8

The International Criminal Court

8.1 The International Criminal Court (ICC) will be the first permanent international tribunal with the power to prosecute perpetrators of crimes against humanity. Its founding statute, The Statute of Rome, is the genus of several years of intense negotiation between the members of the international community. It was officially adopted in July 1998 at a diplomatic conference, with a vote of 121 States for, 20 abstentions and only seven States against: an exceptional achievement for any international agreement. The Court itself will come into existence once 60 States have ratified the treaty. Thirty-two States have already ratified the Treaty. One hundred and thirty-nine States are signatories to it.

8.2 The purpose of the ICC is to prevent individuals responsible for '… the most serious crimes of concern to the international community …' from escaping justice. The crimes to which the Statute applies are the crime of genocide; war crimes; crimes against humanity and aggression.

8.3 During the last century, the world witnessed inhumanity on a massive scale - genocide (Armenia, the Second World War 'Holocaust' and Rwanda); the 'killing fields' (Cambodia); ethnic cleansing (Bosnia, Croatia, Kosovo); apartheid (South Africa); the death squads (Bolivia, El Salvador, the Argentine); torture (Germany, the Soviet Union, China, Chile and the Argentine); deportation and forced removal (the Soviet Union and East Timor) and 'disappearances' (Guatemala, Chile and the Argentine). The perpetrators of twentieth century and current inhumanity, incompletely catalogued above, have very largely escaped justice and have proceeded in the expectation that that would be so. The need for an International Criminal Court arises from this contemporary culture of impunity.

8.4 Even where applicable national laws existed, traditional national law enforcement was incapable of dealing with this situation. The essential characteristic of these crimes is that they are committed by government or are instigated or authorised by government. They are, in a sense, 'official'

crimes. National law rarely enjoined and frequently justified their commission.

8.5 Appalled by the atrocities of the second world war, the international community sought to take up the work that had been done before the war and establish a fabric of international law which sovereign states could draw upon and implement in their national laws. The *Genocide Convention* 1948 condemned and prohibited genocide. The four *Geneva Conventions* of 1949, which were added to by Protocols in 1977, elaborated upon the pre-war conventions defining war crimes and extended their coverage to the treatment of civilians. One of the great obstacles in the evolution of international law in this field had been the notion that international law was exclusively concerned with states and thus did not apply to individuals. The Nuremberg Tribunal (1946) firmly rejected this. Crimes, it observed, were committed by men not 'abstract entities'. The Nuremberg Charter defined the concept of 'crimes against humanity' and the Tribunal, in its judgement, proceeded to establish this as an area of international criminal law separate from war crimes. The Tribunal's Charter excluded the defence of superior orders and the Tribunal gave effect to this.

8.6 With these developments and others, such as the *Convention against Torture* (1984), a body of international law evolved. There was, however, no international court to apply it. It was left to States to incorporate it into their national laws and to enforce them. The basic problem remained. Nations proved either unwilling or unable to carry out effective enforcement. Accordingly, national law enforcement, as the exclusive enforcement mechanism, continued to fail. In certain cases, as with South Africa, domestic law openly defied international norms; in others military governments simply overrode or disregarded them (Chile, Indonesia). In many cases enforcement authorities were afraid of those who were or had been in power. Accordingly, enforcement action in the Argentine ceased with the threatened mutiny of middle ranking officers in the army. In other instances, Courts and prosecuting authorities lacked independence or, bowing to international pressure, charged minor offences or imposed limited punishment.

8.7 Faced with the humanitarian crisis in the Former Republic of Yugoslavia and international outrage, the United Nations Security Council moved to fill the curial vacuum in 1993 by the appointment of an *ad hoc* Tribunal and shortly after appointed a tribunal for Rwanda. After a slow beginning, these tribunals have been increasingly effective in terms of the specific task they have had to do. But as a general solution *ad hoc* tribunals have basic inadequacies. Their appointment depends on a Security Council resolution. It is thus a highly political decision, always subject to

the veto of the Permanent Members. Because of this *ad hoc* tribunals have a random quality. Why Yugoslavia? Why not East Timor?, it may be asked. Also, because of the obstacles to and the uncertainty relating to their appointment, *ad hoc* tribunals provide no deterrent influence. They are essentially a retrospective response to a situation. Finally, *ad hoc* tribunals give rise to the allegation of 'victor's justice'.

8.8 The Statute of the International Criminal Court is intended to meet the need by establishing an independent, standing Court and an independent prosecutor who will have adequate powers of investigation. The essential features are:

- The Court will exercise jurisdiction where national bodies have proved *unwilling* or *unable* to do so;
- The Statute sets out the rules of international humanitarian law which are to apply. The body of law is largely a restatement of the existing law but is set out in a clear, accessible and uniform way;
- The Statute provides for adequate investigatory powers and an international regime for enforcement cooperation among States.

