the ICHRDD and ICCLR&CJP May 2000.
- 8 Mr Asem Judeh (Director, Deir Yassin Remembered), Photographs and newspaper cuttings.
- 9 Dr Ian Spry QC (Editor, National Observer), *The Erosion of National Sovereignty*, An address given by Sir Harry Gibbs to the Samuel Griffith Society on 10 November 2000.

- 10 Dr Ian Spry QC (Editor, National Observer), 'International Criminal Court will limit our Freedom' *The Australian Financial Review*, 13 March 2001, Letters to the Editor, Ex-Military Officers.
- 11 Dr Ian Spry QC (Editor, National Observer), Paper, *The United States rejects the Proposed International Criminal Court*.
- 12 Dr Ian Spry QC (Editor, National Observer), Casey L A & Schaefer B D, *The International Criminal Court: The Issues*.
- 13 Dr Ian Spry QC (Editor, National Observer), Michael P Scharf, *Results of the Rome Conference for an International Criminal Court*, American Society of International Law, August 1998.
- 14 Dr Ian Spry QC (Editor, National Observer), Gary T Dempsey, Foreign Policy Expert at the Cato Institute, *Reasonable Doubt: The Case Against the Proposed International Criminal Court*, CATO Policy Analysis No. 311, July 16 1998.
- 15 Dr Ian Spry QC (Editor, National Observer), David J Scheffer, US Ambassador at Large for War Crimes, *America's Stake in Peace, Security and Justice*, August 11 1998, US Department of State.
- 16 Dr Ian Spry QC (Editor, National Observer), David J Scheffer, US Ambassador at Large for War Crimes, *International Criminal Court: The Challenge of Jurisdiction*, U S Department of State, March 16, 1999.
- 17 Dr Ian Spry QC (Editor, National Observer), *The International Criminal Court - - A Threat to American Military Personnel*, Serial No. 106-176, 25 July 2000, House of Representatives, Committee on International Relations, URL: www.house.gov/internationalrelations
- 18 Hon Justice John Perry (Supreme Court Adelaide) - Slides from a presentation given by Justice Perry
- 18.1 Hon Justice John Perry (Supreme Court Adelaide), Report from the Preparatory Commission for the International Criminal Court 2 November 2000.
- 19 Embassy of the Peoples Republic of China, Letter to De-Anne Kelly MP, July 13, 2001.
- 20 Professor R Wilkins, Letter to Editor dated 25/04/2002.
- 21 Professor R Wilkins, memorandum to The Hon. Nick Minchin, *Possible Constitutional and Domestic Law Implications of Ratifying the Rome Statute for the Creation of an International Criminal Court*, 15 February 2001.
- 22 Professor R Wilkins, Paper, *Ramifications of the International Criminal Court for War, Peace and Social Change*.

Witnesses

Monday, 30 October 2000 – Canberra

Attorney-General's Department

Mr Christopher Hodges, Principal Legal Officer, International Branch, Criminal Law Division

Ms Rebecca Irwin, Principal Legal Officer, Office of International Law

Mr Mark Jennings, Senior Adviser

Mr Geoffrey Skillen, Senior Legal Officer

Department of Defence

Commodore Robyn Warner, Acting Director, Operations and International Law

Department of Foreign Affairs and Trade

Mr Winfred Peppinck, Executive Director, Treaties Secretariat

Mr Richard Rowe, Legal Adviser

Mr Peter Scott, Executive Officer, International Law Section, Legal Branch

Tuesday, 13 February 2001 - Sydney

Individuals

Mr Gareth Kimberley

Ms Nicole McDonald

Mr John Stone

Amnesty International

Mr John Greenwell, Member, Government Liaison

Mr Des Hogan, Campaign Coordinator

Mr Christopher Ward

Australian Lawyers for Human Rights

Ms Kate Eastman, President

Director of Public Prosecutions (NSW)

Ms Helen Brady, Solicitor

Human Rights Watch

Ms Indira Rosenthal, Counsel

International Commission of Jurists

The Hon Justice John Dowd, President, Australian Section

New South Wales Bar Association

Mr Tim Game SC, Bar Council Representative

Mr David Re, Lawyer Assisting

The Issue

Ms June Beckett, Director/Journalist

UNICEF Australia

Ms Gaye Phillips, Chief Executive

Wednesday, 14 March 2001 – Melbourne**Individuals**

Hon Justice John Perry

Mr Denis McCormack

Australian Red Cross

Hon James Carlton, Past President

Rev Professor Michael Tate, Member, National Advisory Committee on International Humanitarian Law

