ADDITIONAL COMMENTS BY HUMAN RIGHTS WATCH ON AUSTRALIAN DRAFT LEGISLATION IMPLEMENTING THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Human Rights Watch would like to make the following additional comments that were not made in our supplementary submission to the Committee (dated 18 April 2002). Human Rights Watch understands that the Committee is in the process of finalizing its report. However, we believe that the following comments are very important and warrant consideration by the Committee in its report.

Privileges and immunities for ICC officials

Unlike the ad hoc tribunals for the former Yugoslavia and Rwanda, the ICC is not an organ of the United Nations. Therefore, the privileges and immunities provided to UN officials and staff members do not apply to ICC officials and staff. Accordingly, article 48(2) of the Rome Statute provides for privileges and immunities for the judges, Prosecutor, Deputy Prosecutor and Registrar of the ICC. Specifically, it provides that they are to enjoy the same privileges and immunities as heads of diplomatic missions when engaged on or with respect to the business of the Court.

Article 48, paragraphs (3) and (4), provide that other officials of the Court, including staff, and those who assist the court as experts etcetera, are to be accorded privileges and immunities provided for in the agreement on privileges and immunities. This agreement was adopted provisionally by the Preparatory Commission for the ICC in 2001 (Draft Agreement on Privileges and Immunities, U.N. Doc. PCNICC/2001/1/Add.3).

The Rome Statute allows the ICC to conduct investigations (article 54) and to sit on the territory of states parties (article 3) in certain circumstances. In such instances, states parties must accord the officers, staff and others assisting the ICC in those investigations or hearings, the privileges and immunities provided for in the Rome Statute and in the draft Agreement on Privileges and Immunities.

The ICC Bill does not specifically address the issue of privileges and immunities for the judges and other officers of the ICC, who may, under Part 5 of the Bill, conduct investigations and sit on Australian territory. However, Human Rights Watch understands that privileges and immunities of ICC officials and staff will be dealt with by regulations to be made under the *International Organisations (Privileges and Immunities) Act 1963*.

Recommendation:

The regulations on the privileges and immunities Australia accords to ICC officials, staff and others must confer the privileges and immunities provided for under the Rome Statute, and the draft Agreement on Privileges and Immunities adopted by the Preparatory Commission. As the Rome Statute will enter into force on 1 July 2002 and the ICC is expected to be operating early in 2003, these Regulations must be made as soon as possible so that Australia is in a position to comply with its treaty obligations from the first day the ICC begins operating.

Arrest of a person following Court request

Article 59 of the Rome Statute requires states parties to "immediately take steps to arrest" a person in response to a request from the ICC for the provisional arrest or arrest and surrender of a person.

Clauses 21 and 22 of the Bill purport to implement article 59 of the Rome Statute. However, these clauses do not require all the authorities responsible for meeting such a request to take immediate steps toward that end. Specifically, neither the Attorney-General, nor a magistrate asked to issue a warrant for arrest pursuant to a request from the ICC, are obliged to act without delay under these clauses. The requirement to act "immediately" on a request from the ICC is an important element of the cooperation regime that should be explicitly reflected in Australia's implementing law. In other parts of the ICC Bill, this requirement is reflected. For example, clause 12 requires the Attorney-General to consult with the ICC "without delay" regarding actual or potential problems with carrying out an ICC request for cooperation.

Recommendation

Clauses 21and 22 should be amended as follows:

(i) Amend sub-clauses 21(1) and 22(1), by adding "without delay and" before "by written notice".

(ii) Amend sub-clauses 21(3) and 22(2), by adding "without delay" before "issue a warrant".

Definition of "magistrate" and "appropriate authority"

The ICC Bill purports to ensure that Australia, once it becomes a state party to the Rome Statute, can fully meet all requests from the ICC for cooperation with its investigations and prosecutions, as required under article 86. However, the definitions of "magistrate" and "appropriate authority" in clause 4 of the ICC Bill have the potential to undermine Australia's ability to meet its Rome Statute obligations. This is because both definitions require arrangements to be in force under clause 175[1] of the ICC Bill for a State magistrate or police officer to be a "magistrate" or an "appropriate authority" for the purposes of the ICC Bill and, thus, for any such officer to be authorized to execute a request from the ICC under the Bill.

