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THE ROME STATUTE AND THE NEED FOR COMPREHENSIVE DOMESTIC PENAL LEGISLATION

Paper prepared for the Commonwealth Secretariat by Katherine L. Doherty[1] and Timothy L.H. McCormack[2]

I. INTRODUCTION

1. It was asserted at a recent meeting of Legal Experts convened by the International Committee of the Red Cross[3] that no single country seems to have comprehensive penal legislation to adequately cover the subject matter jurisdiction of the new International Criminal Court. Even if this assertion is inaccurate, it is certainly difficult to identify any countries with comprehensive legislation. The fact remains that the overwhelming majority, if not all, of the countries which become Party to the *Rome Statute*[4] will need to closely evaluate the extent to which their existing penal legislation covers the crimes within the Court's jurisdictional competence.

2. The purpose of this paper is to expose the likelihood of inadequate existing domestic penal legislation and to suggest that without adequate review of existing legislation, many Commonwealth countries may not be in a position to exercise primary jurisdiction over the new International Criminal Court. While the option of voluntarily devolving jurisdictional competence to the International Criminal Court will always remain, the assumption here is that most States Parties will not be keen to lose the right to primary jurisdiction merely on the basis of oversight.

II. THE 'COMPLEMENTARITY' FORMULA IN THE *ROME STATUTE*

3. Although the International Law Commission's 1994 Draft Statute for an International Criminal Court[5] left open the question of the relationship between the new Court and national courts, it was agreed between governments early on in the preparatory negotiation phase that the new Court would not exercise primary jurisdiction over national courts. The relationship between the two *ad hoc* tribunals for the Former Yugoslavia[6] and Rwanda[7] and the relevant

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[1] Katherine Doherty is a Lecturer in Law and a candidate for LL.M. in the Faculty of Law at the University of Melbourne. This article is based extensively on a paper she submitted for examination in the subject International Criminal Law.

[2] Timothy L. H. McCormack is the Foundation Australian Red Cross Professor of International Humanitarian Law and Associate Dean - Research in the Faculty of Law at the University of Melbourne. He participated as a member of the Australian Government Delegation to the Rome Diplomatic Conference for the Establishment of an International Criminal Court. The views expressed here are those of the authors alone and do not reflect those of the Australian Government. The authors wish to thank Jessica Howard for her helpful assistance in the completion of this article.

[3] The ICRC Advisory Service recently organised a Meeting of Legal Experts from Common Law States on the Enforcement of International Humanitarian Law (Geneva Nov. 11-13, 1998). This meeting followed an earlier, similar one involving Experts from Civil Law States. The assertion referred to here was made by an expert who had participated in both meetings.

[4] *Rome Statute of the International Criminal Court* (1998), adopted by the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, A/CONF.183/9.

[5] See *Report of the International Law Commission on the Work of its Forty-Sixth Session*, UN GAOR, 49th Sess, UN Doc A/49/10, Supp No 10 (1994) (containing the original Revised Draft Statute). This was subsequently revised two times: See UN GAOR, 49th Sess, UN Doc A/CN.4/L.491/Rev.2 (1994) [hereinafter *Draft Statute*]

[6] See SC Res 827, UN SCOR, 48th Sess, (3217th mtg), UN Doc S/RES/827 (1993), 32 ILM 1203 (1993) (establishing the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian

national courts of the parties to those two conflicts was never a serious precedent for the same issue in the Statute of the new International Criminal Court. It is one thing for the United Nations Security Council to establish the tribunals with primary jurisdiction over national courts pursuant to the Council's enforcement powers under Chapter VII of the United Nations Charter and altogether a different thing for the international community to negotiate the terms of a multilateral treaty dealing with this sensitive issue of jurisdictional relationships.