8.9 The International Criminal Court needs to be distinguished from the International Court of Justice (ICJ). The ICJ's purpose is to enable the resolution of disputes between States—for example over a breach of a treaty—by an independent judicial forum. Its jurisdiction is strictly limited. A State may sue another State in the ICJ but only if the other State has consented—by one of several mechanisms—to the jurisdiction of the Court over that dispute. It is not possible for an individual to either sue or be sued in the ICJ. In contrast, the ICC's sole concern is the investigation and prosecution of individuals for war crimes, genocide and crimes against humanity.[1]

8.10 It is important to note that while generally the international community has been supportive of the ICC, there are some prominent nations that have refused to endorse the Court, the United States, China and Israel. The United States of America and China are concerned that their nationals will be prosecuted under the broad jurisdiction of the ICC. The USA has recently become a signatory to the Statute but it remains apprehensive that its troops serving abroad will be vulnerable to politically motivated referrals to the Prosecutor and it is unlikely to ratify. China has refused to sign the Statute of Rome. Israel has signed the Statute on 29 December 2000. Israel objects principally to the inclusion among the offences of Article 8(b)(vii) that which forbids an occupying power from transferring part of its population to occupied territory or deporting or transferring

1 Attorney-General's Department. Transcript, 19 May 2000, p. 56.

from that territory the population that lived there. Some of the concerns expressed by these nations have been raised in the Australian debate and will be discussed below.

Operation of the ICC

8.11 The *Statute of the International Criminal Court* (Statute of Rome) prescribes the manner in which the ICC will operate. It details the establishment and composition of the court, its jurisdiction, and the principles of law that will govern proceedings.

Establishment and Composition of the Court

8.12 The ICC will come into existence once 60 States have ratified the Statute of Rome.[2] The Court will be based in The Hague,[3] but will have its own separate international legal personality, which means that the Court will operate independently of its Member States and the United Nations.[4] It will be able to exercise its functions and powers on the territory of any State party.[5]

8.13 The Court will consist of 18 judges elected by States Parties. Subject to immaterial exceptions, the term of office for a judge is 9 years and a judge is not eligible for re-election. To qualify for election these judges must demonstrate competence in criminal law or international law in the fields of international humanitarian law or human rights and no two judges will be nationals of the same State.[6] The judges will elect a President of the Court[7] who will be responsible for the proper administration of the Court including the allocation of cases to the three different chambers: the Pre-Trial Division, the Trial Division and the Appeals Division. The independence of the judiciary is guaranteed by Article 40. The judicial calibre of the appointees is ensured by the requirement of legal qualifications mentioned above and that a statement of those qualifications must accompany every nomination. An Advisory Committee is proposed to report on candidates' qualifications and the process of election involves determining whether a candidate is to be

2 *Statute of the International Criminal Court*, Article 126.

3 *Statute of the International Criminal Court*, Article 3.

4 However, it should be noted that the Court shall be brought into relationship with the UN by agreement. See *Statute of the International Criminal Court*, Article 2.

5 *Statute of the International Criminal Court*, Article 4.

6 *Statute of the International Criminal Court*, Article 36.

7 *Statute of the International Criminal Court*, Article 38.

appointed by virtue of his or her criminal law or international human rights law competence respectively.[8]

8.14 The Office of the Prosecutor is an independent organ of the ICC. The Prosecutor's responsibility is to investigate alleged crimes and bring prosecutions before the court. Once again, the Prosecutor is elected by secret ballot by the Member States and must be of 'high moral character'.[9]

Primacy of National Courts

8.15 The ICC gives preference to domestic criminal systems. Indeed, if in a domestic jurisdiction, an incident has been investigated and prosecuted, or properly investigated with a decision made not to prosecute, then the jurisdiction of the ICC can not be invoked: this is the principle of complementarity.[10] Further to this, the ICC cannot try a person if the accused has already been tried for the same events in another court of law.[11] The two exceptions to these limits are if the State is either genuinely unwilling or unable to carry out the investigation or prosecution,[12] or the proceedings in the domestic jurisdiction were designed to protect the person from the jurisdiction of the ICC.[13] Any issue of inadmissability of a domestic prosecution must be examined by both the Prosecutor and the Pre-Trial Chamber before a decision can be made to proceed with an ICC prosecution.

Jurisdiction

8.16 The jurisdiction of the ICC is strictly and deliberately limited. The Court can only claim jurisdiction over the crimes of genocide, crimes against humanity, war crimes and—once Member States agree on a definition—the crime of aggression.[14] These crimes are defined in detail in the Statute.[15] These definitions are firmly based on accepted international precedents, including the Genocide and Geneva Conventions and customary international law.

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8 *Statute of the International Criminal Court*, Article 42.

9 *Statute of the International Criminal Court*, Article 42.

10 *Statute of the International Criminal Court*, Article 17.

11 *Statute of the International Criminal Court*, Article 20.

12 *Statute of the International Criminal Court*, Article 17.

13 *Statute of the International Criminal Court*, Article 20.

14 *Statute of the International Criminal Court*, Article 5. Note: Under Articles 5, 121 and 123, for the ICC to gain jurisdiction over the Crime of Aggression, the Assembly of States Parties will need to adopt a definition of the crime with a two-thirds majority. The earliest that a proposed definition can be put to the Assembly is seven years after the Statute of Rome first enters into force.

15 *Statute of the International Criminal Court*, Articles 6-8.