Australian Red Cross (National Advisory Committee on International Humanitarian Law)

Professor Timothy McCormack, Chair

Legacy Coordinating Council

Mr Graham Riches, Vice Chairman

National Observer and RSL

Dr Ian Spry QC

World Vision Australia

Mr Gregory Thompson, Manager, Advocacy Network

Ms Alison Wells, Policy and Campaigns Officer, Advocacy Network (Aust)

Thursday, 19 April 2001 - Perth**Individuals**

Mr Ben Clarke LLB, LLM

Mr Rupert Sherlock

Council for the National Interest

Rear Admiral Philip Kennedy, Chairman

Major General Ken Taylor, Committee

Mr Denis Whitely, Executive Director

National Civic Council (Western Australian Branch)

Mr Richard Egan, State President

Monday, 24 September 2001 - Canberra**Attorney-General's Department**

Ms Joanne Blackburn, First Assistant Secretary, Criminal Justice

Mr Christopher Hodges, Principal Legal Officer, International Crime Branch

Mr Geoffrey Skillen, Acting Senior Legal Officer, International Crime Branch

Ms Annette Willing, Acting Assistant Secretary, International Branch

Department of Foreign Affairs and Trade

Ms Amanda GORELY, Director, International Law Section

Mr Richard Rowe, Legal Adviser

Department of Defence

Commodore Warwick GATELY, Director General, Joint Operations and Plans

Major Bruce OSWALD, Deputy Director, International Law

Tuesday, 9 April 2002 – Sydney**National Advisory Committee on International Humanitarian Law, Australian Red Cross**

Professor Tim McCormack, Chairman

Australian Institute for Holocaust and Genocide Studies

Mr Ara Margossian, Director,

Wednesday, 10 April 2002 – Canberra**Amnesty International Australia**

Mr John Henry Greenwell, Member, Government Liaison Group

Attorney-General's Department

Mr Ben Bartos, Legal Officer, International Crime Branch

Ms Joanne Blackburn, First Assistant Secretary, Criminal Justice

Mr Geoffrey Skillen, Acting Principal Legal Officer, International Crime Branch

Ms Robin WARNER, Assistant Secretary, International Crime Branch

Department of Foreign Affairs and Trade

Ms Amanda GORELY, Director, International Law Section

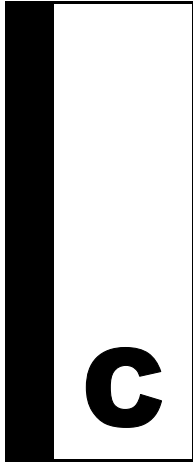
Mr Peter Scott, Executive Officer, International Law Section

Department of Defence

Major James Gaynor, Defence Legal Service

Group Captain Simon Harvey, Director of Operations and International Law

Commodore Michael Smith, Director-General, Defence Legal Services



Appendix C – The Like-Minded Group

Background¹

In the lead-preparatory negotiations for the development of the Rome Statute a group of countries came together based on the following principles:

1. To safeguard the integrity of the Statute adopted in Rome;
2. To work jointly for the Rome Statute's early entry into force;
3. To ratify or accede to the Rome Statute as early as possible;
4. To complete the remaining tasks assigned to the Preparatory Commission in resolution F as early as possible;
5. To encourage other States, through appropriate contacts and to the extent possible, to ratify or accede to the Rome Statute as early as possible; and
6. To fully support appropriate planning and the practical preparations for the effective establishment of the Court.

Canada was the initial chair in 1998. Australia has chaired the Group from 1998 till the present day.

¹ From information provided by Department of Foreign Affairs and Trade.