4. Of course the international community could not, nor did it attempt to, undermine or diminish the constitutional authority of the United Nations Security Council in respect of the relationship between the Council on matters which the Council deems constitute a threat to, or breach of, international peace and security and the jurisdictional authority of the International Criminal Court. All governments involved in the Rome Diplomatic Conference accepted, albeit reluctantly in some cases, the fact that whenever the United Nations Security Council acts on the basis of Chapter VII of the United Nations Charter to refer a situation to the Court, it no longer matters: (1) whether the relevant country is a Party to the Statute of the Court or has otherwise consented to the Court's jurisdiction in a particular case; or, (2) whether the relevant country wishes to exercise national jurisdiction over a particular case. It is important to recognise that the principle of complementarity only becomes operative in respect of the two other consent-based "trigger mechanisms" in the *Rome Statute* — that is, a case by way of State Party complaint or by way of the Prosecutor acting *ex proprio motu*.[8]

5. The agreed formula in the *Rome Statute* is that a country with jurisdictional competence has the first right to institute proceedings unless the International Criminal Court itself decides that the country 'is unwilling or unable genuinely to carry out the investigation or prosecution'.[9] The assumption in Rome was that such a determination would be straightforward for the International Criminal Court in either of two situations: (1) where the country, for whatever reason, chooses not to exercise its jurisdictional competence — the "unwilling" country; or (2) where the country's legal and administrative structures have completely broken down — the all too common so-called 'failed State' phenomenon as the quintessential "unable" country. Our argument here is that there is a third situation in which it may also be possible for the International Criminal Court to make this determination in favour of its own jurisdiction in a particular case and that governments may have overlooked this third possibility. If a country does not have penal legislation covering one or more of the crimes within the jurisdiction *ratione materiae* of the Court, it may well be relatively straightforward for the Court to determine that the country is "unable genuinely" to proceed with the case. It is this possibility of a prospective State Party to the *Rome Statute* failing to exercise jurisdictional priority over the Court where it may want to do that but is precluded, which ought to facilitate a careful stocktake of existing legislation prior to ratification.

III. INTERNATIONAL LAW IN THE DOMESTIC LEGAL SYSTEMS OF COMMONWEALTH COUNTRIES

6. It is an established doctrine in most Commonwealth countries that international law will not become part of domestic law, in the sense of creating either justiciable rights or enforceable penalties, in the absence of implementing legislation. This proposition does not mean that international law can never have an influence on the development of domestic law in the absence of implementing legislation. However, domestic courts have consistently held that, irrespective of the source of international legal obligation, the failure of

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Law Committed in the Territory of the Former Yugoslavia) [hereinafter *Statute for the Former Yugoslavia Tribunal*]

[7] See SC Res 955, UN SCOR, 49th Sess, (3453mtg), UN Doc S/RES/955 (1994), 33 ILM 1598 (1994) (establishing the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide in the Territory of Rwanda and Other Such Violations Committed in the Territory of Neighbouring States) [hereinafter *Statute for the Rwanda Tribunal*]

[8] Article 13 (a) and (c) *Rome Statute*

[9] Article 17(1) (a) and (b) *Rome Statute*

Parliament to enact legislation to implement a particular country's international obligations precludes resort to those obligations either for domestic legal redress or for a source of legal authority.

7. Under the 'Separation of Powers' doctrine which applies to the Westminster system of government in most Commonwealth countries, the Parliament, as the house of the elected representatives of the people, is paramount. Accordingly, if Parliament chooses not to implement the country's international legal obligations, irrespective of the reason for that omission, it is not for the courts to consider the international obligations part of the domestic law. Similarly, if Parliament chooses to exercise a valid constitutional authority to enact legislation which is unambiguously inconsistent with an international legal obligation owed by the country, it is not for the courts to override Parliament's explicit intention. As mentioned above, however, international law can, and increasingly does, have an influence on the development of domestic law apart from the enactment of implementing legislation to give domestic legal effect to international legal obligations. In particular, domestic Commonwealth courts will usually interpret legislation consistently with international obligations where the parliamentary intention permits such an interpretation and, in most countries, the courts are also increasingly willing to look to developments in international law to inform the content of the Common Law.

