Chapter 6

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Australia

1 Domestic Prosecutions of International Crimes Prior to the Implementing Legislation

1.1 Prosecutions under customary and conventional international law

It is established doctrine that international law does not become part of Australian Law, in the sense of creating either justiciable rights or enforcable penalties, in the absence of implementing legislation. This fundamental principle does not preclude international law influencing the development of Australian Law in the absence of implementing legislation. However, Australian courts have consistently held that, irrespective of the source of an international legal obligation – custom, treaty or even UN Security Council Resolution – the failure of Parliament to enact legislation to implement Australia's international obligations precludes resort to those obligations either for domestic legal redress or as a source of legal authority.

The High Court of Australia articulated the general principle in 1936 in *Burgess; Ex Parte Henry.*[1] Since then the principle has been reaffirmed in a succession of cases: (1) in relation to treaties to which Australia is a party;[2] (2) in relation to customary international law obligations binding on Australia;[3] and (3) in relation to UN Security Council Resolutions binding on Australia pursuant to Article 25(1) of the UN Charter.[4] The general principle has never been challenged and has also consistently been affirmed in those

1 55 *Commonwealth Law Reports* (CLR) 608 (1936).

2 For example, in *Simsek v. MacPhee,* 148 *CLR* 626 (1982), Australia had ratified both the Refugee Convention and its Protocol but had no legislation to implement obligations pursuant to either instrument. Accordingly the plaintiff, Simsek, was unable to challenge the denial of the benefits he claimed Australia was obliged to extend to him under these two instruments.

3 For example, in *Polites v. Commonwealth,* 70 *CLR* 60 (1945), Polites was precluded from the protection of a clear customary law rule prohibiting the conscription of foreign nationals into military service. An unambiguous legislative provision to the contrary prevailed in the absence of legislation giving effect to the customary rule.

4 For example, in *Bradley v. Commonwealth,* 128 *CLR* 557 (1973), the Post-Master General was not entitled to rely on Security Council Resolutions calling on Member States to impose sanctions on Rhodesia to terminate mail and telecommunications services to the Sydney office of the Rhodesian Information Service. The failure of Parliament to implement legislation to give effect to Australia's obligations rendered the action illegal. Since this decision of the High Court, the Australian Government has systematically adopted enabling legislation to implement sanctions regimes in Australian domestic law.

cases where Parliament has enacted implementing legislation to give effect to international obligations.[5] In *Simsek v Macphee*, for example, Stephen J traced the rationale for the general principle to the separation of executive and legislative powers under the Westminster system of government:

> "in our constitutional system treaties are matters for the Executive, involving the exercise of prerogative power, whereas it is for Parliament, and not for the Executive to make or alter municipal law." [6]

According to the Separation of Powers doctrine, Parliament, as the house of the elected representatives of the people, is paramount. Accordingly, if Parliament chooses not to implement Australia's international legal obligations, irrespective of the reason for that omission, it is not for the courts to consider the international obligations part of Australian law. Similarly, if Parliament chooses to exercise its constitutional authority to enact legislation unambiguously inconsistent with an international legal obligation owed by Australia, it is not for the courts of this country to override Parliament's explicit intention. As mentioned above, however, international law can, and increasingly does, have an influence on the development of Australian law apart from the enactment of implementing legislation to give domestic legal effect to international legal obligations.

There are currently three different ways in which international law can have such an effect:

(1) It is an established principle of statutory interpretation that the legislature does not intend to violate fundamental norms of human rights or principles of international law,[7] though, as mentioned above, a clearly expressed intention to do so will be valid.[8] In situations of statutory ambiguity, courts are permitted to have regard to extrinsic materials, including treaties or other international instruments referred to in the Act, in order to resolve the ambiguity or to prevent a manifestly absurd result.[9]

(2) Developments in international law can assist courts in determining the content of the common law of Australia. According to Brennan J in *Mabo v Queensland [No. 2]*:

> "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law..."[10]

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5 See, for example, *Chow Hung Ching v R*, 77 *CLR* 449 (1948) at 478; *Bradley v Commonwealth*, 128 *CLR* 557 (1973) at 582; *Simsek v MacPhee*, 148 *CLR* 636 (1982) at 641-2; *Koowarta v Bjelke-Petersen*, 153 *CLR* 168 (1982) at 211-212, 224-225; *Kioa v West*, 159 *CLR* 550 (1985) at 570; *Dietrich v R*, 177 *CLR* 292 (1992), at 305.

6 *Simsek*, per Stephen J at 642.

7 *Polites* pp 68-69 per Latham C J; *Minister for Immigration and Ethnic Affairs v. Teoh,* 183 *CLR* 273 (1995) at 287-288 per Mason C J and Deane J; *Chu Kheng Lim v Minister for Immigration*, 176 *CLR* 1 (1992), at 38.

8 *Polites* at 67-73 per Latham C J; p 77 per Dixon J; and pp 80-1 per Williams J.

9 Section 15 AB(1) and (2), *Acts Interpretation Act (1901).*

10 *Mabo v. Queensland [No. 2]*, 175 *CLR* 1 (1992) at 42.

The decision of the High Court in the *Mabo* case was particularly significant because it recognised, for the first time in Australian legal history, that a 200-year-old rule of the common law of Australia was wrong. Indigenous title to land had never been recognised under Australian law because of the legal fiction that title to land was vested in the British Crown on the basis that Australia was uninhabited – or *terra nullius* – at the time of British settlement. Most importantly for the purpose of this discussion, Brennan J was heavily influenced by developments in international human rights law, the international law of acquisition of territory and the international legal recognition of indigenous title to land to inform his view of the need to alter the Australian common law.[11] Judges in other decisions have also demonstrated a willingness to look to international law to determine the content of the Australian common law.[12]

(3) The High Court has demonstrated a willingness to give some effect to Australia's treaty obligations that have not been implemented into domestic law. In *Minister for Immigration and Ethnic Affairs v Teoh*[13] the High Court was required to consider the effect of a treaty that Australia had ratified but that had not been the subject of domestic implementing legislation – in that particular case, the UN Convention on the Rights of the Child.[14] The High Court stated that an unincorporated treaty may give rise to a 'legitimate expectation' on the part of a person that an administrative decision maker, required to exercise a statutory discretion concerning that person, would do so in conformity with a convention that Australia had ratified, notwithstanding that there was no domestic legislation in place.[15] The Court stressed that the legitimate expectation could be displaced by legislation or by 'executive indications to the contrary', and that the right was properly viewed as one to have the treaty considered, rather than a justiciable right that the treaty obligation be applied.[16]

Consistent with the foregoing discussion, there has never been a prosecution of an alleged international crime in Australia on the basis of either customary or conventional international law. Furthermore, any such prosecution could not occur without a fundamental shift in Australian law – an unlikely event in the foreseeable future. Australian courts have no jurisdiction in respect of the crimes in the ICC Statute by virtue solely of the status of those crimes at international law or even by virtue of Australia's ratification of the Statute.[17]

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11 Gerry Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence',19 *Melbourne University Law Review* 195 (1993).

12 See, for example, on the content of the common law right to a fair trial, P Kirby in *Jago v. District Court of New South Wales*, 12 *New South Wales Law Review (NSWLR)* 558 (1988); also, the High Court in *Dietrich v. The Queen,* 177 *CLR* 292 (1992).

13 183 *CLR* 273 (1995).

14 Convention on the Rights of the Child (entered into force Sept. 2, 1990), G.A. Res. 44/25 (Annex), U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/RES/44.49 (1990).

