Submission

to the

Joint Standing Committee on Treaties

Inquiry into the International Criminal Court

by

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Introduction

The announcement by the Australian Government on 10 October 2000 of its intention to ratify the Statute establishing an International Criminal Court (ICC) under the auspices of the United Nations (UN) has taken many Australians by surprise.

When Australia indicated its agreement in principle with the establishment of the Court by signing the Statute on 9 December 1998, media coverage appears to have been meagre at best. Again, a little over a year later, the media largely ignored the federal Attorney-General's announcement (with the Minister for Foreign Affairs and the Minister for Defence) on 12 December 1999 of the government's intention to introduce legislation necessary to reflect Australia's commitment to the Statute. Nor was there any discussion of the principles of justice underpinning the proposed International Criminal Court, compared with the principles operating in Australian courts. The 57-page Statute has 128 Articles and the accompanying 100-page Rules of Procedure has 225 sections. It is no light matter!

Fortunately, the procedure established by the Howard Government of referring all proposed international treaties to the Joint Select Committee on Treaties for review has resulted in the Committee initiating a public inquiry into this matter. The publication of advertisements in major Australian newspapers on Saturday 4 November 2000 has given the public a welcome opportunity to comment on the proposal for Australia to become committed to the International Criminal Court.

Festival of Light opposes ratification of the ICC Statute as contrary to the best interests of Australians for the reasons set out below.

- The Statute has the effect of overriding laws of self-governing sovereign nations, such as Australia.
- Ratification of the statute would be an improper use of the external affairs power of the Australian Constitution.
- The crimes described in the Statute are sufficiently vague that they could be exploited for social engineering against the beliefs and values of most Australians.
- The proposed procedures of the Court are inferior to those of Australian courts and would be vulnerable to manipulation, corruption and injustice.

Background

In 1951, following the conclusion of the Nuremberg and Tokyo War Crime Tribunals, a proposal was circulated among members of the newly formed United Nations to create a permanent standing court.[1] The proposed court would be responsible for prosecuting grave crimes of international concern committed in armed conflict. Nations of the world initially baulked at the idea of a permanent court because of the potential ramifications for individual state sovereignty.[2] The idea, however, continued to resurface whenever the world was confronted with serious war-time crimes. Finally, following the Gulf War in February 1991, the General Assembly of the United Nations passed a resolution calling for the official creation of a permanent criminal court to deal with war-related atrocities.[3]

Public pressure for the creation of a permanent court increased in the early 1990s as the world reacted to reported atrocities in Rwanda and the former Yugoslavia. Informal meetings on the issue, commenced early in 1990, ultimately resulted in a draft statute for the ICC. As that draft statute emerged, however, the mandate for the proposed ICC slowly but steadily expanded. Instead of dealing solely with well-established customary war crimes, the draft text became a veritable handbook on emerging human rights law, weighted with countless provisions never envisioned by the General Assembly's initial resolution to create the ICC.[4]

A complex draft statute was presented to UN delegates at Rome during the summer of 1998 for finalisation. This draft statute went well beyond the initial draft prepared by the International Law Commission (or ILC). The ILC draft, for example, generally restricted the jurisdiction of the proposed International Criminal Court to nations that had become a party to the treaty creating the Court, and limited the substantive reach

of the Court to customarily recognised international crimes.[5] The final version of the Statute, adopted in Rome on 17 July 1998, created a Court with hitherto unprecedented jurisdictional reach and with substantive authority to adjudicate a long list of crimes previously unknown to the established canon of customary international law.

According to an Australian government briefing paper,[6] Australia played a leading role in the formal negotiations that commenced in 1995, under the auspices of the UN, for the International Law Commission to prepare a draft Statute. This leading role allowed Australia to be closely involved in developing the text of the Statute. The Australian States and Territories were apparently consulted during this preparatory phase through the Standing Committee of Attorneys-General and, more recently, through the Standing Committee on Treaties process. The briefing paper said there were no objections from State or Territory governments to Australian ratification of the Statute. This raises the question: How adequately were State and Territory attorneys-general briefed on the controversial nature of this Statute?

Serious objections to the proposed Court are beginning to be heard. Professor Wilkins, professor of law at the World Family Policy Center, who attended the 1998 Rome diplomatic conference that finalised the Statute, has expressed grave reservations about the ICC.