Human Rights Watch understands that these kinds of Commonwealth-State arrangements are difficult to make and that there are many examples of such arrangements that the Commonwealth and the States have failed to conclude. There is a real risk that clause 175 arrangements may suffer the same fate, in which case, the ICC Bill may commence and the ICC may be operational before a full package of arrangements is in force for all Australian jurisdictions. In fact, Australia could be called upon by the ICC to arrest and surrender a person but not be able to execute that order because the state in which the request is to be executed has not concluded a clause 175 arrangement with the Commonwealth.

If, for example, New South Wales had not concluded an arrangement with the Commonwealth, no NSW magistrate would be able to issue a search warrant under clause 104 of the ICC Bill, take evidence under clause 64 or issue a warrant for arrest or surrender under clauses 21 and 22 merely because he or she would not be "a magistrate of a State in respect of which an arrangement under section 175 is in force". For similar reasons, a NSW police officer could not

[1] Note that clause 175 refers to "arrangements" whereas the definition of "appropriate authority" in clause 4(b) of the ICC Bill refers to an "agreement in force under section 175". This inconsistency should be amended and "agreement" in clause 4(b) replaced with "arrangement".

participate in preserving evidence under clause 79; examining sites under clause 75; identifying and locating persons or things under clause 62.

Magistrates and state police officers are likely to play an important role in meeting any cooperation request from the ICC. Therefore, it is essential that the authorization they need to respond to such requests not be on the conclusion of a clause 175 arrangement.

Recommendation

The definitions of "magistrate" and "appropriate authority" need to be amended so that the legal classification of State officers as "magistrates" and "appropriate authorities" is not contingent on clause 175 arrangements being in force. In fact, the term "magistrate" does not need to be defined as section 16C of the *Acts Interpretation Act 1901* applies.[2] We note that "magistrate" is not a defined term for the purposes of the *Crimes Act 1914*. Similar wording to that used for the term "constable" in section 3 of the *Crimes Act 1914* could be utilized for paragraph (b) of the "appropriate authority" definition.[3]

Trust fund for victims

Under article 75 of the Rome Statute, the ICC may make orders for reparations to victims and states parties may be asked to enforce such orders. Article 79 provides for the establishment of a trust fund for victims into which money and other property appropriated, collected through fines or forfeiture pursuant to an order of the ICC can be paid for the benefit of victims of ICC crimes and their families.

Part 11 of the ICC Bill provides for the enforcement of forfeiture orders when requested by the Court. Forfeited property will then be dealt with in accordance with the *Proceeds of Crime Act 1987* as amended by Schedule 6 of the *International Criminal Court (Consequential Amendments) Bill 2001*. Proposed new section 23D of the *Proceeds of Crime Act 1987* confers a broad discretion on the Attorney-General to dispose of, or deal with, property forfeited under these orders. However, it is not stipulated that the Attorney-General must channel this forfeited property into the trust fund for victims to be maintained by the Court pursuant to article 79 of the Rome Statute.

National prosecutions conducted by the Commonwealth Director of Public Prosecutions regarding the offences contained in the *International Criminal Court (Consequential Amendments) Bill 2001* can also involve the forfeiture of property in accordance with the *Proceeds of Crime Act 1987*. Again, there is no requirement for the Attorney-General to channel these funds towards a Court-administered victims' trust fund, nor does the *Proceeds of Crime Act*

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[2] *Acts Interpretation Act 1901*, section 16C:
(1)Where, in an Act, reference is made to a Stipendiary Magistrate, the reference shall be read as including a reference to any Magistrate in respect of whose office an annual salary is payable.
(2)Where, in an Act passed after the date of commencement of this section, reference is made to a Magistrate, the reference shall, unless the contrary intention appears, be read as a reference to:
(a)a Chief, Police, Stipendiary, Resident or Special Magistrate; or
(b)any other Magistrate in respect of whose office an annual salary is payable.
(3)Unless the contrary intention appears, a reference in an Act to a Magistrate does not include a reference to a Federal Magistrate.

[3] *Crimes Act 1914*. section 3: ".... 'constable' means a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory".