15 *Teoh* at 289-92 per Mason C J and Deane J.

16 At 291, per Mason C J and Deane J. See also, Rosalie Balkin, 'International Law and Domestic Law' in *Public International Law: An Australian Perspective* (1997), p 137.

17 Either at customary international law or pursuant to treaty – both the Rome Statute itself and/or the instruments on which it was based, such as the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 *U.N.T.S.* 277 (entered into force 12 January 1951); CMD.

1.2 Prosecutions under other domestic or international legal provisions

Prior to the enactment of Australia's implementing legislation for the Rome Statute, the international crimes of genocide and crimes against humanity did not exist as crimes in their own right in Australian domestic criminal law.[18] The international crimes of torture and hostage-taking, both of which can constitute crimes against humanity, have been implemented into Australian criminal law on the basis of Australia's multilateral treaty obligations in respect of the two crimes, but there have been no prosecutions under either legislative enactment.[19] Similarly, grave breaches of the four Geneva Conventions of 1949 and of Additional Protocol I of 1977 also constitute domestic crimes in Australia by virtue of the Geneva Conventions Act 1957 but again no prosecutions have ever been undertaken pursuant to that legislation.

The only prosecutions of international crimes in Australia have all been initiated pursuant to the War Crimes Act 1945. The legislation was initially drafted to facilitate the Australian trials of Axis defendants for alleged atrocities during the course of World War II against Australian prisoners of war and, in some cases, against civilians in foreign occupied territory. Most of the victorious Allied nations followed on from the Nuremberg and Tokyo tribunals with national 'subsidiary' trials against either German or Japanese defendants, and Australia was no exception. In a relatively little-known but important chapter of Australia's legal military history, Australian military tribunals conducted 300 war crimes trials in nine different locations against a total of 952 Japanese defendants between November 1945 and April 1951.[20] Death sentences were confirmed against 148 defendants.[21]

The same War Crimes Act was substantially amended (actually almost repealed in its entirety and substituted with new provisions) and utilised again in the early 1990s. Media reports had identified several alleged former Nazis living peacefully in Australia[22] and the

18 For a more detailed discussion of this *lacunae* see Katherine L Doherty and Timothy L H McCormack, 'Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation' 5 *University of California, Davis Journal of International Law and Policy* 147 (1999) at 164-169.

19 In relation to torture, for example, the Crimes (Torture) Act 1988 implements Australia's obligations under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (G.A. Res. 39/46 (Annex), U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1985)) and gives Australian courts universal jurisdiction over alleged acts of torture perpetrated anywhere in the world by individuals who are subsequently present in Australia. Similarly, the Crimes (Hostages) Act 1989 implements Australia's obligations pursuant to the International Convention against the Taking of Hostages (G.A. Res. 34/146, 34th Sess., (1979), 18 I.L.M. 1456) and penalises acts of hostage-taking in Australia, on Australian ships or aircraft, perpetrated by Australian nationals anywhere or committed by non-nationals anywhere in the world where such non-nationals are subsequently present in Australia.

20 A total of 807 individuals were prosecuted but some of them were prosecuted in more than one trial – hence the different figure of 952 defendants.

21 Because some defendants were awarded the death penalty in more than one case and because two individuals died in custody, the actual number of defendants executed was 137. Michael Carrel, 'The Legal Basis for Australia's War Crimes Trials Against Japanese Defendants', unpublished LLM paper (copy on file with the author) citing the Australian Army's Directorate of Prisoners of War and Internees, *War Crimes Trials: Japanese War Criminals Charged Under the War Crimes Act 1945 by Australian Military Authorities* (1958).

22 Mark Aarons, *Sanctuary: Nazi Fugitives in Australia* (1989).

Government responded with a national enquiry into the situation. The Menzies Report identified a list of 70 residents of Australia all alleged to have committed war crimes in the course of World War II[23] and the Government established a War Crimes Special Investigations Unit. The War Crimes Act 1945 was amended to allow Australian criminal courts to try those now residing in Australia for alleged war crimes committed in Europe during World War II. The Government claimed to be committed to prosecuting anyone allegedly responsible for war crimes. However, the temporal and geographic limitations imposed were intended to minimise the chance of prosecutions of returned Australian servicemen and women, the majority of whom had served in the Pacific Theatre of the War. The real targets of the legislation were former Nazis now living in Australia.

Three separate proceedings were instituted pursuant to the legislation after the Special Investigations Unit had investigated several cases. The defendants were Ivan Polyukhovich, Michael Berezowsky and Heinrich Wagner.[24] Polyukhovich was the only defendant to reach the trial stage of proceedings, but his indictment was quashed in the Supreme Court of South Australia for lack of evidence. Berezowsky was subjected to committal proceedings ultimately dismissed on the basis of the deciding magistrate's fear of an unfair trial if proceedings progressed. Wagner suffered a heart attack in the course of committal proceedings and the proceedings were terminated.[25]

Apart from these somewhat frustrating war crimes trial proceedings, Australia has not initiated any other prosecutions of international crimes. There have been relatively recent extradition proceedings brought by Latvia against Konrads Kalejs for his alleged World War II involvement in the Latvian Arajs Kommando Unit. There have also been a succession of recent decisions involving the rejection of applications for refugee status on the basis of the so-called 'Exclusion Clause' of the Refugee Convention – Article 1(F) – that there are grounds for believing that the applicant committed a war crime, crime against humanity or act of genocide.[26] However, all of these experiences involve procedural claims against particular individuals for their forcible transfer from Australia and none of them have involved criminal prosecutions.

2 Implementing Legislation

2.1 Title

Australia's implementing legislation is comprised of two separate legislative enactments entitled:

- International Criminal Court Act 2002 – hereafter ICC Act 2002

23 Andrew Menzies, *Review of Material Relating to the Entry of Suspected War Criminals Into Australia* (1987).

24 For a detailed discussion of the specific proceedings against all three defendants, see Gillian Triggs, 'Australia's War Crimes Trials: All Pity Choked' in Timothy L H McCormack and Gerry J Simpson, *The Law of War Crimes: National and International Approaches* (1997), pp 130-134.

25 Ibid.

26 See, for example, Timothy L H McCormack, 'Australia' in 'Correspondents' Reports', 3 *Yearbook of International Humanitarian Law* 414-419 (2000); and 'Australia' in 'Correspondents' Reports' (2001) 4 *Yearbook of International Humanitarian Law* (in press).

- International Criminal Court (Consequential Amendments) Act 2002 – hereafter ICC (Consequential Amendments) Act 2002 – sub-titled "An Act to Amend the Criminal Code Act 1995 and Certain Other Acts in Consequence of the Enactment of the International Criminal Court Act 2002, and for Other Purposes".

2.2 When in force

Both Acts received the Royal Assent on 27 June 2002 and, in part, became Australian Law the following day. The implementation of the ICC crimes into the existing Criminal Code Act 1995 took effect on the day the Statute entered into force for Australia: 1 July 2002.

2.3 Government departments involved

The Federal Attorney-General's Department had initial responsibility for the drafting of the legislation. Officers from that Department consulted with the Department of Foreign Affairs and Trade and with the Department of Defence to ensure that other relevant Government Departments were satisfied both with the legislative approach as well as with detailed provisions. The Attorney-General's Department also liaised with the Office of Parliamentary Counsel – the office ultimately responsible for the final drafting of the legislation.