As currently structured, the ICC Statute transfers a vast amount of decision making authority from previously sovereign nations to an international court that will be remote from (and unable to be controlled by) the diverse cultures and peoples of the world. It does so by means of language which is vague and, therefore, capable of expansion to conduct well beyond that which (at present) is considered to be within the customary reach of genocide, war crimes and crimes against humanity. The Court's structure, finally, permits pressure groups to obtain ready influence over prosecutorial functions. The net result is that the ICC has the potential to become – not a Court dealing primarily with "the most serious crimes of international concern"[7] *– but a tool for radical social engineering. This potential is so great that I fear the Court may well tread upon the fundamental right of nations to democratic self-determination protected by the UN Charter and numerous human rights instruments.*[8]

The Northen Territory Chief Minister, Hon Dennis Burke, has called for greater consultation with the States before Australia ratifies international treaties. And the Joint Select Committee on Treaties Chairman, Hon Andrew Thomson, has reported "stonewalling" by Canberra bureaucrats when he sought additional information about the proposed ratification of the Statute.[9]

Intrusion on National Sovereignty

Conflict with the Vienna Convention on the Law of Treaties

The jurisdiction claimed by the ICC is unquestionably novel. Not since the Treaty of Westphalia in 1648 has a treaty *ever* purported to bind parties who are not signatories to the treaty. The ICC Statute, however, does just that.

As adopted in Rome, the ICC Statute asserts jurisdiction over defendants so long as either the "State on the territory of which" a crime was committed or "the State of which the person accused of the crime is a national" has ratified the statute.[10] Accordingly, the Statute asserts jurisdiction over a large potential class of defendants residing in non-signatory states. So long as the "crime" is committed in a signatory state, non-ratification of the ICC Statute by the state in which an alleged criminal defendant resides will not defeat jurisdiction. As a result, a decision in one state to engage in conduct that has an impact in a second, ratifying state will subject the conduct to prosecution – even if the first state has not ratified the ICC Statute.

By asserting that the International Criminal Court can claim jurisdiction over a non-signatory state and its citizens, the ICC Statute makes an unabashed claim of international supremacy over the actions of domestic policymakers. Inherent in this claim is the startling conclusion that the International Criminal Court, as an organ of international government, has the power to coerce and command a (previously) sovereign state, regardless of that state's assent to the treaty creating the Court. The standard law for centuries, expressed in the Vienna Convention on the Law of Treaties, is that "a treaty does not create either obligations or rights for a third State without its consent."[11]

Conflict with national jurisdictions

The Statute, according to its terms, is designed to be "complementary to national criminal jurisdictions."[12] As such, the Court is designed to take jurisdiction only when a nation is "unwilling or unable" to act.[13] This language appears to protect national sovereignty, and is invoked by proponents of the Court to calm concerns that the Court might seriously intrude upon questions (such as culture and religious practice) that, according to the UN Charter, are "within the domestic jurisdiction" of a nation-state.[14] But, while it sounds reassuring, the notion of "complementarity" is a legal shadow. Rather than protecting national sovereignty and local democratic self-determination, the concept of "complementarity" operates much like an international supremacy clause.

A recently issued manual for the ratification and implementation of the Rome Statutes explains that "the ICC is no ordinary international regulatory or institutional body."[15] Indeed, in order to comply with the dictates of "complementarity," the manual asserts that "modifications" must be made to a state's "code of criminal law . . . and human rights legislation."[16] Why? Because, if national law diverges in any important detail from the law established by the ICC Statute, that nation will invite the international Court to step in and take action. As the manual states, "should there be a conflict between the ICC legislation and existing [state] legislation," international law established under the ICC "takes precedence."[17] Accordingly, the manual declares that "[i]t would be prudent" for states "to incorporate all acts defined as crimes" into their own "national laws."[18]

Other Court advocates are even more blunt. A booklet issued by The Women's Caucus for Gender Justice asserts that "ratification of the treaty creating the Court will necessitate in many cases that national laws be in conformity with the ICC Statute."[19] The caucus states that implementation of the ICC Statute will provide an opportunity for groups "all over the world to initiate and consolidate law reforms ..."[20] Indeed, the gender caucus asserts that "[i]t is this aspect of the Court – the possibility of national law reform – which may present the most far-reaching potential" for change "in the long run."[21] According to the Caucus, "States parties will be required to review their domestic criminal laws and fill in the gaps to ensure that the crimes enumerated in the ICC Statute are also prohibited domestically."[22]

In other words, national law *must* mirror the terms and conditions of the ICC Statute, and ultimately the judicial decisions of the ICC itself. Otherwise, a state will find its law being circumvented by the Court, which will take jurisdiction because that state will be found "unable" to act. This is the process by which "complementarity," instead of a shield, becomes a sword.

