

HUMAN RIGHTS WATCH

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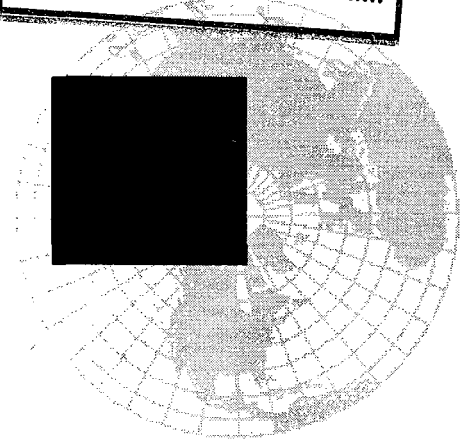
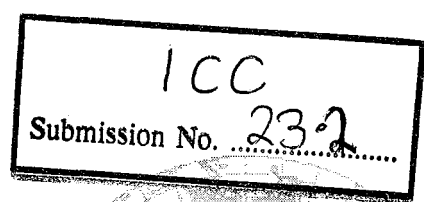
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Joint Standing Committee on Treaties Inquiry into the Statute of the International Criminal Court SUPPLEMENTARY SUBMISSION OF HUMAN RIGHTS WATCH

Introduction

Human Rights Watch welcomes the opportunity to make a submission on the Exposure Draft Implementing Bills: the *International Criminal Court Bill 2001* and the *International Criminal Court (Consequential Amendments) Bill 2001*.

Human Rights Watch has already provided a detailed submission to the Committee advocating that ratification of the Rome Statute of the International Criminal Court (Rome Statute) is in Australia's national interests (Submission No. 24) so this issue will not be addressed again here.

The two draft implementing bills, the *International Criminal Court Bill 2001* (ICC Bill) and the *International Criminal Court (Consequential Amendments) Bill 2001* (ICC Crimes Bill), for the most part, effectively implement Australia's obligations under the Rome Statute and incorporate the ICC crimes into Australian law. Human Rights Watch welcomes the comprehensive and clear approach taken by the drafters and also welcomes the decision by the Attorney-General to incorporate the ICC crimes into Australian law and to provide for the exercise of universal jurisdiction in relation to them.

Importantly, both Bills explicitly state that the jurisdiction of the ICC is complementary to Australia's jurisdiction with respect to the ICC crimes. Australia retains the primary duty and right to prosecute the people for the worst human rights abuses (genocide, war crimes and crimes against humanity).

In particular, the ICC Crimes Bill will permit Australia to assert its jurisdiction over a person in relation to any of the ICC crimes. As you know, Australia is asserting jurisdiction over some of these crimes for the very first time and Human Rights Watch welcomes this development. Once enacted, the ICC Crimes Bill will update Australian criminal law and jurisdiction in some important respects, for example by explicitly adding genocide to Australian criminal law. 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.

As the crimes in the ICC Crimes Bill are the most serious international crimes, Human Rights Watch believes that it is appropriate and consistent with the fair trial rights of accused persons that the constitutive elements of each crime be clearly enumerated. We therefore welcome the detailed approach taken in the ICC Crimes Bill. This approach will provide certainty to the prosecutor, the judiciary and perhaps most importantly to accused persons, all of whom will know, in advance, what the prosecutor must prove beyond reasonable doubt in order to secure a conviction.

Specific comments on the implementing Bills

Human Rights Watch would like to make the following specific comments and recommendations on the draft implementing laws.

Immunity from prosecution

Article 27 of the Rome Statute states that the ICC's jurisdiction "applies equally to all persons without any distinction based on official capacity" and that the "official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no way exempt a person from criminal responsibility under this Statute". It also provides that immunities and other special procedural rules that may attach to the official capacity of the person do not bar the ICC from exercising its jurisdiction over such a person.

In addition, the Rome Statute does not provide any grounds on which states parties may refuse to arrest and surrender a person upon the request of the ICC. The implementing Bills are silent on this issue and thus contain no provision overriding the immunity of certain foreign officials from criminal prosecution conferred in the *Foreign States Immunities Act 1985* and the *Diplomatic Privileges and Immunities Act 1967*. These Acts implement Australia's international obligations (for example, under the 1961 Vienna Convention on Diplomatic Relations) by conferring certain immunities and privileges with respect to "official acts".

Acts of genocide, war crimes and crimes against humanity fall outside the scope of a person's "official capacity" so, arguably, there is no need to expressly override these immunities; they simply do not apply. In addition, I am aware that section 42 of the *Foreign States Immunities Act 1985* permits the Governor-General to make regulations that retrospectively modify any immunity that undermines the operation of a treaty, including the Rome Statute.

Recommendation

Nonetheless, Human Rights Watch believes it would be best to explicitly provide that immunities and other barriers to prosecution do not apply to the crimes covered in the ICC Crimes Bill, either in relation to the arrest and surrender of a person to the ICC or for the purposes 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*.