2.4 Amendments to existing domestic legislation

The ICC (Consequential Amendments) Act 2002 involves 91 pages of text with a total of three prefatory sections and 163 additional provisions in seven separate schedules to the Act. Each of these schedules contains the provisions to amend a different existing Act of Parliament. Schedules 2-7 contain a combined total of 10 provisions and all the other 153 provisions – the overwhelming bulk of the legislation – are contained in Schedule 1 of the Act. The existing Acts amended by the new legislation are as follows:

- *Schedule 1* amends the Criminal Code Act 1995 by adding an entire new Division (No. 268) entitled 'Genocide, Crimes Against Humanity, War Crimes and Crimes Against the Administration of the Justice of the International Criminal Court'. The Schedule includes 124 new sections in 10 different subdivisions of the new Division and constitutes the overwhelming bulk of the entire Act. Schedule 1 also incorporates 27 new entries into the definitions section of the Criminal Code Act 1995 necessitated by the provisions of the new Division 268. The incorporation of the Rome Statute crimes into the Criminal Code Act 1995 will be discussed in more detail below.

- *Schedule 2* amends the Director of Public Prosecutions Act 1983 with a single procedural amendment: the addition of the ICC Act 2002 as one of the enumerated legislative enactments for which the Director of Public Prosecutions undertakes proceedings.

- *Schedule 3* amends the Geneva Conventions Act 1957 by repealing Part II of that Act. Part II gives Australian courts jurisdiction over the domestic crimes of grave breaches of any of the four Geneva Conventions of 1949 or of Additional Protocol I of 1977 in the context of international armed conflicts. That legislative enactment is now superfluous given the scope of the new Division 268 of the Criminal Code Act 1995. However, it is important to recognise that, by virtue of the provisions of the Acts Interpretation Act 1901, Part II of the Geneva Conventions Act 1957 continues to operate in respect of alleged grave breaches occurring between 1957 when the

legislation entered into force and 2002 when the ICC (Consequential Amendments) Act 2002 took effect.

- *Schedule 4* amends the Migration Act 1958 with two minor procedural additions of the ICC Act 2002 in enumerated lists of relevant legislation.
- *Schedule 5* amends the Mutual Assistance in Criminal Matters Act 1987 by extending the application of the existing legislation from 'foreign countries' to now include the ICC.
- *Schedule 6* amends the Telecommunications (Interception) Act 1979 to authorise interceptory measures in certain specified proceedings under the ICC Act 2002.
- *Schedule 7* amends the Witness Protection Act 1994 by adding a new substantive provision allowing for the possible inclusion of a person in a national witness protection programme at the request of the ICC.

3 Co-operation with the International Criminal Court

The ICC Act 2002 includes comprehensive and detailed provisions on co-operation with the Court. A request for co-operation by the ICC to Australia, in respect of an investigation or prosecution, may include:

- assistance in connection with the arrest and surrender to the ICC of a person;
- identification of the whereabouts of a person or items;
- the taking of evidence;
- the questioning of any persons the subject of investigation or prosecution;
- service of documents;
- temporary transfer of prisoners to the ICC;
- site examinations;
- the execution of searches and seizures;
- provision of records and documents;
- protection of victims or witnesses;
- preservation of evidence; and
- identification, tracing and freezing of the proceeds of crimes.[27]

Furthermore, the ICC Act 2002 authorises the provision of any other assistance intended to facilitate the investigation and prosecution of crimes within the ICC's jurisdiction, so long as that assistance is not prohibited under Australian law.[28] The ICC Act 2002 also allows for the provision of 'informal assistance' (e.g. police to police); such forms of assistance need not comply with the ICC Act 2002.[29]

27 Section 7(1)(a)(i)-(xii), *International Criminal Court Act 2002*. Unless otherwise noted, section numbers in the footnotes refer to this act.

28 Section 7(1)(b).

29 Section 7(2).

Unless urgent, requests for co-operation are to be made in writing to the Attorney-General of Australia or through the International Criminal Police Organisation (or its regional equivalent).[30] Requests must be executed in accordance with the ICC Act 2002[31] and any problems must be communicated and discussed with the ICC without delay.[32]

3.1 Arrest and surrender

The provisions on arrest and surrender are contained in Part 3 of the ICC Act 2002. Where the ICC Pre-Trial Chamber[33] has issued a warrant of arrest, requests for arrest and surrender of that person by Australia must be accompanied by certain specified information, including information describing the person sought, their probable location and an authenticated copy of the warrant.[34] Where the request relates to a person already convicted, the request must be supported by authenticated copies of the warrant of arrest, the judgement of conviction and the sentence imposed (if any).[35] Requests for the provisional arrest of a person must be supported by identification and location information, statements of the crimes for which the person is sought, the facts allegedly constituting those crimes, and the existence of an arrest warrant or judgment of conviction.[36] A further requirement of a request for provisional arrest is a statement that a request for surrender of the person will follow.[37]

3.1.1 Procedure for arrest

Upon the receipt by the Attorney-General of a complete request for arrest and surrender of a person by the ICC, the Attorney-General *may* notify any magistrate, by written notice in the prescribed form, that the request has been received.[38] The decision whether to notify a magistrate about a request from the ICC must not be made unless the Attorney-General has, in his or her absolute discretion, signed a certificate that it is appropriate to act on the request.[39] It is important to note that the decision to exercise this discretion is a non-compellable one and the decision itself is non-reviewable. The rationale for requiring the Attorney-General to issue a certificate as a pre-condition for the initiation of proceedings is to safeguard the primacy of Australia's national jurisdiction over the ICC under the complementarity regime.

This unfettered discretion on the part of the Attorney-General is, of course, potentially open to abuse if the Government decides to use the non-issuance of a certificate to shield an Australian national from prosecution. It is hoped that such abuse will not occur but if it

30 Section 8.

31 Section 10.

32 Section 11.

33 Article 58, ICC Statute.

34 Section 17.

35 Section 18.

36 Section 19.

37 Section 19(e).

38 Section 20. The notice (and any other notices given by the Attorney-General) must be in accordance with the 'statutory form', which is prescribed in the regulations.

39 Section 22.

does at some future stage it will be for the ICC to declare that such action on the part of the Australian Government is inconsistent with Australia's obligations arising under the ICC Statute.

The warrant of arrest or judgment of conviction issued by the ICC must accompany the written notice issued by the Attorney-General to the magistrate. Upon receipt of such notice, the magistrate *must* issue a warrant for the person's arrest on behalf of the ICC, and must notify the Attorney-General once this warrant has been issued.[40] The procedure for the issuing of a warrant for provisional arrest is identical, save for the fact that the Attorney-General's written notice need not be accompanied by any other documentation.[41]

Once an arrest warrant is issued, it authorises police officers to enter premises to arrest the person named in the warrant, where there are reasonable grounds to suspect that the person is there, and to use "such force as is necessary and reasonable in the circumstances".[42] At the time of an arrest, the person arrested must be informed of the crime in respect of which s/he is being arrested, in general terms.[43] The Act authorises the searching of arrested persons[44] (ordinary, frisk and strip searches), and of the arrested person's premises where there are reasonable grounds to believe that there are seizable items or evidentiary materials on the premises.[45] Police officers may also apply to a magistrate for search warrants where there are reasonable grounds for suspecting that evidential material relating to the crimes in the arrest warrant may be in a particular place, or held by a particular person.[46]

Once arrested, the person under arrest must be given a written notice that specifies the crime within the jurisdiction of the ICC of which the person is accused and that describes the conduct allegedly constituting that crime. As soon as practicable after arrest, the person must be brought before a magistrate in order for the magistrate to determine that the person arrested is the person named in the warrant and that the arrest was made in accordance with the Act.[47] If the magistrate is satisfied about these matters, the person is to be remanded in custody unless there are special circumstances justifying remand on bail.[48] If the magistrate is not satisfied as to either of these matters, the person must be released from custody; such an order for release does not prevent the issuing of further arrest warrants in respect of that person.[49]

In deciding whether to grant bail, the magistrate must consider the gravity of the alleged crimes, whether there are urgent and exceptional circumstances warranting the granting

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40 Section 20(3), (4).