Improper use of Australian Constitution

Ratification by Australia of international treaties, such as the ICC Statute, relies for validity on Section 51(29) of the Australian Constitution - the external affairs power. This power has been interpreted so broadly in a series of judgements by the High Court of Australia that it has allowed Commonwealth legislation to override State legislation on matters otherwise outside Commonwealth power. This expansive reinterpretation of the external affairs power has been described as "the most blatant and cynical departure from the original constitutional intention that we have ever seen."[23]

Australia's classic commentary on the Constitution by Quick and Garran devotes six pages to this power, in which they make the following observation. *It must be restricted to matters in which political influence may be exercised, or negotiation and intercourse conducted, between the Government of the Commonwealth and the Governments of countries outside the limits of the Commonwealth. This power may therefore be fairly interpreted as applicable to (1) the external representation of the Commonwealth by accredited agents where required; (2) the conduct of the business and promotion of the interests of the Commonwealth in outside countries; and (3) the extradition of fugitive offenders from outside countries.*[24] In short, the original meaning of "external affairs" could be summarised as: foreign diplomacy, foreign trade and extradition of offenders.

The external affairs power of the Constitution played little part in Australia's governmental arrangements until the mid-sixties. The situation changed markedly as a result of three landmark High Court decisions known as the *Seas and Submerged Lands* case in 1975, the *Koowarta* case in 1982 and the *Tasmanian Dam*

case in 1983.[25] Dr Colin Howard, Hearn Professor of Law and Melbourne University for 25 years (1965-1990), commenting on these cases said he entirely disagrees with the view that "if Australia enters into an international agreement it can, with the assistance of s.51(29) of the Constitution, use that agreement as a means of getting its own way on domestic questions." He adds, "That is not the way the system should work."[26]

Every time the Commonwealth exploits an international treaty to get its own way in a major domestic dispute, it undermines Australia's federal structure and weakens our capacity and resolve to make our own decisions as an independent nation.

Growing disquiet about the use of the external affairs power culminated in the release on 20 January 1994 of a joint statement by eight major industry associations urging the federal government to change its approach to treaty-making. Towards the end of 1994, the Senate referred the operation of s.51(29) to its Legal and Constitutional References Committee.[27]

Against this background of disquiet about abuse of the external affairs power, Dr Colin Howard has proposed an amendment to s.51(29) of the Constitution prohibiting the external affairs power from being given a meaning and effect we do not want. He proposes adding after the words "external affairs" the following:

"provided that no such law shall apply within the territory of a State unless
(a) the Parliament has power to make that law otherwise than under this sub-section; or
(b) the law is made at the request or with the consent of the State; or
(c) the law relates to the diplomatic representation of the Commonwealth in other countries or the diplomatic representation of other countries in Australia."[28]

Festival of Light supports the amendment proposed by Dr Howard as an appropriate limitation of the external affairs power. Were this amendment to the external affairs power in place, the ICC Statute could not be ratified by the federal government alone. It would first be necessary for enabling acts requesting ratification of this Statute to be passed by all State parliaments. It would also be desirable, before ratification were permitted, for the federal parliament to pass an act authorising the proposed ratification.

Regardless of the merits or otherwise of the ICC Statute, Festival of Light would oppose ratification unless that action were supported by acts of the Commonwealth and all State parliaments.

Risk of Social Engineering

Genocide trivialised

Even if the ICC Statute and the Court's forthcoming judicial decisions supplant all conflicting national law, the Statute says that Court will only deal with "the most serious crimes of international concern."[29] Therefore, one might argue, there is no real risk that international judges will supplant the policy decisions of national legal systems in areas of true domestic concern. However, the elastic terms of the ICC Statute suggest that the Court – rather than dealing solely with genocide, mass murder and other similarly horrifying acts – may become the ultimate forum for the resolution of delicate questions of social policy.