The membership includes the following countries:

Andorra	Czech Republic	Lesotho	Senegal
Argentina	Denmark	Liechtenstein	Sierra Leone
Austria	Egypt	Lithuania	Singapore
Australia (Chair)	Estonia	Luxembourg	Slovakia
Belgium	Fiji	Malawi	Slovenia
Benin	Finland	Malta	Solomon Islands
Bosnia- Herzegovina	Gabon	Namibia	South Africa
Brazil	Georgia	Netherlands	Spain
Brunei	Germany	New Zealand	Swaziland
Bulgaria	Ghana	Norway	Sweden
Burkina Faso	Greece	Philippines	Switzerland
Burundi	Hungary	Portugal	Trinidad and Tobago
Canada	Iceland	Poland	United Kingdom
Costa Rica	Ireland	Republic of Korea	Venezuela
Chile	Italy	Romania	Zambia
Congo (Brazzaville)	Jordan	Samoa	Zimbabwe
Cote d'Ivoire	Latvia	San Marino	
Croatia			



Appendix D – Signatories and States parties to the ICC Statute¹

Signatories: 139 Parties: 66.

Participant	Signature	Ratification, acceptance (A), approval (AA), accession (a)
Albania	18 Jul 1998	
Algeria	28 Dec 2000	
Andorra	18 Jul 1998	30 Apr 2001
Angola	7 Oct 1998	
Antigua and Barbuda	23 Oct 1998	18 Jun 2001
Argentina	8 Jan 1999	8 Feb 2001
Armenia	1 Oct 1999	
Australia	9 Dec 1998	
Austria	7 Oct 1998	28 Dec 2000
Bahamas	29 Dec 2000	
Bahrain	11 Dec 2000	
Bangladesh	16 Sep 1999	
Barbedos	8 Sep 2000	
Belgium	10 Sep 1998	28 Jun 2000
Belize	5 Apr 2000	5 Apr 2000
Benin	24 Sep 1999	22 Jan 2002
Bolivia	17 Jul 1998	
Bosnia and Herzegovina	17 Jul 2000	11 Apr 2002
Botswana	8 Sep 2000	8 Sep 2000
Brazil	7 Feb 2000	

¹ This information was copied on 11 April 2002 from a listing provided on the Home Page of the International Criminal Court, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>.

Participant	Signature	Ratification, acceptance (A), approval (AA), accession (a)
Bulgaria	11 Feb 1999	11 Apr 2002
Burkina Faso	30 Nov 1998	
Burundi	13 Jan 1999	
Cambodia	23 Oct 2000	11 Apr 2002
Cameroon	17 Jul 1998	
Canada	18 Dec 1998	7 Jul 2000
Cape Verde	28 Dec 2000	
Central African Republic	7 Dec 1999	3 Oct 2001
Chad	20 Oct 1999	
Chile	11 Sep 1998	
Colombia	10 Dec 1998	
Comoros	22 Sep 2000	
Congo	17 Jul 1998	
Costa Rica	7 Oct 1998	7 Jun 2001
Côte d'Ivoire	30 Nov 1998	
Croatia	12 Oct 1998	21 May 2001
Cyprus	15 Oct 1998	7 Mar 2002
Czech Republic	13 Apr 1999	
Democratic Republic of the Congo	8 Sep 2000	11 Apr 2002
Denmark	25 Sep 1998	21 Jun 2001
Djibouti	7 Oct 1998	
Dominica		12 Feb 2001a
Dominican Republic	8 Sep 2000	
Ecuador	7 Oct 1998	5 Feb 2002
Egypt	26 Dec 2000	
Eritrea	7 Oct 1998	
Estonia	27 Dec 1999	30 Jan 2002
Fiji	29 Nov 1999	29 Nov 1999
Finland	7 Oct 1998	29 Dec 2000
France	18 Jul 1998	9 Jun 2000
Gabon	22 Dec 1998	20 Sep 2000
Gambia	4 Dec 1998	
Georgia	18 Jul 1998	
Germany	10 Dec 1998	11 Dec 2000
Ghana	18 Jul 1998	20 Dec 1999
Greece	18 Jul 1998	
Guinea	7 Sep 2000	
Guinea-Bissau	12 Sep 2000	
Guyana	28 Dec 2000	
Haiti	26 Feb 1999	