41 Section 21.

42 Section 129. For further details on what constitutes 'necessary and reasonable' force, see section 130.

43 Section 131.

44 Sections 132, 133 and 135.

45 Section 134.

46 Section 27. For further details on search warrants, see also Part 6 of the Act.

47 Section 23.

48 Section 23(4), (5).

49 Section 23(3).

of bail and whether necessary safeguards exist to ensure that Australia can meet its obligation to surrender the person to the ICC.[50] Where an application for bail is made, the Attorney-General must notify the ICC and must pass on to the magistrate deciding the application any recommendations made by the ICC. An application for bail may be made by the person arrested or upon the direction of the Attorney-General.[51] If the person is released on bail, the Attorney-General must provide periodic reports to the ICC on the person's bail status.[52]

Where a person has been remanded in custody or on bail for a period of 60 days and a request for surrender has not been received, the Attorney-General must direct a magistrate to order the release of the person.[53] Where a person was arrested under the provisional arrest procedure, s/he must be brought before a magistrate if s/he has been held on remand for 60 days and has not yet received notice of a duly completed formal request for arrest by the ICC. Unless such a notice is likely to be received within a reasonable period of time, the magistrate must order the release of the person.[54]

3.1.2 Procedure for surrender

Where a person has been remanded pursuant to an arrest warrant, the Attorney-General may issue a warrant, in the prescribed statutory form, for the surrender of that person to the ICC.[55] A surrender warrant must not be issued unless the Attorney-General has, in his or her absolute discretion, certified that it is appropriate to do so.[56] Where the person the subject of the request is imprisoned due to the commission of a different offence in Australia, the Attorney-General, after consulting with the ICC, may do one of two things: either (1) issue a surrender warrant to take effect at the end of the term of imprisonment or (2) surrender the person to the ICC on a temporary basis.[57] It should be noted that Australia's extensive requirements on extradition (Extradition Act 1988) are not required to be met in respect of a request for surrender to the ICC.[58]

Once a surrender warrant has been issued, the person the subject of the warrant must be remanded in custody until the warrant is executed, even where the person was previously on bail.[59] The surrender warrant must authorise the transfer of the person into the custody of an authorised officer of the ICC and their transport to a place specified by the ICC, which may be outside Australia.[60] Surrender warrants are only valid if executed in accordance with their terms.[61]

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50 Section 23(6).

51 See, e.g., section 25(1)(b).

52 Section 24.

53 Section 25(1)(a).

54 Section 26.

55 Section 28(1).

56 Section 29.

57 Section 30.

58 Section 31(3).

59 Section 42.

60 Section 43.

61 Section 44.

Refusal of request for surrender

The Attorney-General can refuse a request for surrender in certain, precisely defined circumstances. Where the ICC has determined that the case is inadmissible,[62] the request for surrender *must* be refused.

Where there are competing requests from the ICC and from a foreign State that is a Party to the ICC Statute, the Attorney-General must determine, in accordance with section 38, whether to surrender or extradite the person. Priority must be given to the ICC request if:

- the ICC has made a determination that the case is admissible and that determination considers the investigation or prosecution conducted by the foreign country requesting extradition; or
- The ICC makes such a determination after notification of the foreign country's extradition request.[63]

If no such determination has been made then the procedure for extradition of the person may be commenced; however, the person cannot be extradited until the ICC determines that the case is inadmissible.[64]

Where there are competing requests from the ICC (for surrender) and a foreign State that is *not* a Party to the ICC Statute (for extradition), either (1) relating to the same conduct as that contained in the surrender warrant,[65] or (2) relating to the same person but different conduct from that contained in the surrender warrant[66], *and* (3) Australia has concluded an extradition agreement with the foreign country, the Attorney-General must determine whether to surrender or extradite the person and may refuse the surrender request.[67] In reaching this decision, the Attorney-General must consider 'all relevant matters', including the respective dates of the requests, the interests of the foreign country (including the nationality of the victims and perpetrator) and the possibility for future surrender to the ICC by the foreign country.[68]

Where the extradition request is from a non-State Party to the Rome Statute, with whom Australia has not concluded any formal extradition arrangements, priority must be given

62 Section 33(4) (where the ICC determines case is inadmissible under Article 20 of the Rome Statute, namely, that the person has previously been convicted, acquitted or tried in respect of the relevant conduct by the ICC or another Court); section 35(3) (where a person is being, or has been, investigated or prosecuted in Australia in relation to the relevant conduct and the ICC has determined that the case is inadmissible); and section 36(3) (where the ICC considers an admissibility challenge under Article 18 or 19 of the Rome Statute and determines that the case is inadmissible).

63 Section 38(2).

64 Section 38(3). This limitation does not apply if the ICC does not make its determination on an expedited basis: section 38(4).

65 Section 31(a), in conjunction with section 39(6).

66 Section 31(2)(b), in conjunction with section 40(3).

67 Section 31(2).

68 Section 39(7) in relation to the same conduct, section 40(4) in relation to different conduct. An additional requirement in section 40(4) is that the Attorney-General give special consideration to the relative nature and gravity of the conduct for which surrender and extradition are sought.

to the ICC request.[69] Where the competing requests relate to the same conduct, extradition proceedings may be commenced, but cannot be completed until the ICC determines that the case is inadmissible.[70] There is no such limitation on the extradition process where the competing requests relate to the same person but in respect of different conduct.

The execution of a request for surrender may be postponed where the ICC is determining the admissibility of the case;[71] where the request would interfere with an ongoing investigation in Australia involving the same person but different conduct to that contained in the request;[72] or, the request involves a conflict with Australia's international obligations (e.g. Article 98 agreements).[73] All decisions must be communicated to the ICC.[74]

3.1.3 Constitutional and human rights concerns

The Australian Constitution provides very limited guarantees of individual rights, and those that do exist are largely irrelevant in this context.

Limited protection of individual rights is provided by the common law, particularly the requirement that administrative decision-making comply with the requirements of natural justice. On some matters, the Attorney-General would be required to comply with this requirement. However, in relation to those matters where the decision made is at the absolute discretion of the Attorney-General, it is possible that the accused may not be accorded procedural fairness because the Attorney-General's decision is non-reviewable by Australian courts.

The provisions on arrest and surrender contain clear safeguards against indefinite and arbitrary detention, including the requirement to bring an arrested person before a magistrate after 60 days of detention. The Australian common law provides a remedy to any person unlawfully detained – the writ of *habeas corpus* – and this remedy is not excluded by the ICC Act 2002. However, it appears unlikely that the remedy would ever need to be relied upon.

There are clear guidelines on the circumstances in which force may be used and limits are set on the use of force. In the main, the degree of force used must be reasonable, necessary and proportionate to the situation at hand. As noted above, the ICC Act 2002 authorises various kinds of searches, including personal searches. Again, the powers granted appear to be subject to sufficient safeguards.

69 Section 39(2), section 40(2).

70 Section 39. This limitation does not apply if the ICC does not make its determination on an expedited basis: section 39(5).