8. Given the general approach of domestic courts in Commonwealth countries to the reception of international law, it is clear that domestic courts could not exercise jurisdiction in respect of the crimes within the *Rome Statute* by virtue solely of the status of those crimes at international law.[10] It is also clear that Parliaments have the requisite constitutional competence to introduce legislation to implement the *Rome Statute* crimes into their respective domestic criminal law should they choose to do so. We turn now to consider, briefly, each of the crimes within the jurisdiction *ratione materiae* of the International Criminal Court.

IV. THE SUBSTANTIVE CRIMES IN THE *ROME STATUTE* AND EXISTING DOMESTIC CRIMINAL LAW

A. *Genocide*

9. Despite some support for 'opening up' the definition of genocide to include the targeting of political and social groups, the definition of genocide in the *Rome Statute* replicates *verbatim* that set out in the 1948 *Genocide Convention*[11] Genocide, as such, will not be a crime under the domestic law of most Commonwealth countries in the absence of specific legislation implementing the relevant international law.

10. While the United Kingdom, for example, does have a *Genocide Act*[12] which gives its courts universal jurisdiction over alleged acts of genocide in the territory of the United Kingdom, most Commonwealth countries do not have similar legislation.[13] Those Commonwealth countries which do have legislation similar to the UK model must ensure that their legislation also provides for universal jurisdiction to maximise the right to exercise primary jurisdiction over the International Criminal Court if that country chooses to do so. Jurisdiction limited only to acts allegedly committed on sovereign territory or by nationals abroad could enable the International Criminal Court, having indicted an individual from that country for genocide

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10 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*, opened for signature 9 December 1948, 78 UNTS 277; Cmnd 4421 (entered into force 12 January 1951) [hereinafter *Genocide Convention*].

11 Article 2 *Genocide Convention*

12 *Genocide Act 1969* (UK)

13 Australia, for example, has a *Genocide Convention Act 1957* but this legislation fails to criminalise genocide in Australian criminal law. The only substantive section of the Act gives Australian Federal Parliamentary approval for ratification of the *Genocide Convention*. Other Commonwealth Countries have no specific legislation at all.

committed on the territory of a third country, to decide that the requested country is 'genuinely unable' to try the case and national jurisdiction could be forfeited.

11. Some would argue, of course, that in most cases the physical acts set out in Article 6 of the *Rome Statute* would also contravene the domestic criminal law. Laws against murder and causing bodily injury would, for example, squarely cover 'killing members of the group' and 'causing serious bodily or mental harm to members of the group' respectively. However, other genocidal acts may not be so obviously covered. 'forcibly transferring children of the group to another group' may well sit less clearly within existing domestic law. While in some cases this may constitute kidnapping or child stealing, it is possible to imagine situations which would fall outside the parameters of the domestic crimes, yet constitute genocide at international law.

12. In any case, there are two further limitations to the reach of existing domestic criminal law, even where it does cover the *actus reus* of the crime of genocide: (1) the mental element required for a charge of genocide to be sustained; and (2) the jurisdictional limitations of domestic criminal law. Genocide has a very precise and high threshold mental element: the accused must have committed the acts in question 'with intent to destroy, in whole or in part' one of the groups listed. The domestic crime of murder in contrast, focuses on the defendant's intention to kill or seriously injure the individual victim or victims. The victim's status as a member of a group and targeting *for that reason* are irrelevant. Secondly, domestic criminal law is generally based primarily on territorial jurisdiction, and will not usually cover acts committed elsewhere either by nationals or by non-nationals, unless the laws are specifically given extraterritorial and/or universal effect by legislation.