The language of the ICC Statute is sweeping. Although the Statute purports to reach only serious crimes, the potential breadth of the crimes set out in articles 6, 7 and 8 of the Statute is limited largely by the imaginations of international lawyers and the judicial restraint (or lack of it) that will be exhibited by the judges on the Court. The crime of genocide, for example, includes not only killing members of a "national, ethnical, racial or religious group," but also "causing serious ... mental harm to members of the group."[30] Thus, the Court's machinery conceivably could be used to prosecute the racially and religiously charged rhetoric often employed by both sides of the on-going dispute regarding a Palestinian homeland in the Middle East. While no rational person approves of rhetoric inspired by racial or religious animosity, it is far from clear whether such name-calling-contests qualify as "most serious crimes of international concern."[31]

The Statute's definition of "genocide" as including "mental harm to members of a racial group" would be of particular concern to Australians who were involved in helping care for Aboriginal children a generation ago. The report *Bringing Them Home* tabled in Federal Parliament on 26 May 1997 describes the mental anguish suffered by the "stolen children" as "genocide".[32] The elasticity of the concept of genocide is indicated in an address by Professor Kenneth Minogue, who remarked that: "The term *genocide* has on various occasions been used by indigenous spokesmen to refer to all cases where a tribal child is assimilated to European culture ..."[33] We are left with the question: Could those Australian people who preserved the lives of indigenous children by taking them into care find themselves transported to The Hague to be prosecuted in the International Criminal Court for the crime of genocide?

Crimes against humanity

Of great concern are the potentially far-reaching "crimes against humanity" set out in Article 7. The Statute condemns as "crimes against humanity" such acts as murder, extermination, enslavement, forcible transfer of population, torture, sexual slavery, persecution and "other inhumane acts."[34] These crimes certainly *sound* terrible, but the ICC Statute gives very little guidance as to what these words *actually proscribe.*

For example, the crime of "persecution," as set out in the Statute and as further refined in the recently issued "Elements of Crimes," condemns the "severe deprivation" of a group's "fundamental rights."[35] The crime of "inhumane acts" criminalises the infliction of "great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act."[36] What do these terms proscribe? At present, it is impossible to say definitively. But, the arguments of some proponents for the Court suggest that the reach of these proscriptions will be far broader than a quick reading of the ICC Statute might suggest.

Consider some of the rhetoric of activists at the forefront of society's gender wars. According to one prominent legal theorist, women have the choice of "either . . . marrying or . . . aligning herself with a pimp .... In both cases she typically becomes emotionally, financially, physically, and sexually dependent on and subordinate to a man."[37] Another legal scholar, Dianne Post, in a recent edition of The Women's Rights Reporter, has boldly called for the abolition of marriage.[38] According to Ms Post, *Marriage itself originated as a way for a man to have one woman at his beck and call. For a woman, it was at first a relief to be responsible only to one man, who was obligated to provide for her, rather than to the entire tribe or clan as was a single woman. Feminist rhetoric that the only difference between a prostitute and a wife is that the wife has sold herself to only one man has a basis in history.*[39] In other parts of her article, Ms Post argues that marriage constitutes unjustifiable persecution of women on economic and other grounds.[40]

Were Ms Post (or others of similar ideological ilk) to serve as the judges and prosecutors for the International Criminal Court (a distinct possibility), the crimes of inhumane treatment and persecution could be used to indict government or religious[41] policies dealing with marriage and dissolution of marriage. Laws and religious practices that promote marital union, for example, arguably impose "great suffering" and "serious injury" to the mental health of a spouse who wishes to dissolve the relationship, thus constituting "inhumane acts." Similar arguments, centered upon the claim that autonomy is a "fundamental right," could be made under the rubric of the crime of persecution.

Enforcement of social policy

While these (and related) arguments unquestionably press the outer boundaries of the ICC's plain language, they cannot be dismissed. In Rome, The Women's Caucus for Gender Justice boldly attempted to use the ICC's judicial machinery to create a world-wide right to abortion. It did so by inserting the previously unknown crime of "forced pregnancy" into the Statute.[42] The premise of this crime was straightforward: if a woman became pregnant and was unable to terminate the pregnancy because national law prohibited or regulated access to abortion, the woman would be unlawfully "forced" to be pregnant.[43] Because of its novelty and obviously far reaching impact, the issue of "forced" pregnancy became one of the most contentious at the entire Rome conference. And, although the caucus' effort to obtain global abortion on demand ultimately failed,[44] the very attempt makes clear that the ICC Statute can be used – not just to prosecute criminals – but to create social policy.