8.17 The Court may exercise jurisdiction in respect of alleged offences referred by a State Party or by the prosecutor on his own motion where:

- The offence occurs on the territory of a State Party;
- The accused is a national of a State Party; or
- A non-State Party declares that it accepts the jurisdiction of the Court.[16]

8.18 The Court may exercise jurisdiction in any territory by reference of the Security Council under Chapter VII of the Charter, ie, in a situation endangering peace and security.

8.19 In order for a State Party to refer a situation or an investigation to be initiated by the Prosecutor, there must be State consent. Either the State on whose territory the crime occurred, or the State of the accused's nationality must have agreed to the ICC's jurisdiction. The acceptance of the jurisdiction will be automatic for a Member State. A Non-member State can accept the jurisdiction of the Court with respect to a particular incident.

8.20 A final qualification on the ICC's jurisdiction is that it can not operate retrospectively.[17] Any crimes committed before the Statute comes into effect will need to be prosecuted in other forums.

Principles of Law

8.21 The Statute outlines some of the general principles of criminal law that the Court will apply. They are a combination of doctrines of the Civil Law and Common Law systems.[18] Detailed regulations on procedure and evidence have been prepared by the Preparatory Commission and will be considered and approved by the Assembly of States Parties once the Statute takes effect.

8.22 The Statute only applies to those over 18 years old, and specifically adopts the traditional Common Law doctrines of the presumption of innocence and the requirement of proof beyond reasonable doubt.[19] It must also be shown that the crimes were committed with both 'intent and knowledge'.[20] There is no statute of limitations and Heads of State and other elected officials can not rely on their traditional immunity to escape criminal responsibility.[21]

16 *Statute of the International Criminal Court*, Article 12.
17 *Statute of the International Criminal Court*, Article 11.
18 Attorney-General's Department. Submission No. 87, p. 866
19 *Statute of the International Criminal Court*, Article 66.
20 *Statute of the International Criminal Court*, Article 30.
21 *Statute of the International Criminal Court*, Article 27.

8.23 There are four accepted defences outlined in Art 31: insanity, intoxication, self-defence and defence of others, and duress. The further defence of superior orders cannot be invoked unless three criteria are satisfied:

- The accused was under a legal obligation to obey the orders in question
- The accused did not know that the order was unlawful and
- The order was not manifestly unlawful.

Under the Statute an order to commit genocide or crimes against humanity are considered manifestly unlawful.

8.24 The Court cannot impose the death sentence. In cases justified by the extreme gravity of the crime, the court can sentence the accused to life imprisonment; otherwise the term of the sentence is limited to no more than 30 years.[22] The Court also has the ability to fine, to order a forfeiture of proceeds from the commission of the crime, and to order reparation to the victims.[23]

Enforcement

8.25 While the Court is an independent body, its success will rely firmly on the cooperation of the international community. The Statute imposes a general duty on State Parties to cooperate with the Court in both its investigations and prosecutions of crimes.[24] This will include the arrest and surrender of persons indicted by the Court, providing evidence and documents, assisting in the protection of witnesses, conducting searches and seizures, taking evidence and examining places or sites. The prosecutor may apply to the Pre-Trial Chamber for the issue of a warrant of arrest.[25] Where a State, such as Australia, receives a request to surrender a person against whom such a warrant has been issued, the request shall, *inter alia*, be accompanied by such information as is required under Australian law, except that those requirements '… should not be more burdensome than those applicable to the extradition …'.[26] In the case of requests for information, the Statute provides extensive procedures for the protection of national security.[27]

8.26 In addition to these obligations, Member States will be required to assist in the enforcement of judgments made by the Court, including imprisoning

22 *Statute of the International Criminal Court*, Article 27.
23 *Statute of the International Criminal Court*, Article 75.
24 *Statute of the International Criminal Court*, Article 86.
25 *Statute of the International Criminal Court*, Article 58.
26 *Statute of the International Criminal Court*, Article 91(2)(c).
27 *Statute of the International Criminal Court*, Article 72.

convicted criminals in domestic gaols. Member States are also expected to assist in securing the assets of the accused, so that when the ICC orders reparation, fines can successfully be levied against those assets.[28]

Australia's Position

8.27 Australia has played, and continues to play, an important role in the establishment of the ICC. It chairs the Likeminded Countries, a group of more than 60 States committed to the establishment of the Court, and is participating in the Preparatory Commission. This participation included working on the Elements of Crimes and the Rules of Procedure and Evidence for the Court.[29] DFAT believes that this '… promotion of the Court reflects the Government's strong commitment to practical and constructive outcomes in the field of human rights …'.[30]

8.28 Several submissions have welcomed the Government's position on the ICC. Professor Hilary Charlesworth described the Statute of Rome as '… one of the most significant [treaties] in the post World War II era [as it] will create a safety net to ensure that those responsible for international crimes are held to account'.[31] The United Nations Association of Australia (UNAA) considers the ICC to be an important structure to the world's capacity to intervene effectively in support of human rights and freedoms.[32] The Australian Red Cross '… strongly believes that the International Criminal Court is not only viable but an essential step towards international justice'.[33] The Women's International League for Peace and Freedom (WILPF) feels that the ability to prosecute human rights violators will act as deterrent to future commission of crimes.