71 Section 32.

72 Section 34.

73 Section 12.

74 See, for example, section 41.

3.2 Other forms of assistance

3.2.1 Forms of assistance pursuant to Article 93

Part 4 of the ICC Act 2002 authorises the giving of assistance to the ICC, as required by Article 93 of the ICC Statute.[75] Part 4 establishes comprehensive procedures for the provision of assistance to the ICC in:

- identifying or locating persons or things;
- the taking of evidence or production of documents/articles;
- the questioning of a person being investigated or prosecuted by the ICC;
- the service of documents;
- facilitating the voluntary appearance of witnesses or experts before the ICC;
- the temporary transfer of prisoners to the ICC;
- examination of places or sites;
- the search and seizure of evidentiary material;
- the provision of records/documents;
- protecting victims and witnesses;
- preserving evidence; and
- identifying, tracing, freezing and seizing of proceeds of crimes within the jurisdiction of the ICC.

A request for co-operation from the ICC must contain, or be supported by, certain documentation, depending on the nature of the request.[76] Generally, a request will need to be supported by a concise statement of the purpose of the request and the assistance required, together with as much detailed information as possible to assist in the fulfilment of the request. Requests for assistance are to be dealt with in the same way regardless of whether they are to assist the Court, the prosecution or the defence.[77]

Section 51 of the ICC Act 2002 authorises the Attorney-General to refuse to provide assistance to the ICC in certain circumstances. Where the request relates to information or documents provided to Australia on a confidential basis by a third party foreign country, intergovernmental organisation or international organisation, and the third party does not consent to disclosure, the Attorney-General *must* refuse the ICC's request.[78]

The Attorney-General may refuse a request where there are competing requests for assistance from the ICC and a foreign country[79] or where it is necessary in order to protect

75 See sections 49-106.

76 See section 50(1).

77 Section 105.

78 Section 51(1), in conjunction with section 142.

79 Sections 51(2)(b) and (c), in conjunction with section 56 and subsections 59(4) and 60(3).

Australia's national security interests.[80] Part 8 details the way in which national security issues are to be dealt with.[81] Where a request for co-operation from the ICC appears to relate to the disclosure of information or documents that would, in the Attorney-General's opinion, prejudice Australia's national security interests, the Attorney-General must consult with the ICC according to the procedure contained in Article 72 (5) of the ICC Statute.[82] If, after this process, the Attorney-General decides that there are no means or conditions under which the information or documents could be disclosed without prejudice to Australia's interests, the ICC must be notified, in accordance with Article 72 (6) of the ICC Statute.[83]

3.2.2 Obligations outside the mutual assistance context

Part 5 of the ICC Act 2002 contains measures to facilitate the ICC sitting and exercising its functions and powers in Australia. The ICC is authorised to sit in Australia for the purpose of performing its functions under the ICC Statute or the Rules of Procedure and Evidence, including taking evidence, conducting or continuing a proceeding, giving judgment or reviewing a sentence.[84]

3.2.3 Enforcement of sentences

The provisions regarding enforcement in Australia of sentences imposed by the ICC are contained in Part 12 of the ICC Act 2002. The Attorney-General may notify the ICC that Australia agrees to act as a State of enforcement, allowing ICC prisoners to serve their sentences in Australia, subject to certain enforcement conditions.[85] Australia can withdraw this agreement at any time by notifying the ICC.[86] The enforcement conditions may include a requirement that the prisoner consent in writing to serving the sentence in Australia, that appropriate ministerial consent is first obtained, that any appeal avenues available to the prisoner have been exhausted, or that at least six months of the prisoner's sentence remains to be served at the time of transfer.[87]

If the ICC imposes a sentence on a prisoner and, acting under Article 103 of the ICC Statute, designates Australia as the place in which the sentence is to be served, the Attorney-General must then consider whether to accept the designation.[88] Before accepting, the Attorney-General must determine which Australian state is to 'host' the prisoner, and obtain the consent of that state. The designation may be accepted if the ICC has agreed to the enforcement conditions (if any), the 'host' state has consented and,

80 Section 51(2)(a).

81 Sections 144-149.

82 Section 148.

83 Section 149.

84 Section 108.

85 Section 160(1).

86 Section 161.

87 Section 160(2).

88 Section 162.

where the prisoner is not an Australian citizen, the Immigration Minister has consented to the prisoner serving their sentence in Australia.[89]

In order to facilitate the transfer of an ICC prisoner to Australia to serve their sentence, the Attorney-General is required to issue a warrant for transfer to Australia.[90] The warrant for transfer must comply with certain statutory conditions.[91]

Once an ICC prisoner has been transferred to Australia, the Attorney-General may determine that the sentence of imprisonment imposed by the ICC be enforced on the prisoner.[92] The sentence enforced must not be harsher, in legal terms, than that imposed by the ICC and cannot be longer in duration.[93] The Attorney-General may only give a direction reducing a sentence in accordance with a decision of the ICC under Article 110 of the ICC Statute.[94] Once a prisoner as been transferred to Australia, no appeal or review lies in Australia against the sentence of imprisonment imposed by the ICC.[95]

ICC prisoners held in Australia have the right to communicate on a confidential basis with the ICC, without impediment from any person. A judge or other member of staff of the ICC is authorised to visit an ICC prisoner.

4 Incorporating the Crimes

4.1 Measure and extent of incorporation

The amendment of the Criminal Code Act 1995 with the addition of an entirely new division of crimes represents an unprecedented initiative in the national implementation of international criminal law in Australia, both in breadth of scope and level of detail. This new legislation comprehensively covers all the crimes within Articles 6, 7 and 8 of the ICC Statute and is significantly more extensive than any previous Australian legislation. The general approach of the legislation is to include a separate legislative provision for each of the distinct offences provided for in Articles 6-8 of the Statute, following closely the approach adopted in the Elements of Crimes negotiated after the opening for signature of the ICC Statute.

This approach of a separate provision for each individual offence, specifying the precise elements of the separate crimes, is entirely consistent with the overall approach already adopted in the Criminal Code Act 1995. The most recent substantial amendment to the Criminal Code Act 1995 prior to the current legislation was the Criminal Code Amendment (United Nations and Associated Personnel) Act 2000 implementing Australia's obligations as a State Party to the Convention on the Safety of United Nations and Associated

89 Section 164.

90 Section 165.

91 Section 166.

92 Section 168.

93 Section 169.

94 Section 170(2).

95 Section 171.

Personnel into Australian domestic law. The newly added Division 71 of the Criminal Code Act 1995 entitled 'Offences Against United Nations and Associated Personnel' reflects exactly the same approach as that adopted in Schedule 1 of the ICC (Consequential Amendments) Act 2002. This approach involves the enumeration of the precise elements that must be proved beyond reasonable doubt as well as facilitating the identification of a maximum penalty for each separate offence. Although it creates an unwieldy and complicated impression, this does have the advantage of introducing certainty into the criminal trial process for all the parties involved – prosecution, defence and the judiciary. The detailed Australian approach is apparently unique among implementing legislation to date of States Parties to the ICC Statute.[96]

4.1.1 Genocide

Subdivision B of the new Division 268 of the Criminal Code Act 1995 replicates precisely the five separate offences of genocide in the Elements of Crimes. The specific elements in each also mirror those contained in the Elements of Crimes (albeit in slightly different order) with one major exception. The legislation does not include the requirement, which applies to each separate offence of genocide in the Elements of Crimes, that "the conduct took place in the context of a manifest pattern of similar conduct directed against that [targeted] group or was conduct that could itself effect such destruction". The omission of this specific element altogether will make it easier for an Australian Court to convict an individual of the crime of genocide than it will be for the ICC. It may well be the case that, in most instances of alleged genocide, this quantitative requirement will be satisfied. However, the possibility remains that in some cases this quantitative context may be difficult to prove and the drafting decision to omit this additional requirement is to be welcomed.