Participant	Signature	Ratification, acceptance (A), approval (AA), accession (a)
Honduras	7 Oct 1998	
Hungary	15 Jan 1999	30 Nov 2001
Iceland	26 Aug 1998	25 May 2000
Iran (Islamic Republic of)	31 Dec 2000	
Ireland	7 Oct 1998	11 Apr 2002
Israel	31 Dec 2000	
Italy	18 Jul 1998	26 Jul 1999
Jamaica	8 Sep 2000	
Jordan	7 Oct 1998	11 Apr 2002
Kenya	11 Aug 1999	
Kuwait	8 Sep 2000	
Kyrgyzstan	8 Dec 1998	
Latvia	22 Apr 1999	
Lesotho	30 Nov 1998	6 Sep 2000
Liberia	17 Jul 1998	
Liechtenstein	18 Jul 1998	2 Oct 2001
Lithuania	10 Dec 1998	
Luxembourg	13 Oct 1998	8 Sep 2000
Madagascar	18 Jul 1998	
Malawi	2 Mar 1999	
Mali	17 Jul 1998	16 Aug 2000
Malta	17 Jul 1998	
Marshall Islands	6 Sep 2000	7 Dec 2000
Mauritius	11 Nov 1998	5 Mar 2002
Mexico	7 Sep 2000	
Monaco	18 Jul 1998	
Mongolia	29 Dec 2000	11 Apr 2002
Morocco	8 Sep 2000	
Mozambique	28 Dec 2000	
Namibia	27 Oct 1998	
Nauru	13 Dec 2000	12 Nov 2001
Netherlands	18 Jul 1998	17 Jul 2001 A
New Zealand	7 Oct 1998	7 Sep 2000
Niger	17 Jul 1998	11 Apr 2002
Nigeria	1 Jun 2000	27 Sep 2001
Norway	28 Aug 1998	16 Feb 2000
Oman	20 Dec 2000	
Panama	18 Jul 1998	21 Mar 2002
Paraguay	7 Oct 1998	14 May 2001
Peru	7 Dec 2000	10 Nov 2001
Philippines	28 Dec 2000	

Participant	Signature	Ratification, acceptance (A), approval (AA), accession (a)
Poland	9 Apr 1999	12 Nov 2001
Portugal	7 Oct 1998	5 Feb 2002
Republic of Korea	8 Mar 2000	
Republic of Moldova	8 Sep 2000	
Romania	7 Jul 1999	11 Apr 2002
Russian Federation	13 Sep 2000	
Saint Lucia	27 Aug 1999	
Samoa	17 Jul 1998	
San Marino	18 Jul 1998	13 May 1999
Sao Tome and Principe	28 Dec 2000	
Senegal	18 Jul 1998	2 Feb 1999
Seychelles	28 Dec 2000	
Sierra Leone	17 Oct 1998	15 Sep 2000
Slovakia	23 Dec 1998	11 Apr 2002
Slovenia	7 Oct 1998	31 Dec 2001
Solomon Islands	3 Dec 1998	
South Africa	17 Jul 1998	27 Nov 2000
Spain	18 Jul 1998	24 Oct 2000
Sudan	8 Sep 2000	
Sweden	7 Oct 1998	28 Jun 2001
Switzerland	18 Jul 1998	12 Oct 2001
Syrian Arab Republic	29 Nov 2000	
Tajikistan	30 Nov 1998	5 May 2000
Thailand	2 Oct 2000	
the former Yugoslav Republic of Macedonia	7 Oct 1998	6 Mar 2002
Trinidad and Tobago	23 Mar 1999	6 Apr 1999
Uganda	17 Mar 1999	
Ukraine	20 Jan 2000	
United Arab Emirates	27 Nov 2000	
United Kingdom & Northern Ireland	30 Nov 1998	4 Oct 2001
United Republic of Tanzania	29 Dec 2000	
United States of America*	31 Dec 2000	
Uruguay	19 Dec 2000	
Uzbekistan	29 Dec 2000	
Venezuela	14 Oct 1998	7 Jun 2000
Yemen	28 Dec 2000	
Yugoslavia	19 Dec 2000	6 Sep 2001
Zambia	17 Jul 1998	

Participant	Signature	Ratification, acceptance (A), approval (AA), accession (a)
Zimbabwe	17 Jul 1998	

* In a letter to the Secretary-General of the United Nations, Kofi Annan the Under Secretary for Arms Control and International Security, John R Bolton, on 6 May 2002, indicated that the United States of America ‘does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depository’s status lists relating to this treaty’.