> If states leaders knew that their activities were likely to come under scrutiny from an international jurisdiction, we believe that they would be less likely to pursue such policies as those which have resulted in the deaths, rapes, terrorising and brutalisation of hundreds of thousands of men and women in recent times.[34]

28 Attorney-General's Department. Transcript, 22 March 2001, p. 558.

29 DFAT, Submission No. 107, p. 1298.

30 DFAT, Submission No. 107, p. 1298.

31 Charlesworth, Hilary. Exhibit No. 65, p. 1.

32 UNAA. Submission No. 71, p. 609.

33 Australian Red Cross. Submission No. 104, p. 1176.

34 Women's International League for Peace and Freedom (Australian Section). Submission No. 63, p. 513.

Amnesty International Australia echoes this sentiment with its assertion that the ICC '… can be expected to work towards ensuring that human rights are respected in a preventative as well as a reactive sense …'.[35]

8.29 However, other submissions have expressed great concern with the concept of the ICC and its implementation. The Court is seen as '… invalid, illegitimate, unsustainable and totally undemocratic'.[36] These concerns need to be looked at and addressed individually.

Sovereignty

8.30 The main concerns raised in the submissions to the committee related to the impact that the ICC will have on Australian sovereignty.

Australian Legal System

8.31 Several submissions to the committee have told of their fear that ratification of the Statute of Rome will subject Australia to a new international criminal code that will either nullify or override current Australian laws. The Council for the National Interest submits that 'Australia's criminal laws should be made by Australian parliaments and should be administered by Australian courts for Australian people'.[37] Mr Gates' concern is that 'a previous government legislated to abolish the then right to go to the … Privy Council, because it was deemed to be a foreign court. Is it not a contradiction … to once again … have … a higher court than Australian Courts …?'[38]

8.32 These concerns are based on a fundamental misunderstanding of both the Court and its purpose. The ICC does not and will not have the power to rewrite Australian criminal laws, nor can it act as an appellate court. Its role is strictly limited to the prosecution of war crimes, crimes against humanity and genocide in situations where Australia has been unable or unwilling to prosecute.

8.33 It is important to remember at this juncture that the Court is based on the principle of complementarity. The doctrine was specifically devised in order to '… respond to concerns about the impact of an international criminal regime on state sovereignty'.[39] The effect of complementarity is that once a domestic legal system has invoked its jurisdiction over a defendant then the ICC can no longer prosecute. In a sense, the ICC is

35 Amnsty International Australia. Submission No. 114, p. 1446.

36 Lloyd-Smith, G. Submission No. 26, p. 173.

37 Council for the National Interest. Submission No. 103, p. 1171.

38 Gates, John. Submission No. 78, p. 677.

39 Professor Charlesworth, Exhibit No. 65, p. 2.

designed to be a 'back up' to national jurisdictions,[40] to prevent perpetrators from escaping justice merely because a State is unable or unwilling to prosecute.

8.34 The Australian Government has announced that there will be a '… full regime in domestic law to cover the crimes within the jurisdiction of the Court'.[41] This legislation will closely follow the definitions in the ICC statute. This means that Australian law will reflect the international crimes. As a result, Australia will have the ability to either prosecute or to decide not to prosecute, thereby limiting the jurisdiction of the ICC and retaining full control of its domestic legal system.

8.35 Dr Spry of the National Observer described a further anxiety brought to the committee's attention:

> The proposed ICC could override national courts if in its own opinion they were "unwilling or unable to deal genuinely with alleged crimes by way of investigation or prosecution." It hence appears that if by a rule of Australian law it were found by an Australian court that no offence had been committed, if the proposed ICC did not approve of that rule, it would be empowered to assume jurisdiction and override Australian law.[42]

8.36 This interpretation is flawed. The 'unwilling or unable' provision is designed to prevent a State from acting in bad faith to protect an accused national with a sham trial. Its purpose is not to override legitimate domestic legal decisions. To illustrate the operation of this clause it is worth examining the hypothetical situation of an Australian who is accused of crimes against humanity.

8.37 Under the complementary legislation, crimes against humanity will be illegal under Australian law. An investigation would need to be launched by the authorities into any alleged incident. If the investigation team then makes the decision not to proceed with prosecution, then the mere making of that decision ousts the jurisdiction of the ICC, unless '… the decision resulted from the unwillingness or inability of Australia genuinely to prosecute'.[43]

8.38 Unwillingness to prosecute is to be initially determined by the Prosecutor who must have regard to whether the authorities intended to 'shield' the Australian from criminal responsibility. The Prosecutor must then convince the Pre-Trial Chamber that there is a reasonable basis for

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40 Amnesty International Australia, Exhibit No. 58, p. 2.

41 Attorney-General's Department. Transcript, 22 March 2001, p. 554.

42 National Observer. Submission No. 126, p. 1637.

43 *Statute of the International Criminal Court*, Article 17.

investigation of Australia's actions. If this investigation is authorised, and the Prosecutor concludes that Australia did not act in good faith then this decision can also be challenged before the Court.