Professor Wilkins of the World Family Policy Centre reports that, during a December 1999 Preparatory Commission meeting held to draft Rules of Procedure and Elements of Crimes Accordingly, 11 Arab nations introduced a proposal which, among other things, insured that the ICC would not be used to prosecute "family matters."[45] The proposal also sought to protect the "rights, duties and obligations incident to marriage" as well as fundamental "religious principles" from becoming subject to prosecution. In March 2000, The Women's Caucus for Gender Justice responded by issuing two documents: (1) a booklet which explains how the ICC can be used to enforce the Beijing Platform for Action[46] and (2) recommendations and commentary on crimes against humanity.[47] These documents demonstrate that – whatever its "plain language"– the ICC Statute *could* be used to restructure family life and religious practice.

Wilkins comments that, during the past decade the United Nations System has negotiated numerous "platforms," "agendas" and "declarations" setting out aspirational goals for Member States in virtually every area of human life. The Women's Caucus for Gender Justice unquestionably intends to use the International Criminal Court to enforce these (previously) "soft law" norms. As the caucus' March booklet explains, "the creation of the world's first permanent criminal court" provides "an opportunity to codify as international law ... many of the strategic objectives outlined and committed to by Governments in [such documents as the Beijing] Platform for Action." The ICC, in short, could transform previously unenforceable (and often broadly worded) norms into indictable criminal conduct. In the Caucus' view, the ICC is not merely (or even primarily) a court to deal with the "most serious crimes of international concern." Rather, the ICC is an institution with which to achieve "many of the commitments in the [Beijing] Platform for Action *as well as a mechanism through which to achieve others*."[48]

Therefore, if the gender caucus is to be taken at its word, the ICC Statute could be used to re-engineer social policies throughout the world.

Judicial action that refashions social norms has become quite commonplace in the United States, Canada, Australia and the European Union. The impact of such judicial tinkering is now becoming clear in the decaying family and social structures in these parts of the world. The International Criminal Court could well become the mechanism by which the Western innovation of judicially (rather than legislatively) crafted social policy – and its accompanying consequences – are exported to the rest of the world.

Procedural Abuse

Ideological judges

One of the most important characteristics of a sound judicial structure is judicial impartiality.[49] Professor Wilkins reports that, in Rome, certain groups made it quite clear that they intended to use the court to enforce and further their particular (and debatable) social agendas. Perhaps the largest interest lobby at the conference espoused the vague concept of "gender sensitivity" as a litmus test for judicial selection. As a result, the Draft ICC Statute required "gender balance" on the court and mandated that *any* judicial nominee must possess "expertise on issues related to sexual and gender violence."[50] These selection criteria were problematic because they have no well-established, universally recognised and cohesive legal meaning. "Gender balance" could have created a "gender" quota for the court that would undermine any selection system based primarily on merit, and could have even required that judges be selected precisely *because* of their particular "sexual orientation." The requirement of "expertise" on "sexual and gender violence" had equally ambiguous ramifications.

Expert "gender" judges and prosecutors, of course, might be expected to be receptive to the kinds of arguments proposed by legal scholars who would subject domestic family law to the perceived human rights strictures gleaned from the ICC Statute's list of "crimes against humanity." As adopted, however, the ICC Statute does not require specific "gender expertise." Instead, the Statute mandates that "States Parties shall ... take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children."[51] One can only wonder how judges with "legal expertise" regarding "violence against women and children" will receive arguments asserting that various cultural and religious practices violate international humanitarian law.

Unaccountable prosecutors

Even assuming the International Criminal Court were graced with the most impartial and gifted judges, Professor Wilkins raises serious concerns about the prosecutorial structure established by the ICC Statute. As adopted, the ICC Statute grants the prosecutor "proprio motu" powers;[52] that is, the prosecutor has the power (subject only to review by a panel of ICC judges) to initiate an investigation and prosecution completely on his/her own authority and without oversight or control by any national or international power.[53] Wilkins says: *While this provision was purportedly designed to prevent the prosecutor from being swayed by "political" concerns, experience in the United States suggests that there is more to fear from a politically unaccountable prosecutor than from a politically accountable one.*

Following the resignation of President Richard Nixon, the United States embarked upon a well-intentioned experiment with proprio motu *prosecutors. Fearing that prosecutors under the control of the President would be unable to prosecute effectively Executive Branch wrongdoers, the U.S. Congress passed the Ethics in Government Act of 1978, which authorised the appointment of "independent prosecutors." But, rather than demonstrating a penchant for apolitical and unsullied prosecutions, the history of the independent prosecutor's office demonstrated just the contrary. An "independent" prosecutor may not be answerable to established political organs, but such a prosecutor is (in fact) readily swayed by general political currents, popular sentiments, and personal political predilection. Accordingly, America's experiment with independent prosecutors has now been abandoned.*[54]

In conformity with this experience, the United States (along with a few other countries) argued that the ICC prosecutor should be permitted to proceed *only* upon referral of a case by a nation/state or an appropriate UN body.[55] That proposal was rejected and the ICC Statute, as drafted, confers expansive investigational and prosecutorial authority on the prosecutor.