Definitions of the crimes - ICC Crimes Bill

Crimes against humanity and war crimes concerning sexual violence

The treatment of the crimes of sexual violence in the ICC Crimes Bill is inconsistent. Specifically, the formula used in the Elements of Crimes Paper¹ for the “force” element of the crimes of rape, enforced prostitution and sexual violence has not been consistently followed in the ICC Crimes Bill. The Elements Paper formula is only followed in relation to the crimes of enforced prostitution and sexual violence and not rape. The reasons for this are not apparent.

Specifically, the “force” element for these crimes in the Elements Paper provides that the conduct 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”.

The clauses on the crime against humanity and war crime of enforced prostitution and sexual violence follow the formula found in the Elements Paper (see clauses 268.15 & 268.60) with the addition of an alternative way of using force, namely “taking advantage of a coercive circumstance”. However, this approach was not followed in the clauses on the crime against humanity and war crime of rape (clauses 268.13 and 268.58 & 268.81 respectively). In fact, the ICC Crimes Bill does not even refer to “force”, using a lack of consent formula instead. It is unclear why this difference of approach was taken and why the more retrogressive focus on consent was used in the case of rape.

Recommendation

Consideration should be given to harmonizing these provisions according to the Elements of Crimes Paper.

Crimes against humanity of enslavement and sexual slavery

Paragraph (3) of clauses 268.14 and 268.59 limit “sexual service” to the “commercial” use or display of the body of the person ...”. This requirement is both unnecessarily restrictive and inappropriate. It is possible that the “sexual service” provided by the person forced into sexual slavery is not provided for a commercial purpose. It is, in fact more likely to be provided for some other purpose related to the subjugation or oppression of the victim. Further, the requirement for a commercial use or purpose confuses sexual slavery with the crime of enforced prostitution which requires that the perpetrator obtained or expected to obtain some pecuniary advantage in exchange for the sexual acts they force the victim to perform.

Recommendation

¹ Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, Finalised Draft Text of the Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2 (Elements of Crimes Paper).

Human Rights Watch recommends that clauses 268.14 and 268.59 be amended to remove the reference to commercial use or purpose or to make it only one of a number of illustrative uses or purposes for which the sexual services are provided.

In addition, it is clear that crimes against humanity of enslavement and sexual slavery share the element of the condition of slavery. Sexual slavery is a form or subset of enslavement. However, the ICC Crimes Bill treats the two crimes quite differently. Clause 268.9 on the crime against humanity of enslavement includes the element from the Elements of Crimes Paper dealing with the condition of slavery (i.e. the perpetrator exercises the right of ownership over a person etc.). This element is absent from the sexual slavery provisions in the Bill (clause 268.14). Again it is not clear why this distinction has been made.

Crime against humanity and war crime of rape

In addition to the comment made above on the approach taken in the definitions of rape in the ICC Crimes Bill, Human Rights Watch believes that that part of the definition relating to penetration is unnecessarily restrictive. Specifically, clauses 268.13, 268.58 and 268.81 on rape require the perpetrator to penetrate the genitalia, anus or mouth of the victim. In comparison, the Elements paper is broader, defining rape as the perpetrator invading:

“the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, of the anus or genital opening of the victim with any object or part of the body”.

This formula is preferable as, unlike the definition in the ICC Crimes Bill, it does not exclude the possibility that the perpetrator might penetrate a part of the body other than the genitalia, anus or mouth of the victim or the possibility that the perpetrator might force the victim to penetrate a third person. Unfortunately, such acts of rape are not unknown and there does not seem to be any good reason for restricting the definition in this way.

Recommendation

Human Rights Watch recommends that the ICC Crimes Bill be amended to include a less restrictive definition for rape.

War crime of sexual violence

This crime, which is covered in clauses 268.63 and 268.86 does not follow the carefully worded equivalents in the Elements of Crimes Paper, namely articles 8(2)(b)(xxii) and 8(2)(e)(vi). Specifically, sub-clauses 268.63(1)(b) and 268.86(1)(b) provide that a person commits an offence of the war crime of sexual violence if, *inter alia*, “the perpetrator’s conduct also constitutes a grave breach of the Geneva Conventions”.

By contrast, paragraph (2) of both articles 8(2)(b)(xxii) and 8(2)(e)(vi) of the Elements of Crimes paper provides that the “conduct was of *a gravity comparable* to that of a grave breach of the Geneva Conventions” (emphasis added).

The distinction is important. Requiring that the sexual violence conduct actually be a grave breach of the Geneva Conventions establishes a much higher threshold for the crime than requiring the conduct to be of a comparable gravity. The latter approach requires an assessment of the gravity of the conduct, while the former one requires the actual commission of a grave breach of the Geneva Conventions test. While it may be the case that an act of sexual violence also constitutes a grave breach, for example torture, it is a different matter to require that all of the elements of torture be proven as well.

The distinction between a grave breach and conduct of comparable gravity was the subject of much debate in the negotiations and the approach taken in the Australian ICC Crimes Bill, was explicitly rejected by the Preparatory Commission as too restrictive.²

Recommendation

Human Rights Watch recommends that clauses 268.63 and 268.86 of the ICC Crimes Bill be amended to reflect paragraph (2) of articles 8(2)(b)(xxii) and 8(2)(e)(vi) of the Elements of Crimes Paper.

² See *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, ed. Roy Lee et al, Transnational Publishers, USA 2001, at page 198.