8.39 In the words of Amnesty International '… the scenario becomes increasingly fanciful …'[44] when one considers that it is hard to imagine Australia—a signatory of both the Geneva and Genocide Conventions—deliberately shielding a citizen from either war crimes, genocide or crimes against humanity violations. And if Australia did deliberately shield a national from criminal responsibility then '… why, it may be asked, should international justice not intervene?'[45]

Australian Soldiers

8.40 The above procedures will also apply if an Australian soldier serving overseas is accused of war crimes. The *Defence Force Discipline Act 1982* (Cth) incorporates breaches of the G*eneva Conventions Act 1957* (Cth) as a criminal act. So in such a situation, the ICC would defer to Australian jurisdiction. Indeed, the Department of Defence believes

> … given that Australia will properly and conscientiously exercise its national responsibilities to deal with allegations of violations of the law by ADF members under domestic legislation, the prospect of action against an ADF member before the ICC is unlikely.[46]

8.41 The ICC will also offer an important element of protection to our military personnel serving overseas in a peacekeeping mission. Under current international law, Australia can not offer legal protection to its soldiers if they are arrested within the jurisdiction of a foreign State. This is the case even if the soldiers are subject to a quick show trial and found guilty without due process and without sufficient evidence. However, once the ICC is established, Australia would be able to approach the Court requesting an investigation into the incident. It would be up to the Prosecutor to follow procedure and investigate whether the trial was carried out with 'good faith'. If the State was found to have acted in bad faith, then the ICC could claim jurisdiction and institute a proper hearing into the incident for which the Australian soldier was accused. From this perspective, the ICC can be seen as an effective mechanism to ensure a proper hearing in institution with integrity[47] and an extra protection for Australian servicemen caught up in an overseas conflict.

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44 Amnesty International Australia, Exhibit No. 58, p. 3.

45 Amnesty International Australia, Exhibit No. 58, p. 2.

46 Department of Defence. Submission No. 108, p. 1339.

47 Charlesworth, Hilary. Transcript, 21 March 2001, p. 424.

Territorial Sovereignty

8.42 A further anxiety that has been brought before the committee is the ICC's very broad jurisdiction, in that it can extend beyond territorial limitations. If the Court has the permission to investigate from the State of the accused, it does not need the permission of the State on whose territory the crimes were committed. As a result, the Court could be seen to be interfering in areas traditionally protected by State sovereignty.

8.43 Dr Spry stated his concerns thus:

> The traditional criminal rule in all jurisdictions is that, when persons commit a criminal offence, they are prosecuted in the jurisdiction in which the offence was committed … If a crime takes place in Australia, many people would regard it with alarm if it were possible to prosecute a person in, say, America, Argentina or Zimbabwe in relation to that particular offence. In the case of war criminals, I would adopt the traditional view under the criminal law that the prosecution ought to take place within the state where the alleged offence occurred and that, if appropriate, extradition proceedings should be taken from that place to bring a person who is in some other place into that jurisdiction to be tried.[48]

8.44 The concerns are two-fold: States should not prosecute crimes extra-territorially and territorial sovereignty should be absolute.

Extra-territorial Crimes

8.45 According to Dr Spry the 'traditional view of criminal law' is that Australia should only prosecute crimes committed on Australian soil. Yet this is not and has never been the only basis of Australian jurisprudence. The *Defence Force Discipline Act 1982* (Cth), the *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth) and the *Criminal Code Amendment (Bribery of Foreign Public Officials Act 1998* (Cth) allow the prosecution of crimes that have been committed overseas. Indeed Professor Charlesworth comments that '… a number of countries have very broad extraterritorial legislation … [and] certainly from an international law perspective there is absolutely no problem at all'.[49]

8.46 The position in international law is that crimes against humanity are subject to universal jurisdiction. That is, the offender may be prosecuted wherever he or she is found. The reason for this is quite simply because crimes of this character are not crimes against particular nations. They are crimes 'against humanity'. There is a longstanding principle in

48 Spry, I C F. Transcript, 6 July 2000, p. 267.

49 Charlesworth, Hilary. Transcript, 21 March 2001, p. 425.

international law that crimes which offend all mankind are subject to universal jurisdiction. Piracy is an old example of this. As the House of Lords said in the Pinochet case, '… ever since 1945, torture on a large scale has featured as one of the crimes against humanity … [which] justifies States in taking universal jurisdiction over torture wherever committed'.[50] States vested with universal jurisdiction may, as a matter of comity and convenience, defer to the State in which the offence took place. The principle of complementarity in the ICC Statute is designed to facilitate that circumstance.

Absolute Territorial Sovereignty

8.47 Dr Spry further suggests that the ICC should not be allowed to interfere in any way with the territorial sovereignty of States. Yet, the whole purpose of the court is that violators '… should not be able to hide behind the mantle of national sovereignty'.[51]

> In relation to war crimes, the concept of 'national sovereignty' has, we believe, for too long been used to serve as [a] refuge and shield of leaders, including leaders of states, who, as known war criminals, have conducted genocides and campaigns of terror with impunity.[52]
>
> Legal limitations need to be imposed on state authority so that the doctrine of state sovereignty can no longer serve as protection for those who perpetrate war crimes and crimes against humanity.[53]

Without this power to intervene in State territory, the ICC would be rendered useless. Yet, the power is not absolute, the various safety mechanisms within the Court's statute are intended to ensure that the ICC does not abuse it.

