

March 13, 2001

Joint Standing Committee on Treaties
Parliament House
Canberra ACT 2600

P.O. Box 251
Glen Waverley
Victoria 3150

Attention: Andrew Thompson
Committee Chairman
Cc: Committee Members

Dear Sir,

**PROPOSED INTERNATIONAL COURT AND IMPLICATIONS UNDER
SECTION 51 EXTERNAL POWERS SECTION OF CONSTITUTION FOR
AUSTRALIA**

Under the Australia Act Australia ceased referring any matters from the High Court to the Privy Council in London, amongst other things. Australia was then able to independently decide its own judicial matters, it would be highly unwise to for Australia to once again defer to another legal entity outside Australia, unless proper safeguards to protect our Common Law system were in place and such an arrangement was not contrary to the Australian Constitution. It would not be in the long term National Interest of Australia to do otherwise.

The independence of the Australian Judiciary is based on the Common Law system derived from the Westminster system of Government is what makes Australia different from other countries, dispensing justice based on Common Law to all its citizens. Any one under Australian Law is innocent until proven guilty. It now appears that the basic freedoms of all Australians are now under threat from two level's. At a State level in Victoria the discussion paper on the proposed Racial and Religious Tolerance Bill has been put before the Victorian Parliament for consideration is one aspect. The very nature of this Law, if past, would reverse the onus of proof and introduce a law, which is used by totalitarian systems, if passed in its present form. Such a proposed Law is quite contrary to our tradition and heritage. All Law should be based on providing equity to all, irrespective of ones religious belief or otherwise.

The foundation of all law should provide for equity and fairness both in the way it is drafted and how it is exercised. We are presently free in Australia to hold to and practice a particular moral or religious belief or not. The Federal Constitution confers the right to freedom of religion on all Australian subjects. There are those who proponents of the ICC who do not appear to hold that these same values as self evident and desirable. The law must be seen to be impartial in order to have meaning and effect while the intent of the law needs to respect traditional values not just cater for minority viewpoints.

The present Government is to be commended for introducing the Joint Standing Committee on Treaties to study such submissions. However, that does not give the Attorney General or the Government the license to further sacrifice the sovereignty of Australia on the altar of expediency, just because it feels like the right thing to do. Rather, the future well being of Australia needs to come first. Too much of Australia's foreign policy has been done on what is expedient at the time and not based on principle, particularly when it comes to UN Treaties on Human Rights. The make up of those participants on the UN Committee who design these Treaties often come from countries who have a questionable understanding of what proper Justice represents. Instead, as a matter of principle Australia should be taking a more

strident and active role to increase the establishment of genuine equity and justice in international law by requiring greater safeguards and accountability for such entities to comply with the Australian system of due process, which should be a fundamental prerequisite for UN controlled bodies such as the ICC. This is certainly not the case now.

This can only be done by Australia using greater restraint and using better judgment, and with stronger advocacy to ensure that Australia does not lose more than it actually gains by ratification of such a UN Treaty or Charter. There should be no ratification of any such a Treaty unless the ICC Statute provides for the provision of an Independent Prosecutor approved by Australia for any case involving Australia, who will be subject to the statutes of Australian Law in any case involving an Australian or resident of Australia who has been indicted by the ICC.

The judicial process should be further safeguarded to protect the innocent from arbitrary or unwarranted treatment by ensuring that the due process of law is maintained by the ICC in accordance with same safeguards provided for under Australian Law and that only after the matter has been referred to by a Prosecutor approved by the High Court by majority vote, that a accused person from a third country, other than Australia should they be tried under the same Law of that citizens country or if the person so chooses under the Common Law and Trial procedures of Australian Law to ensure maximum fairness and equity is maintained. It is important to understand that many other countries around the world do not have the safeguards, values or legal processes which form an essential part of Australia's tradition and heritage. This includes being able to be properly legally represented.

Therefore the High Court of Australia should remain the final judge in legal matters or opinion, unless by majority vote the matter be referred to the ICC. The ICC under no circumstances should be allowed to make decisions that take precedent over Australian Law or decisions made by Australian Courts. This would be legally contrary to section 51 in the Australian Constitution. Therefore to protect the Australian legal process no ICC definitions of what constitutes "most serious crimes of international" should not be enacted into Australian law. Australia needs to have an arms length relationship with the ICC to make the ICC more accountable to its own mandate by requiring the ICC to adopt the Common Law as part of its *raison d'être*. The reverse onus of proof does not guarantee the same provision of fairness to the defendant.

The only exception whereby the ICC may legally should be legally be able try some one from Australia is where a person cannot be tried in a third country, where that countries legal system has fallen into disarray. This strict statute of limitation should be imposed on the ICC by all nations to safeguard the integrity of international law, if a citizen of another country who is not an Australian citizen who cannot be tried in his own country (ie A Serbian Citizen who had committed a crime during the Kosovo crisis but was resident in Australia) only then under these circumstances should the ICC be able exercise its judicial authority. A legal Statute of Limitations should be imposed on the ICC by all Nations, as to the Legal Authority of the ICC and its limitations. An Australian would be extradited to Australia to be tried under Australian Law. Australia has a solemn responsibility to act as an advocate for this requirement and to require this to be a statutory provision of the ICC, if the ICC is constituted.

This should be a matter of principle to ensure that the ICC will uphold the standards of international justice, while respecting the individual sovereignty of each Nation. The danger of not doing so could make the ICC open to abuse as the judgment of any Court is only as good as that court is able to act impartially and fairly dispense justice without undue influence from NGO's or Government's other such

international bodies possibly interfering in the legal process and distorting the impartiality of the ICC's independence and decision making processes. The proper checks and balances are not yet in place to ensure that the ICC will be a just Court and seen to be just when it comes under international scrutiny from those in the world community, who recognize the importance of retaining justice and equity in any judgments that might be made by the ICC and also by retaining the proper respect for the legal precedents of other countries legal processes.

There is a genuine danger that the ICC could merely become another tool by those who see social engineering as the ultimate goal of such a Court to interfere in the internal affairs of other countries. This could be another way to try to impose these so called Conventions such as the United Nations Convention on Human Rights on Australia. The main problem is with this idealistic approach to Law is that it has not been derived from the Parliamentary process or tested by proper debate and it has all been created by people who are un- elected and be people who in some cases have a biased view of Law, which only reflects their point of view and does not take into account differing views. Differing views are essential if sound a legal framework is to emerge. Instead the role of any Court should be built on a moral foundation, which is the basis of Australian Law, as well as taking into account all the views in the world community, particularly who respect the fundamental right of all peoples to have freedom of religion, freedom the right to uphold moral values and value of the traditional family in sustaining a stable world community.

Under these circumstances Australia should refrain from signing the ICC charter until the proper legal safeguards and limitations of the jurisdiction of the ICC to ensure that Sovereignty of Australia over its legal system is maintained and the independence of the Australian legal system is safeguarded to protect the legal rights of every Australian from possible abuse intentional or otherwise. Australian Law involving Australian Citizens shall be what takes precedence over any statute which shall govern ICC and its jurisdiction. ICC legal authority and is only what individual nations allow the ICC to have in any case. Therefore wisdom dictates that like all power it needs to wisely apportioned in the maintenance of Justice in Australia and globally not be able take precedence over Australian Law in proper compliance with the intent of Section 51 of the Australian Constitution now or in the future.

Yours faithfully,

RICHARD H. GELLIE.