Subdivision B constitutes the first introduction of genocide as a crime in its own right into Australian criminal law. There has been an intense public debate in Australia over several years about the lack of any explicit criminalisation of genocide in Australian law – particularly in the context of revelations about successive governments' policies of forcibly removing indigenous Australian children from their own families to be placed into white foster families or white institutions.[97] A Member of the Australian Democrats – a minority party with limited members in the Australian Parliament – tabled a draft Private Member's Bill to criminalise genocide in response to the awareness of this gap in Australian Criminal Law.[98] That proposed legislation did not receive sufficient parliamentary support from either of the major political parties and is now rendered otiose on the enactment of Subdivision B of Schedule 1 of the ICC (Consequential Amendments) Act 2002 – at least in respect of alleged acts of genocide occurring post 1 July 2002.

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96 See, for example, Matthias Neuner (ed), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (2003).

97 For a detailed account of this debate, including an analysis of the jurisprudence of Australian Courts on the place of genocide as a crime under Australian Law, see Timothy L H McCormack and Sue Robertson, 'Jurisdictional Aspects of the Statute for the New International Criminal Court', 23 *Melbourne University Law Review* 635 (1999) at 649-651.

98 The draft Bill was tabled in 1999 by Senator Brian Greig as the Anti-Genocide Bill 1999 (see www.law.mq.edu.au/Units/law309/bill). The explanatory sub-title of the Bill was 'A Bill for an Act to give effect to the Convention on the Prevention and Punishment of the Crime of Genocide and for related purposes'.

4.1.2 Crimes against humanity

Subdivision C of the Criminal Code Act mirrors the Elements of Crimes in relation to both the specific offences themselves (16 separate crimes against humanity) and the individual elements of each offence. Again there is one departure in the Australian Act from the approach in the Elements of Crimes, but in this Subdivision that departure is not a variation on the specific elements of each offence in the Elements of Crimes. Rather, in relation to crimes against humanity, the Act faithfully replicates each individual element for each of the separate crimes against humanity (although here, as with Subdivision B, the order of the specific elements as enumerated in the Elements of Crimes is altered).

The single point of departure in relation to crimes against humanity in the Act arises in Section 268.21 – the crime against humanity of forced disappearance of persons. The proposed Australian legislation splits the crime into two options (268.21(1) and (2)). Section 268.21(1) criminalises the conduct of the perpetrator in arresting, detaining or abducting persons with the support of the government or a political organisation and only requires the government or the organisation to refuse to acknowledge the deprivation of freedom. Consequently, it is not an element of this offence for the accused themselves to have either refused to have acknowledged, or known of a refusal to have acknowledged, the deprivation of freedom – an element that is required to prove the offence under the Elements of Crimes. Section 268.21(2), however, also criminalises the refusal to acknowledge the deprivation of freedom where the individual accused did not themselves conduct the arrest, detention or abduction but did know of it taking place. This extension of the scope of the crime against humanity beyond the limits imposed by the Elements of Crimes is welcome, although it must be conceded that the conduct captured by Section 268.21(2) would be covered by the provisions of the ICC Statute on participation in the commission of the offence.

Perhaps one of the most graphic examples of the faithfulness of the Australian legislation in following the Statute relates to the crime against humanity of torture. It is well known that in the negotiation of the text of Article 7(1)(f) of the ICC Statute, delegations intentionally departed from the restrictive terms of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in defining the crime. As defined in Article 7(2)(e), the perpetrator is not required to inflict the severe physical or mental pain or suffering for a particular specified purpose. The Elements of Crimes reflect this liberated approach to the definition of the crime against humanity of torture.

By contrast, delegations did not explicitly refer to the limitations of the customary law definition of the international crime of torture when negotiating the war crime of torture in either Article 8(2)(a)(ii) or Article 8(2)(c)(i). Consequently, the Elements of Crimes replicate the Convention Against Torture requirement of a specific purpose for the infliction of severe pain or suffering as an element of this war crime. The Australian Act reflects this disparity of approach. Section 268.13 – the crime against humanity of torture – removes the requirement of a specific purpose for the infliction of severe pain or suffering while Sections 268.25 and 268.73 – the war crime of torture in an international armed conflict and in a non-international armed conflict respectively – maintain the requirement of a specific purpose on the part of the perpetrator. Section 268.13 thus departs from the existing legislative definition of the crime of torture in Section 3 of the Crimes (Torture) Act 1988, which implements Australia's international obligations as a State Party to the

Convention Against Torture. This departure is only explicable on the basis of faithfulness to the ICC Statute, in this case Article 7(2)(e), and to the Elements of Crimes.

As with Subdivision B on genocide, Subdivision C constitutes the first introduction of crimes against humanity as a distinct category of crime in its own right into Australian domestic law. Section 17 of the War Crimes Act 1945 (as amended in 1989) permits a defence to responsibility for a war crime if the alleged conduct was "permitted by the laws, customs and usages of war" and did not constitute a 'crime against humanity' at the time such alleged conduct occurred. This is the only previously existing Australian legislative reference to the distinct category of 'crimes against humanity'. The War Crimes Act 1945 does not define the category and certainly does not create a separate category of crimes against humanity under Australian domestic criminal law.

4.1.3 War crimes

Subdivisions D, E, F and G faithfully replicate both the specific war crimes offences and their particular elements in the Elements of Crimes. The four Subdivisions reflect the four categories of war crimes in Article 8(2) of the ICC Statute, and the only point of departure in the Act is the omission of the war crime in Article 8(2)(b)(xx) – that of employing weapons, projectiles or materials or methods of warfare listed in the Annex to the Statute. Since that Annex contains no such listed weapons yet (and will not before the 1st Review Conference of the Statute seven years after entry into force – at the earliest) the Australian legislation does not include this particular offence. Once the Annex does have specific weapons listed, and assuming Australia is still a State Party to the Statute, the Australian implementing legislation will presumably be amended appropriately.

The Act, however, contains a somewhat anomalous addition – Subdivision H covering 'War Crimes That are Grave Breaches of Protocol I to the Geneva Conventions'. The rationale for this additional Subdivision is to bring all war crimes under Australian Law into one legislative location – the new Division 268 of the Criminal Code Act 1995. As a State Party to the four Geneva Conventions of 1949 and the two 1977 Protocols Additional to the Conventions, Australia is obligated to provide criminal sanctions for grave breaches of the Conventions and of Additional Protocol I.

Until now, those penal sanctions have been provided in the Geneva Conventions Act 1957. The intention of Schedule 3 of the Act is to amend the Geneva Conventions Act 1957 by repealing the operative part of the legislation criminalising grave breaches on the basis that all grave breaches will henceforth be covered by the Criminal Code Act 1995. Because Subdivision D of the Act explicitly covers grave breaches of the Geneva Conventions (reflecting Article 8(2)(a) of the ICC Statute), it was not necessary to draft an additional subdivision for those offences. However, the ICC Statute does not include an equivalent sub-article explicitly dealing with grave breaches of Additional Protocol I. There is no question that some of the provisions in Article 8(2)(b) of the ICC Statute do cover certain grave breaches of Additional Protocol I. However, the ongoing lack of consensus about the customary law status of the Protocol precluded the Rome Conference from comprehensively listing all grave breaches of the instrument in Article 8(2)(b) of the Statute. The Act achieves a more comprehensive approach than the Statute itself and this result is admirable.