B. *Crimes Against Humanity*

13. Unlike genocide, there is no conventional definition of crimes against humanity. The definition adopted in the Rome Statute in Article 7(1) is largely referable back to the Nuremberg Charter[14] and more recently the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Paragraphs 2 and 3 of Article 7 go on to define and clarify the terms used in paragraph 1. As in the Statute for the Rwanda Tribunal, the Nuremberg nexus of crimes against humanity with the existence of an international or internal armed conflict has been broken[15]

14. Very few Commonwealth countries have a specific offence of 'crimes against humanity'.[16] Obviously, as with genocide, some of the acts referred to in the definition are also domestic crimes per se, such as murder and rape. Laws against assault, intentionally causing serious injury and kidnapping, may, depending on circumstances, cover other acts listed in the definition of crimes against humanity in Article 7 of the Rome Statute. Greater difficulties may, however, arise in respect of acts constituting apartheid and torture. Many Commonwealth countries are party to one or both of the Apartheid Convention[17] and the

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[14] *Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal*, opened for signature 8 August 1945, 82 UNTS 279 (entered into force 8 August 1945) [hereinafter *Nuremberg Charter*]

[15] See Article 6(c) *Nuremberg Charter*; Article 3 *Statute for the Rwanda Tribunal*. Cf Article 5 *Statute for the Former Yugoslavia Tribunal*

[16] Canada is one exception where 'crimes against humanity' exists as a separate offence under the Canadian *Criminal Code*, RSC 1985, c C-34 (as amended by RSC 1985, c 30 (3d Supp))

[17] *International Convention on the Suppression and Punishment of the Crime of Apartheid*, opened for signature 30 November 1973, 13 ILM 50 (entered into force 18 July 1976)

Torture Convention.[18] The critical question will be whether or not implementing legislation has been enacted to bring those offences into the domestic criminal law. It should also be noted that even if a Commonwealth country already has a Torture Convention Act (or equivalent legislation) which implements the obligations of the Torture Convention, it is likely that the definition of the domestic criminal offence will mirror that in the Convention itself. Given that the Article 7 definition of torture is wider in scope than the Convention definition, a State Party to the Rome Statute will still need to review its existing legislation criminalising torture.

15. Even where domestic criminal law covers the *actus reus* of a crime against humanity, the potential limitations of territorial jurisdiction discussed in relation to genocide may also apply equally here.[19] Moreover, it seems to us that domestic penal provisions fail to capture what makes the international crimes truly heinous and distinguishes them from domestic 'equivalents'. What gives the acts listed their dubious status as international crimes is the additional element – the context or 'situationing' for crimes against humanity and the mental element for genocide.[20] The acts listed in Article 7 of the *Rome Statute* are proscribed *when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.*[21] The domestic criminal law of most Commonwealth countries would simply not address these aspects of the international crime.

C. *War Crimes*

16. The provisions of the *Rome Statute* dealing with war crimes are the most detailed of the four substantive crimes within the Court's jurisdiction *ratione materiae*. They are based primarily on the *Four Geneva Conventions* of 1949[22] and on the 1977 First and Second *Additional Protocols*,[23] as well as on *Hague Convention IV* of 1907.[24] Article

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[18] *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, UKTS 107 (1991), Cm 1775; 23 ILM 1027(1984); 24 ILM 535 (1985), (entered into force 26 June 1987)

[19] There are obvious exceptions to this as Senator Augusto Pinochet, for example, has discovered in respect of the universal jurisdiction of UK courts in respect of alleged acts of torture!

[20] This is not to say that a single instance of torture, for example, is not of the same order of an international crime. However, for those crimes with domestic parallel, what 'elevates' them to the level of international opprobrium is this additional element of context or scale, or intention

[21] This is necessarily going to be an element to be considered by the ICC when determining its own jurisdiction in a particular case

[22] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 UNTS 31 [hereinafter *First Geneva Convention*]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 UNTS 85 [hereinafter *Second Geneva Convention*]; *Geneva Convention Relative to the Treatment of Prisoners of War*, 75 UNTS 135 [hereinafter *Third Geneva Convention*]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287 [hereinafter *Fourth Geneva Convention*]. All Conventions were opened for signature on 12 August 1949 and entered into force on 21 October 1950. As at 24 March 1999, there were 188 States Parties

[23] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 1125 UNTS 3; 16 ILM 1391 [hereinafter *Additional Protocol I*]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 1125 UNTS 609; 16 ILM 1442 [hereinafter *Additional Protocol II*]. Both Protocols were opened for signature on 8 June 1977 and entered into force on 7 December 1978. As at 24 March 1999, there were 145 States Parties

