GPO Box ...5
PERTH WA 6842
PHONE (08) 9321 1925
FACSIMILE (08) 9321 1798

COUNCIL FOR THE NATIONAL INTEREST

WESTERN AUSTRALIAN COMMITTEE

A Supplementary Submission Submission No. 19.1

TO : The Secretary
The Joint Standing Committee on Treaties
Parliament House
CANBERRA A C T 2600

Re : Inquiry into the International Criminal Court

This supplementary submission is made in response to the invitation from members of the Joint Standing Committee on Treaties (JSCOT) at the public hearing in Perth 19 April, 2001.

At the outset we reiterate our contention, supported by the writings of Professor R G Wilkins(1) that:

* the body which is to now emerge from the 1998 Statute for an International Criminal Court (the Statute) goes far beyond "war related atrocities" and in fact will transfer a great amount of decision making power from a sovereign nation (such as Australia) to a remote international court. The language by which it does this is vague and thus capable of expansion to include conduct, well beyond war related atrocities whilst at the same time allowing pressure groups to influence prosecutorial functions.

* The Statute asserts that the ICC will have jurisdiction even over non-ratifying countries. This concept of "universal jurisdiction" is contrary to well established principles of international law. Reason and prudence dictate against disregarding the established boundaries of international law.

* "Complementarity to national criminal systems", which proponents of the ICC invoke to calm concerns that the ICC might seriously intrude into matters which are within the domestic jurisdictions of nation-states is but a legal shadow. The manual for the ratification and implementation of the Statute asserts that to comply with complementarity "modifications must be made to a state's "code of criminal law...and human rights legislation" and further "should there be a conflict between the legislation of the ICC and existing (state) legislation" inter-national law established under the Statute "takes precedence". Clearly complementarity will operate as an international supremacy clause rather than protecting national sovereignty.

* There is significant potential for prosecutorial abuse, not only from the fact that the prosecutor can initiate an investigation and prosecution, without oversight by any national or international power but also, because Article 44 allows the prosecutor to accept "any...offer" of "gratis personnel offered by States Parties, intergovernmental organisations and non-governmental organisations." Imagine some time in the future, "gratis personnel", doing the work of the Court and paid for by an NGO with a particular axe to grind! It is quite frightening and totally unacceptable.

RATIFICATION

The National Interest Analysis asserts that "Ratification will allow Australia to sustain this leadership role, which enables Australia to ensure that its interests are properly taken into account. It is important for Australia to be one of the first 60 ratifications, in order to have influence in the Court's administration, including its financial matters, the setting of its budget and the appointment of its judges." This is perhaps a little disingenuous. Whether Australia ratifies in the first nations or later, it would still be a member of the Assembly of States. The Assembly of States "shall consider and adopt, as appropriate, the recommendations of the Preparatory Commission." Australia was a member of the Commission and would not therefore vote against the recommendations. Herein lies a problem. The elements of crimes was agreed by the Preparatory Commission and this is the area of real concern as to future interpretation of these vaguely defined crimes.

Should there be just 60 countries ratifying, ie the number required to bring the Statute into force, then those 60 nations will form the Assembly of States. Decisions would be made by "a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting."
It is farcical that these "decisions of substance" could be made by just two thirds of thirty one which equals 21 States Parties, being, perhaps a number of the less democratic and less developed nations at that.

Clearly Australia's national interest would best be served by withdrawing from this farce rather than becoming further involved through ratification.

AN ALTERNATIVE

When giving notice of withdrawal Australia could propose the following alternative:

* there be established under the auspices of the United Nations Security Council a permanent War Crimes Unit;

* this Unit would have the power to immediately put in place War Crimes Courts as and when the need emerges subject only to the final approval of the Security Council;

* the crimes to be dealt with would be clearly defined accepted "war crimes and war related atrocities";

* the terms of reference, judicial appointment, support staff, salaries, expenses and other arrangements would be agreed as relevant to each specific situation as it emerged;

* there would be a permanent panel of judges chosen for their specific expertise in these crimes and called to duty when the situation arose;

RECOMMENDATION

We reiterate our recommendation, which essentially is:

that Australia should not ratify the Statute but rather should withdraw from the Statute whilst at the same time supporting the establishment of a more specifically focussed "War Crimes" body and further, that Australia's treaty making process should be amended to make it mandatory for all treaties to be approved by the Parliament before being signed or ratified.

Denis J Whitely
Executive Director
CNI - WA

14 May 2001

References

(1) Wilkins, Richard G., Professor of Law and Managing Director The World Family Policy Centre, J Reuben Clark Law School, Brigham Young University, "Doing the Right Thing : The The International Criminal Court and Social Engineering.