In the initial draft of the legislation, however, proposed Subdividision H included 15 war crimes – all grave breaches of Additional Protocol I.[99] As it happened, some of those proposed war crimes repeated offences in either Subdivision D or E. The mere fact of repetition may not necessarily have caused problems except that the specific elements of the repeated offences were, on occasion, disparate. The inconsistency in specifying elements could easily have caused 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.

Some examples will illustrate the potential problem. Proposed Section 268.96, the war crime of 'medical or scientific experiments', repeated the same offence as proposed Section 268.47 (in Subdivision E). Both proposed Sections 268.96 and 268.47 enumerated five similar elements of the specific offence but those elements were not identical. For example, proposed Section 268.96(1)(c) incorporated an objective test for evaluating the perpetrator's conduct such that the conduct was not "consistent with generally accepted medical standards that would be applied under similar medical circumstances to persons who are nationals of the perpetrator…". Since proposed Section 268.47 contained no such explicit reference to an objective standard of conduct, it is arguable that the prosecution may have been 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 have been more difficult to prove 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 could not have been helpful.

Other examples of war crimes referred to in the original draft of Subdivision H that repeated offences already covered in proposed Subdivisions D or E included draft Section 268.98 – "attacking civilians" (repeating draft Section 268.34 of the same name); draft Section 268.99 – the "war crime of indiscriminate attack against civilians or civilian objects resulting in excessive loss of life, injury to civilians or damage to civilian objects" (repeating draft Section 268.37 – the war crime of "excessive incidental death, injury or damage"); draft Section 268.103 – the war crime of "improper use of the distinctive emblems of the Geneva Conventions" (repeating draft Section 268.43 of the same name); and draft Section 268.104 – the war crime of "transfer of population" (repeating draft Section 268.44 of the same name).

The written submission of the Australian Red Cross to the enquiry of the Joint Parliamentary Standing Committee on Treaties into Australia's ratification of the ICC Statute exposed the repetition and the possible problems arising from that repetition.[100] The Joint Standing Committee referred explicitly to the Australian Red Cross submission in making its recommendation to Parliament that the draft legislation be amended to

99 See Sections 268.94-268.108 of the ICC (Consequential Amendments) Bill 2001.

100 This submission to the Inquiry of the Joint Standing Committee on Treaties is available at: http://www.aph.gov.au/house/committee/jsct/ICC/sub244.pdf. See specifically pp 6 and 7 of the submission on the issue of repetition of some war crimes.

remove the repeated crimes.[101] The consequence is that the enacted Subdivision H now contains only seven war crimes, each of which are grave breaches of Additional Protocol I not covered elsewhere in the legislation – namely the war crimes of "medical procedure", "removal of blood, tissue or organs for transplantation", "attacks against works and installations containing dangerous forces resulting in excessive loss of life, injury to civilians or damage to civilian objects", "attacking undefended places or demilitarised zones", "unjustifiable delay in repatriation", "apartheid", and "attacking protected objects". This is in contrast to the originally proposed 15 war crimes in this Subdivision. Eight of those draft provisions have been omitted from the Act because they are already covered in either Subdivision D or E of the legislation.

4.1.4 Crimes against the administration of the justice of the ICC

Subdivision J (there is no proposed Subdivision I – presumably to avoid confusion between the capitalisation of the letter 'i' and Roman Numeral I) of the new Division 268 of the Criminal Code Act 1995 covers a range of offences against the work of the ICC. None of these offences are within the subject matter jurisdiction of the Court itself and yet it will be important for such offences to be prosecuted in some other forum if and when they are actually committed. Article 70(4)(a) of the ICC Statute acknowledges this reality and obliges States Parties to enact laws criminalising offences against the Court and its work. In this respect, it is significant that Section 268.117 authorises Australian courts to exercise extraterritorial jurisdiction over these particular offences if the perpetrator is an Australian citizen. Whether or not that breadth of jurisdictional competence will be utilised by Australian authorities remains to be seen, but the provision of such broad jurisdictional scope is considered significant.

The new offences in Subdivision J include "perjury", "falsifying evidence", "destroying or concealing evidence", "deceiving witnesses", "reprisals against witnesses" and "reprisals against officials of the International Criminal Court". As a general rule, the stated maximum penalties for offences under this Subdivision are significantly less than for the other substantive crimes in Subdivisions B-H (ranging from 5 to 10 years' imprisonment).

5 Jurisdiction of Domestic Courts and Principles of Liability

5.1 Grounds of jurisdiction

The implementing legislation extends universal jurisdiction to Australian courts in respect of the new domestic crimes of genocide, crimes against humanity and war crimes – that is, an alleged perpetrator of any of these new crimes under Australian law who happens to be in Australia or otherwise in Australian custody can be tried for the alleged crime irrespective of the territory where the crime allegedly occurred, irrespective of the nationality of the accused and irrespective of the nationality of the victims of the crime.

101 See Recommendation 10 of the Report of the Joint Standing Committee on Treaties to the Parliament of the Commonwealth of Australia on 'The Statute of the International Criminal Court'. P 85 of the Report involves the Committee's discussions of Recommendation 10. The full text of the Report is available at: http://www.aph.gov.au/house/committee/jsct/reports/report45/report45.pdf

As has already been mentioned, in respect of crimes against the administration of justice of the ICC, Australian courts can only exercise jurisdiction against those allegedly committing such crimes on the physical territory of Australia or against Australian nationals allegedly responsible for such crimes irrespective of where in the world the crimes were said to have occurred.

5.2 Temporal jurisdiction

The Australian legislation precludes any retrospective application of the law. Prosecutions of any of the crimes within the new Division 268 of the Criminal Code Act 1995 can only arise in respect of the alleged perpetration of acts after the entry into force of the ICC Statute for Australia – namely 01 July 2002, the date of the deposit of the country's instrument of ratification.

5.3 Principles of liability

The new Division 268 of the Criminal Code Act 1995 is silent as to principles of liability and so the general provisions of the legislation apply. Those preclude criminal responsibility for children under 10 years of age (Section 7.1) and require the prosecution to establish that a child aged 10 years or more but under the age of 14 is criminally responsible by proving beyond reasonable doubt that the child knew their conduct was wrong (Section 7.2). A child over the age of 14 is presumed to be criminally responsible for alleged crimes falling within the Criminal Code Act 1995. Here then the Australian implementing legislation diverges markedly from the ICC Statute prescription that children under 18 years of age cannot be tried before that Court.

All the new domestic crimes in Division 268 of the Criminal Code Act 1995 only apply to natural persons. All of them explicitly commence with the words "A person (*the perpetrator)* commits an offence if…" precluding the prosecution of a corporation for any of the specific crimes.

6 Rights of the Accused

A person accused of the commission of an offence under Division 268 of the Criminal Code Act 1995 will be entitled to all the same rights as any other accused person in Australia. The rights of the accused include those codified in the Criminal Code Act 1995[102] as well as those available under the Constitution and at common law.

7 Available Defences

In the main, the defences available to a person accused of committing a crime contained in the Rome Statute appear to be the same as those available for other offences under the Criminal Code Act 1995. Brief details of the applicable defences, including the war crimes specific defence of superior orders, are provided below.

102 The full text of the Criminal Code Act 1995 is available at http://scaleplus.law.gov.au /html/pasteact/1/686/top.htm.