[24] *Convention Concerning the Laws and Customs of War on Land (Hague IV)*, opened for signature 18 October 1907, 205 CTS 277, (entered into force 26 January 1910) [hereinafter *Hague Convention*]

8(1) is a threshold provision: 'The Court shall have jurisdiction in respect of war crimes *in particular* when committed as a part of a plan or policy or as part of a large-scale commission of such crimes' (emphasis added).[25] Paragraph 2(a) covers grave breaches of the *Geneva Conventions*; 2(b) covers 'Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law...'; 2(c) and (d) cover common article 3 of the *Geneva Conventions*, dealing with armed conflicts not of an international character; 2(e) and (f) cover prohibitions on other serious violations of the laws and customs applicable in internal armed conflicts.

17. While some Commonwealth countries have no legislation at all to implement their obligations under the *Geneva Conventions*, there are others which do have a *Geneva Conventions Act* (or equivalent legislation) along the lines of the UK Act by the same name.[26] The UK legislation took a minimalist approach to the implementation of Convention obligations - only granting universal jurisdiction to domestic courts in relation to grave breaches of the *Four Geneva Conventions* as required pursuant to the Conventions. Most Commonwealth countries have followed this basic approach. Given that the UK recently ratified both *Additional Protocols* of 1977, the legislation has now been amended to include penal sanctions for grave breaches of *Additional Protocol I*.[27] Some Commonwealth countries, which ratified the *Additional Protocols* earlier than the UK, have already amended their legislation to include penal sanctions for grave breaches of *Additional Protocol I*.[28] These countries have tended not to include penal sanctions for serious violations of *Additional Protocol II* because the Protocol does not obligate States to do so.

18. The crucial point here is that no Commonwealth country currently has domestic legislation comprehensive enough to cover the full scope of the definition of war crimes in Article 8 of the *Rome Statute*. Even those countries which have legislation implementing penal sanctions for grave breaches of the *Four Geneva Conventions* and *Additional Protocol I* do not currently criminalise violations of international law committed in the context of non-international armed conflicts. A major advance of the *Rome Statute* over the traditional international law of war crimes is that non-international armed conflicts will now be subject to the jurisdictional competence of the International Criminal Court, as will other serious violations of the laws and customs of war. The implication of this is that, at a minimum, Commonwealth countries contemplating ratification of the *Rome Statute* will need to extend existing legislation to cover those aspects of Article 8 of the *Rome Statute* beyond grave breaches of the *Conventions* and *Additional Protocol I*. Countries with no legislation at all will, of course, need to implement more extensive legislation.

D. *Aggression*

19. The new International Criminal Court will not have jurisdiction over the crime of aggression unless and until the States Parties agree on an acceptable definition. Given the political implications and difficulties involved in drafting any definition, it is likely that agreement, and hence the Court's jurisdiction, will be some time off. Nonetheless, a few

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[25] One of the other versions suggested at Rome would have substituted 'only' for 'in particular' in the above clause. Another option had no provision on threshold: See Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum, *Draft Statute for the International Criminal Court*, A/CONF.183/2/Add.1, (Apr. 14, 1998) at 25.

[26] The *Geneva Conventions Act 1957* (UK) (as amended by the *Geneva Conventions (Amendment) Act 1995* (UK))

[27] The *Geneva Conventions (Amendment) Act 1995* (UK) enables effect to be given to the *Additional Protocols* of 1977. The instrument which brings this Act into force is the *Geneva Conventions (Amendment) Act 1995 (Commencement) Order 1998* (UK)

[28] See, for example, the legislation of Australia: *Geneva Conventions Act 1957 (as amended 1991)* (Cth); New Zealand: *Geneva Conventions Act 1958 (as amended 1987)* (NZ); and Canada: *Geneva Conventions Act* RSC 1985, c G-3

observations in terms of our present project are warranted.