Victor's Justice

8.48 A major anxiety brought to the committee's attention is the possible politicisation of the ICC resulting in an imposition of 'Victor's Justice'. The submissions expressed concern that the International Criminal Court will be partisan and will '… become a terrible instrument of power politics and

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50 (1999) 2 AER97 at 108-109.

51 UNYA. Submission No. 47, p. 323.

52 Women's International League for Peace and Freedom (Australian Section). Submission No. 63, p. 513.

53 Women's International League for Peace and Freedom (Australian Section). Submission No. 63, p. 513.

conflicting international interests'.[54] Mr Clark proclaimed 'A pox on International Courts, criminal or otherwise, we are incapable of keeping our own courts honest what chance would we have with international ones?'[55] While Mr Palmer contended that '… there will be one or two scapegoats to the crime and the big fish [will swim] away unscathed'.[56]

8.49 A further element to this anxiety is that 'victors' will declare who the war criminals are.[57] Several submissions argued that powerful member States would use their influence to pursue war criminals of other nations, while ensuring that their own citizens escape prosecution. A contemporary example, frequently cited in the submissions, is that neither President Clinton nor Prime Minister Blair have been prosecuted for war crimes committed during the NATO campaign in Kosovo, yet President Milosevic has been indicted by the International Criminal Tribunal for the Former Republic of Yugoslavia.[58] The anxiety is that the ICC will be an instrument of a few nations to subjugate members of different and less powerful States.

8.50 It must be stressed that the fact that a standing court has been proposed is the best safeguard against 'victor's justice', a claim more readily levelled at *ad hoc* tribunals which follow particular conflicts. Kofi Annan made this point at the ceremony to celebrate the adoption of the Statute of Rome on 18 July 1998:

> 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 was only happening 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.

54 Lee, Jeremy. Submission No. 12, p. 100.

55 Clark, C E. Submission No. 39, p. 250.

56 Palmer, Michael. Submission No. 7, p. 67.

57 Renehan, Michael. Submission No. 9, p. 78.

58 Freedombell Pipeline, Submission No. 80, p. 724; Sheil, Glenister. Submission No. 3, p. 19; and Lee, Jeremy. Submission No. 12, p. 100.

8.51 The ICC's statute has been specifically and deliberately drafted to avoid one nation or group of nations abusing the court's processes. The safety mechanisms incorporated into the Statute of Rome include the fact that smaller member States have exactly the same rights and obligations to the ICC as the larger more powerful nations. All State Parties have the ability to complain to the Court about an investigation and also have the power to recommend investigations to the Prosecutor.

8.52 It must be remembered that the ICC is not the political instrument of a single State. It is an independent judicial forum created by the agreement of more than that 120 States. It is designed to serve and protect the needs of all the State Members, and the States will not be involved in the day to day affairs of the Court.

Independence

8.53 The Queensland National Party is apprehensive that there is no form of 'independent' appeal from the ICC, and queries just how competent the judges will be if their appointments need to be dictated by geographical block interests rather than by merit.[59] This is echoed by Dr Sheil's concerns about who makes the decision to appoint the judges[60] and Freedombell Pipeline's worry that the ICC will not remain independent from the United Nations.[61]

8.54 It is true that there is no appeal to a forum outside the ICC, but it is erroneous to suppose that there will therefore be no independent form of appeal. All appeals will be put before the specially formed Appeals Division consisting of five judges who were in no way involved with the trial at first instance. So whilst, the appeal still occurs within the same institution, the actual process is similar to an appeal to a higher court in Australia. UNYA also reminded the committee that the ICJ has operated successfully as the final arbiter of its own decisions and therefore believes that the ICC will operate equally successfully.[62]

8.55 The election of the judges follows a similar model to the election of the judiciary for the Tribunals the Former Yugoslavia and Rwanda. They are nominated by the State Parties and elected by the Assembly of States Parties.[63] Nine of the eighteen judges must have experience in criminal law and at least five must have experience in international law. No two judges can be from the same State. The Assembly must also take into

59 National Party Queensland. Submission No. 106, p. 1221.

60 Sheil, Glenister. Submission No. 3, p. 19.

61 Freedombell Pipeline. Submission No. 80, p. 724.

62 UNYA. Submission No. 47, p. 323.

63 *Statute of the International Criminal Court*, Articles 36(4) and 36(6).

account the representation of the Civil Law and Common Law legal systems, equitable geographical representation and a fair representation of female and male judges. Finally, the judges must be of 'high moral character, impartiality and integrity' and 'possess the qualifications required in their respective States for appointment to the highest judicial offices'.[64] An important aspect of the judicial election is that the judges' qualifications are placed firmly before any geographic requirements. Together all these conditions should ensure the independence of the ICC's judiciary.