1987 establish an Australian-administered trust fund for property forfeited via national prosecutions.[4]

Recommendation

For these reasons, Human Rights Watch recommends that express legislative provisions be made requiring the payment of funds from forfeited or seized property or fines or proceeds of ICC crimes, whether pursuant to an order of the ICC or an Australian court made in the conduct of national prosecutions under the ICC Crimes Bill, either to:

(i) the ICC-administered victims' trust fund established under article 79 of the Rome Statute; or

(ii) an Australian-administered victims' trust fund.

International Criminal Court (Consequential Amendments) Bill 2001

Defence of superior orders

Clause 268.122 reproduces article 33 of the Rome Statute and allows for a defense of superior orders in certain circumstances that are not permitted under customary international law.[5] The defense of superior orders can be a factor in mitigation but does not relieve a person of their criminal responsibility. Clause 268.122 should be amended to bring it into line with established rules of international law.

The principle of no defense of superior orders rose to prominence in the Nuremberg trials. Article 8 of the Nuremberg Charter provides that: *"The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires".* In response to the many defendants that raised this defense during the Nuremberg trials, the Military Tribunal stated that: *"The provisions of this Article [article 8] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment".*

The defense of superior orders has been consistently excluded in relevant legal instruments adopted since the Nuremberg Charter, (with the exception of the Rome Statute) including the Tokyo Tribunal Charter (article 6), Control Council Law No. 10 (article 4) and, more recently, the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 7) and Rwanda (article 6).

The rationale for excluding the defense of superior orders, particularly for the most heinous crimes that the ICC will prosecute, is that a person who commits such a crime should not be able to avoid culpability altogether. It is up to a court to determine the effect of the superior order on

[4] Compare the Canadian ICC legislation provides for the creation of a Canadian trust fund for victims into which money obtained through enforcement in Canada of ICC orders for reparation, forfeiture or fines, as well as proceeds of assets seized or forfeited or fines through domestic prosecution of ICC crimes, can be paid for the benefit of victims and their families. See *Crimes Against Humanity and War Crimes Act 2000*, sections 30-32.

[5] See article 8 of the Nuremberg Charter which says that: "The fact that the Defendant acted pursuant to an order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires". Also, articles 7(4) and 6(4) of the Statutes of the International Criminal Tribunal for the former Yugoslavia and Rwanda respectively. And, article 5 of the Draft Code of Crimes Against the Peace and Security of Mankind (1996).

the person's culpability and to what extent, if any, it nullifies their criminal responsibility. For example, a subordinate who is a willing participant in a crime irrespective of an order of a superior incurs the same degree of culpability as if there had been no such order. In such a situation, the existence of the superior order does not exert any undue influence on the behavior of the subordinate.

In contrast, a person who unwillingly commits a crime pursuant to an order of a superior because of the fear of serious consequences for himself or his family resulting from a failure to carry out that order does not incur the same degree of culpability as a subordinate who willingly participates in the commission of the crime and may justify a mitigation of the penalty imposed.

The competent court must consider whether a subordinate was justified in carrying out an order to commit a crime to avoid the consequences resulting from a failure to carry out that order. The court must weigh the seriousness of the consequences that in fact resulted from the order having been carried out, on the one hand, and the seriousness of the consequences that would have most likely resulted from the failure to carry out the order under the circumstances at the time, on the other.

Recommendation: Clause 268.122 should be amended to reflect customary international law on the defense of superior orders and not the formula in article 33 of the Rome Statute. Articles 7(4) and 6(4) of the Statutes of the International Tribunals for the former Yugoslavia and Rwanda respectively could be used as a model provision in this regard.

General Comments on incorporation of ICC crimes

Australia is urged to ensure that its national courts can prosecute the acts listed in article 7 of the Rome Statute defining crimes against humanity, even if they do not amount to a crime against humanity. Such crimes are extremely serious, yet a number of them are not proscribed in Australian criminal law (e.g. enforced disappearance, enforced pregnancy). It would be anomalous for Australian courts to be able to prosecute, for example, the crime against humanity of enforced disappearance but not to be able to prosecute a single act of enforced disappearance. The enactment of the ICC Crimes Bill is a good opportunity for Australia to strengthen its national criminal laws to ensure that all these heinous crimes are punishable under national law whether committed against one person or against one hundred persons.

Recommendation: The ICC Crimes Bill should be amended to criminalize the conduct listed in article 7 of the Rome Statute and enumerated in Subdivision C of Schedule 1 of the Bill, as "single acts"; that is, when the threshold for a crime against humanity is not met.