20. Aggression *per se* is not a crime under the domestic law of any Commonwealth country as far as we can discern. While it would certainly be possible to draft a domestic equivalent for the crime of aggression once a definition is agreed to, this may be a situation in which an independent international tribunal is, if not ideally placed, then better placed than any country to investigate and prosecute any allegation made. The nature of the crime of aggression would involve a country passing judgment on the policies and acts of another country - something domestic courts are understandably loathe to do. Whilst it is not necessarily the case that a charge of aggression before the Court be initiated by a determination of the Security Council, this is likely in practice[29]

VI. Conclusions: Some Possible Approaches in Preparation for Ratification of the *Rome Statute*

21. In summary, it is apparent that, with the exception of the grave breaches provisions of the *Geneva Conventions* and *Additional Protocol I*, there is probably scant specific domestic coverage of the crimes within the jurisdiction of the ICC for most Commonwealth countries. Nonetheless, in many, if not most, cases there will be coverage of the acts making up those crimes by the general domestic criminal law.

22. Any Commonwealth country which wishes to maximise the complementarity provisions of the *Rome Statute*, therefore, has two options. The first is to continue to rely on existing domestic criminal law, accepting that each country may be obliged to defer to the ICC's jurisdiction in relation to any situation not covered. Assuming that most countries will not want to be in the position of automatically forfeiting a right to national jurisdiction, this option seems unlikely to be followed by the majority of countries. The second, and more likely option is to implement new and/or amending legislation to comprehensively reflect the *Rome Statute* crimes.

23. There are some general issues Governments will need to consider including, for example, whether to extend universal jurisdiction to cover all offences wherever committed, or whether to limit the jurisdictional competence of national courts to acts of nationals. Universal jurisdiction exists at customary international law in relation to all of the international crimes referred to in the *Rome Statute*.[30] Governments will also need to consider other general issues such as the 'principles of legality', including the different bases for individual criminal responsibility and the various defences available under the *Rome Statute* to determine the consistency or otherwise of existing domestic criminal law. Governments will also need to determine how any new legislation will define the offences: whether (1) new legislation simply criminalises the offences referred to in the *Rome Statute* and then refers to the Statute, appended to the legislation, for definitions of the crimes — along the lines of existing *Geneva Conventions Acts*; or (2) the new legislation includes more detail on definitions and the elements of each offence.

24. Apart from these general issues, governments can choose either to enact: (1) entirely new omnibus legislation — something along the lines of a new *Crimes (International Criminal Court) Act* which gives national courts jurisdiction over each of the substantive crimes in the *Rome Statute* on the basis of the Statute's own definitions of those crimes; or (2) only amendment to existing legislation — particularly the *Geneva Conventions Act*, for example, or countries' existing *Criminal Codes*. The suggestion here is not that the only choices are one or other of these two approaches. Between the two extremes, governments have a broad range of options to both amend some existing legislation and to enact new additional legislation to supplement amendments as required.

25. Whatever legislative approach is undertaken, legislation is, of course, only part

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29 See Timothy LH McCormack and Gerry Simpson (eds), 'Achieving the Promise of Nuremberg: A New International Criminal Law Regime?' in *The Law of War Crimes* (1997) 229.

30 Kenneth C Randall, 'Universal Jurisdiction under International Law' (1998) 66 *Texas Law Review* 785, 788.

of the task. We have focused exclusively on the issue of legislative implementation in this paper. The issue of complementarity presents a welcome opportunity to see tremendous improvement in domestic penal provisions for prosecution of serious international crimes. However, it is fitting to conclude here by recognising that the most comprehensive legislation in the world is no guarantee of an end to impunity. Legislation is usually a prerequisite for prosecution but does not guarantee action of the part of an individual country. The reticence by most States Parties to fulfil the obligation in the *Geneva Conventions* to prosecute or extradite is ample testimony to the reality of the lack of political will to ensure that any legislation does more than salve our collective humanitarian conscience. The greatest outcome of the years of negotiation which culminated in Rome would be for countries - even if only because of the threat of international jurisdiction - to demonstrate an emboldened commitment to enforcement of human rights law and international humanitarian law at home as well as abroad. What an encouraging start to the new Millennium that would be!

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