Uniform Criminal Law

8.56 A lack of uniform criminal law is another anxiety brought before the committee. The anxiety is that States with different value systems will impose their laws on the ICC exposing Australian nationals to unfamiliar law. Dr Sheil believed that the member States 'comprise such a variety of views on law that it would be impossible for them to agree on a uniform set of laws to administer'.[65] The example he cited is the acceptance in some Islamic societies of retribution killing, a practice forbidden in most other States. Mr Morrow considered that '… the establishment of an International Criminal Court would require the making of a body of Criminal Law agreeable to all nations'.[66]

8.57 These concerns overlook the fact that that State Parties have already agreed to certain uniform legal provisions described in the Statute of Rome. These include the presumption of innocence, the requirement of proof beyond reasonable doubt and no imposition of the death penalty. The States have also agreed to the crimes that will be prosecuted, the definition and the elements of those crimes. In addition to this, the Preparatory Commission is detailing further procedures that can only be adopted with the consent of the States.

8.58 The agreement of the States was facilitated by jurisdiction of the Court limited to four major crimes of international significance. Whether States of different ideological backgrounds can establish a uniform law is effectively a moot point, the Statute of Rome proves they already have.

64 *Statute of the International Criminal Court*, Article 36(2).

65 Sheil, Glenister. Submission No. 3, p. 19.

66 Morrow, Harley. Submission No. 28, p. 190.

Weaknesses in the ICC's Statute

8.59 The ICC was warmly welcomed in several submissions; yet, some of its supporters remain critical of aspects of the Statute of Rome. Professor Charlesworth believed that during the negotiation process the United States achieved 'significant compromises' that diluted the effect of the Statute.[67] These compromises included the removal of the ability of the State whose national suffered injury to consent to the jurisdiction of the Court. Instead, States that could consent were limited to either the State on whose territory the offence occurred, or the State whose national committed the offence.[68] Other criticisms are discussed below.

Opt-out clause

8.60 Article 124 of the Statute of Rome provides that a State '… may declare that for a period of seven years after the entry into force of the Statute … it does not accept the jurisdiction of the Court' with regard to war crimes. This clause essentially permits a State to opt-out of the jurisdiction of the Court for limited period. It has been characterised as a 'license to kill'[69] and has been heavily criticised.

8.61 The Australian Red Cross saw this as a great weakness in the ICC Statute.[70] UNICEF believed that '… this clause, if exercised, could give those responsible for today's atrocities, a green light to continue their nefarious violations of human rights and international law'.[71] World Vision Australia contended that '… this type of continued impunity should not be tolerated by the international community'.[72]

Definitions

8.62 Another perceived weakness is the lack of a universally accepted definition of genocide and crimes against humanity. Dr Spry of the National Observer believed that '… very different views are held as to what particular acts may amount to "genocide"' and that '… even more indefinite is what amounts to an infringement by way of a "crime against

67 Charlesworth, Hilary. Exhibit No. 65, p. 3.
68 See paragraph 8.15 above.
69 Hogan, Des. Transcript, 5 July 2000, p. 179.
70 Australian Red Cross. Submission No. 104, p. 1177.
71 UNICEF Australia. Submission No. 84, p. 834.
72 World Vision Australia. Submission No. 99, p. 1032.

humanity".'[73] As such, Dr Spry was fearful that the ICC will '... take a much wider view of these matters than would an Australian Court'.[74]

8.63 There is a strong international precedent for the definitions of both genocide and crimes against humanity.[75] Most of the crimes specified in the Statute are already crimes under international criminal law and, as such, are universal in their application. These crimes are defined and specified in the Genocide Convention 1948; the Geneva Conventions of 1949, the 1977 Protocols to those Conventions and the Convention against Torture 1984[76] or are existing 'crimes against humanity' under customary international law. The concept of 'crimes against humanity' was established in international law by the Nuremberg Tribunal and has been applied and developed ever since. The offences specified in the Statute are more specific and narrower by virtue of the large number of definitions included in it.

8.64 In addition to this, the Australian government has announced that the legislation adopting the crimes of the Statute of Rome will mirror the definitions of the actual Statute.[77] As a result, the principle of complementarity will ensure that the ICC will not be able to pursue prosecutions as long as Australia has genuinely investigated any complaints under domestic law. It is not sufficient that the ICC prosecutor considers the investigation to be inadequate. They must be satisfied that the State concerned is '... unwilling or unable genuinely to carry out the investigation'.[78]

Article 98(2)

8.65 World Vision Australia has heavily criticised the inclusion of Art 98(2) in the ICC's Statute. The article declares that the Court cannot request a State to surrender a person, if the action of surrender would cause the State to act inconsistently with its obligations under international agreements. This clause was designed specifically to ensure that all existing and future 'status of forces agreements' (SOFA) are respected by the ICC. The SOFA agreements provide that where an allegation has been made against a soldier serving overseas, then that soldier will be sent home for trial or

73 National Observer. Submission No. 126, p. 1638.

74 National Observer. Submission No. 126, p. 1641.

75 Attorney-General's Department. Transcript, 22 March 2001, p. 556.

76 Australia is a party to all these conventions and, on the Geneva and Genocide Conventions, has been so for more than 50 years. However, it should be noted that the Genocide Convention has yet to be implemented through domestic legislation.

77 Attorney-General's Department. Transcript, 22 March 2001, p. 556.

78 *Statute of the International Criminal Court*, Article 17(1)(a) and Article 17(2).

surrender. The agreements are very common and are the normal practice for UN peacekeeping operations.