7.1 Duress

Duress is available as a defence against criminal responsibility where a person carries out conduct because he or she reasonably believes that:

- A threat has been made that will be carried out unless an offence is committed; and
- There is no reasonable way that the threat can be rendered ineffective; and
- The conduct of the accused is a reasonable response to the threat.[103]

The defence is not available if the threat is made by a person with whom the accused is voluntarily associated for the purpose of committing the crime.

7.2 Age

As noted above, children under the age of 10 are not criminally responsible for the commission of an offence.[104] Where a child aged between 10 and 14 years is charged with an offence, s/he can only be criminally responsible for an offence if s/he knows that the conduct is wrong.[105] This is a question of fact, and the burden of proof falls on the prosecution. There is no defence on the basis of age available to persons over 14 years.

7.3 Intoxication

The defence of intoxication is available on limited grounds under the Criminal Code Act 1995 and turns on whether it was self-induced.[106] Intoxication is presumed to be 'self-induced' unless it was involuntary or was as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force. Where the intoxication was not self-induced, an accused is not criminally responsible for conduct arising from that intoxication.[107] Where the intoxication was self-induced, and the defence depends on the actual knowledge or belief of the accused, then evidence of intoxication may be considered in determining whether that knowledge or belief existed. Where the relevant standard is that of a reasonable person, self-induced intoxication is not a defence.

7.4 Self-defence

The Criminal Code Act 1995 provides for self-defence in section 10.4, and this defence absolves the accused of criminal responsibility for their conduct.[108] Conduct is carried out in self-defence where a person believes the conduct is necessary to:

- defend themselves or another person;
- prevent or terminate the unlawful imprisonment of any person;

103 Section 10.2, Criminal Code Act 1995.

104 Section 7.1, Criminal Code Act 1995.

105 Section 7.2, Criminal Code Act 1995.

106 Sections 8.1-8.5, Criminal Code Act 1995.

107 Section 8.5, Criminal Code Act 1995.

108 Section 10.4 (1) , Criminal Code Act 1995.

- protect property from unlawful appropriation, destruction, damage or interference; or
- prevent criminal trespass or remove a person committing criminal trespass

The conduct must also be a reasonable response in the circumstances, as perceived by the accused.[109] It should be noted that self-defence is not available as a defence to the use of force intended to inflict really serious injury or death in order to protect property or prevent trespass.

7.5 Diminished responsibility and insanity

Section 7.3 of the Criminal Code Act 1995 contains the defence of mental impairment. 'Mental impairment' includes senility, intellectual disability, mental illness, brain damage and severe personality disorder. According to this section, a person is not criminally responsible for an offence if, at the time of commission, s/he suffered from a mental impairment that meant that the person:

- did not know the nature and quality of their conduct;
- did not know that the conduct was wrong; or
- was unable to control the conduct.

It is presumed that an accused was not suffering from mental impairment; however, this presumption can be displaced if the mental impairment is proven on the balance of probabilities.

7.6 Mistakes of fact and law

It is a defence to a crime under the Criminal Code Act 1995 if the person accused was under a mistaken belief about, or was ignorant of, facts, and if those facts had existed, the conduct would not have constituted an offence.[110] In general, mistakes about, or ignorance of, the law (including subordinate legislation) do not constitute a defence to criminal responsibility.[111]

7.7 Superior orders

A limited defence of superior orders was inserted into the Criminal Code Act 1995 by the ICC (Consequential Amendments) Act 2002.[112] The fact that a person, pursuant to an order of a government or a superior, has committed genocide or a crime against humanity does not relieve that person of criminal responsibility.[113] There is a limited defence of superior orders available for the commission of war crimes. It is a defence to a war crime where a person, pursuant to an order of a government or a superior, commits a war crime, and:

109 Section 10.4(2), Criminal Code Act 1995.

110 Section 9.1, 9.2, Criminal Code Act 1995.

111 See sections 9.3 and 9.4, Criminal Code Act 1995.

112 Section 268.116, Criminal Code Act 1995.

113 Section 268.116(1), Criminal Code Act 1995.

- the person was under a legal obligation to obey the order;
- the person did not know that the order was unlawful; and
- the order was not manifestly unlawful.

The defendant bears the evidential burden of establishing the elements of the defence of superior orders.

7.8 Other

Two further defences are available under the Criminal Code Act 1995: the defence of lawful authority[114] and the defence of sudden or extraordinary emergency.[115] According to the defence of lawful authority, a person is not criminally responsible for an offence if the conduct is justified or excused by, or under, a law. The defence of sudden or extraordinary emergency is available where the conduct constituting the offence was in response to a sudden or extraordinary emergency. The person must reasonably believe that the circumstances of such an emergency exist, that committing the offence is the only reasonable way to deal with the emergency and that the conduct is a reasonable response to the emergency.

8 Immunity, International Crimes and Domestic Courts

Australia's implementation of its obligations contained in Article 27 of the ICC Statute is less than satisfactory. Article 27 states that the ICC's jurisdiction "shall apply equally to all persons without any distinction based on official capacity…[O]fficial capacity…shall in no case exempt a person from criminal responsibility under this Statute". Given the detailed nature of the Australian implementing legislation, the absence of specific incorporation of Article 27 is strange. According to the Attorney-General's Department, the terms of Article 27 are not repeated in the implementing legislation "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".[116] According to this view, acts of genocide, war crimes and crimes against humanity can never form part of a person's 'official capacity'; the immunity does not attach to conduct of this nature. Thus, there is no need for the implementing legislation to expressly override the privileges and immunities afforded to officials in Australia.

Whilst this position may be technically correct, as was noted by Human Rights Watch in its submission to the review of the Australian implementing legislation,

> "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

114 Section 10.5, Criminal Code Act 1995.

115 10.3, Criminal Code Act 1995.

116 Attorney-General's Department, *Submission No 232.2* (2002), p 2.

> provision expressly excluding the application of the immunities in the *Foreign States Immunities Act 1985 and the Diplomatic Privileges and Immunities Act 1961."*[117]

The parliamentary review body – the Joint Standing Committee on Treaties (JSCOT) – recommended 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."[118]

This recommendation is particularly important in light of the fact that, in certain circumstances, there are limitations on Australia's power to arrest and surrender a person in an official capacity to an international tribunal. In particular, Australia may be unable to comply with a request for arrest and surrender where such a request would require Australia 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".[119] JSCOT's recommendation was not incorporated into the legislation before its passage into law.

9 Trial Procedure and Punishment in Domestic Courts

The trial procedure and punishment in domestic courts for persons accused of war crimes, genocide and crimes against humanity is subject to the same procedure as any other criminal offence. The proceedings can be heard in any jurisdiction and the right of appeal to the High Court of Australia is available.

10 Article 98 Agreements

10.1 Government response to American attempts to conclude Article 98 agreements

The Australian Government has acknowledged that it has been approached by the US with a request to conclude an Article 98 Agreement. The Government has indicated its willingness to enter into negotiations but has also stated that it will ensure that any such agreement is not inconsistent with Australia's obligations under the ICC Statute. No agreement has yet been signed. Before the Government commits itself to any such agreement, the text of the instrument must be considered by JSCOT. That body has the discretion to call a public enquiry into the proposed agreement and take both written and oral submissions from interested members of the public or to conduct its review of the proposed agreement without public consultation.

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117 Human Rights Watch, *Submission No 23.2* (2002), p 2.

118 Joint Standing Committee on Treaties, *Report 45: The Statute of the International Criminal Court* (May 2002), Recommendation 8, p 84. The report is available online at: http://www.aph.gov.au/house/committee/jsct/ICC/index.htm.

119 Attorney-General's Department, *Submission No 232.2* (2001), p 2.