8.66 In essence, the operation of article 98(2) can be seen as an extension of the principle of complementarity as the national jurisdiction of the offender is given the first opportunity to investigate and prosecute the allegations. If the State takes up that option, then it is only in situations where it is either genuinely unwilling or unable to carry out the investigation or prosecution, or the proceeding in the domestic jurisdiction were designed to protect the accused that the ICC can invoke its jurisdiction. The troop-sending State also has the option to grant consent to the ICC's jurisdiction thereby waiving its rights under the SOFA agreement.

8.67 Considering the limited area of operation of Article 98(2), the Committee disagrees with World Vision that the clause would fundamentally undermine the working of the ICC.

'Rogue States'

8.68 Another perceived weakness in the Statute of Rome is the ICC's reliance on State cooperation to exercise its jurisdiction and enforce judicial decisions. This is a weakness that can be attributed to all international organisations. Yet, States have shown themselves willing to comply with the judicial decisions of the International Court of Justice. There is currently no reason to suppose that State cooperation will be any different for the International Criminal Court.

8.69 It is further suggested that the ICC is confronted with an 'inescapable contradiction',[79] as it is generally proclaimed that Member States will be more inclined to fulfil their international obligations than Non-member States. It is therefore argued that international crimes are more likely to be committed by nationals of a Non-member State in the territory of another Non-member. Thus, rogue States will escape the provisions of the ICC and the ICC will be rendered impotent.[80] A further aspect to the ICC's impotence is the Statute makes no direct provision for prosecution in cases of an intra-state conflict.[81]

8.70 Yet, the Security Council has the ability to authorise the Prosecutor to investigate violations by a Non-ratifying State under its power in Chapter VII of the United Nations Charter.[82] In addition to this Amnesty

79 Amnesty International Australia, Exhibit 58, p. 8.

80 Mr Stone, Transcript of the Public Hearing of the Joint Standing Committee on Treaties Inquiry into the International Criminal Court, 13 February 2001, p. 92.

81 Palmer, Michael. Submission No. 7, p. 67.

82 *Statute of the International Criminal Court*, Article 13.

International reminded the committee that '… the problem should not be overstated'.[83]

> The situation is not static. States prone to human rights violations may become democratic and tolerant … Ratification of human rights instruments gathers a momentum of its own. Thus both China and Chile ratified the Convention Against Torture.[84]

As a result the committee does not believe that this weakness in the Statute is insurmountable. South Africa, The Argentine and Chile have already ratified the ICC Statute.

Non-Party v Party

8.71 A further question has been raised as to the benefits Australia would receive in ratifying the treaty. According to the National Observer '…if the court comes into existence, no significant advantage will flow to Australia if Australia becomes a State Party, as opposed to a Non-party'.[85] The basis for this argument is, as noted above, that Non-member States are also bound to comply with requests for surrender made by the ICC.

8.72 However, by refusing to cooperate in the establishment of the ICC Australia would lose the opportunity to shape the Court. Australia has been active in preparing the rules of evidence and procedure at the Preparatory Commission. Were Australia to be among the first 60 States to ratify, it would have the opportunity to participate in the election of the first judiciary and further influence the establishment of the Court. It would not be in the national interest for the Court to be established without Australia's continued support and participation.

Conclusion

8.73 For many years, the international community has been working towards a permanent international criminal tribunal. Decades of negotiation resulted in the Statute of Rome that created the International Criminal Court, and once sixty States have ratified the treaty, this powerful human rights tool will be a reality.

8.74 The Court has been given broad powers and a wide jurisdiction to fulfil its role to prosecute perpetrators of crimes of international concern. Yet restrictions have been placed to ensure that the Court does not either

83 Amnesty International Australia, Exhibit 58, p. 8.

84 Amnesty International Australia, Exhibit 58, p. 8.

85 National Observer. Submission No. 126, p. 1641.

misuse or abuse its power. The principle of complementarity will guarantee that Australia maintains control of its domestic criminal system. The fact that the ICC will operate in situations where the State is 'unable or unwilling' to prosecute will provide Australian nationals with extra protection from sham trials in foreign courts. The committee also recognises that while the power of the ICC to impinge on the territorial sovereignty of a nation remains controversial, it is nonetheless fundamental to the successful operation of the Court.

8.75 The Statute of Rome has been carefully drafted to avoid an imposition of 'Victor's Justice'. Member States have equal access to the Court and its appeal mechanisms. The judiciary is independent and judges are elected primarily for their legal ability. In addition to this, all the Member States have formally agreed to the applicable law and relevant definitions.

8.76 The committee recognises that there are weaknesses in the Statute of Rome. These include the 'license to kill' clause and the ability of rogue States to deny the jurisdiction of the Court. Yet, none of these failings are fundamental flaws that will prevent the successful operation of the ICC. Instead, the committee believes that the International Criminal Court is likely to prove itself a vital tool in the international fight against human rights violators.

Recommendation 10

The committee commends the Australian Government for its contribution to the development of the International Criminal Court and recommends that the Government ratify the Statute of Rome as soon as possible.

Recommendation 11

The committee recommends that the Australian Government pursue with reluctant member states a clarification of the outstanding issues of concern to them and use its good offices to persuade member states to ratify the Statute of Rome.