This broad prosecutorial power – rather than being immune to political considerations – may be particularly subject to the most corrosive kinds of political influence. Article 44 of the Statute allows the prosecutor to accept "any ... offer" of "gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations."[56] "Gratis personnel" are personnel paid for by third parties. But, while their salary is paid by a third party, such personnel are nevertheless performing the "work ... of the organs of the Court."[57] One can expect that many of these "gratis personnel" will be supplied by well-funded international NGOs who are hostile to religion and traditional values.[58] An independent prosecutor's office free from any real governmental control is dangerous enough. An independent prosecutor's office staffed by NGOs with ideological axes to grind is positively frightening.

Court omnipotence

Unlike United Nations Treaty Committees which can condemn but not punish, the ICC would have power to sentence convicted persons to lengthy periods of imprisonment, including life imprisonment, and impose heavy financial penalties.

In an extraordinary concentration of power, the ICC Statute provides for agents of the court "to investigate crimes, prosecute, pass judgments, sentence and even hear the appeals of its decisions."[59] This court omnipotence is fundamentally inconsistent with Australian legal traditions, in which the functions of investigation, prosecution, trial and appeal are clearly separated to ensure that the accused receives a fair trial and that corruption and politicisation are avoided. Our freedom is protected by separation of the roles of investigation by police, prosecution by a Crown prosecutor, trial by jury and appeal to a higher court.

This separation of powers is part of our English common law heritage, which dates back to King Alfred of England. He was said to have "burnt some cakes" - but his far greater contribution to his country was to establish the Holy Scriptures (and the Ten Commandments in particular) as the foundation of our laws. The common law system recognises that human nature is prone to sin, and our Christian forefathers set up structures to minimise the possibility of corruption.

The ICC ignores the hard-won safeguards of our common law system and instead adopts trial by inquisition, which is common in European countries and dictatorships. The ICC Statute makes the

Prosecutor responsible for investigation of crimes - as well as subsequent prosecutions.[60] It provides for trial by three judges - there is no option for trial by jury.[61] The verdict is by majority decision of the three judges - not unanimity as in trial by jury.[62] Any appeal is heard by different judges in the same Court - unlike Australia, where appeals from State courts may be heard by the completely separate High Court of Australia.[63]

Trial by inquisition

The great advantage of the common law system of trial by jury is its protection of the innocent, which is achieved partly through being an adversarial system. A key element of this adversarial system is that the accused is defended from false charges by the defence counsel. The prosecutor must convince the jury beyond reasonable doubt of the guilt of the accused. Significantly, the prosecutor, the defence counsel and the jury are all independent of the judge thereby minimising the risk of collusion and corruption to find an innocent person guilty.

The ICC uses an inquisitorial process which has none of these safeguards. There is no defence counsel to protect the innocent. The Statute says: "The Prosecutor shall ... in order to establish the truth ... investigate incriminating and exonerating circumstances equally."[64] Thus, protection of the innocent is at the mercy of a prosecutor with divided loyalties. When prosecutors are under pressure to achieve convictions, the innocent will suffer.

Moreover, the bifurcated prosecutor has no jury to convince, only a panel of three judges who are employed by the same court as the prosecutor. Opportunities for collusion and corruption abound.

Presumption of victimisation

A central element of the common law system is the presumption of innocence - the accused is entitled to be considered innocent unless proved guilty beyond reasonable doubt. Theoretically, the ICC has the same presumption of innocence, for Article 66 states: *Everyone shall be presumed innocent until proved guilty ... The onus is on the Prosecutor to prove the guilt of the accused ... beyond reasonable doubt.*

However, the Statute severely undermines the putative presumption of innocence and elevates instead a presumption of victimisation. The emphasis on victims is indicated by use of the word 38 times in the Statute. Instead of using a neutral term, such as complainant or plaintiff, which leaves open the question of whether or not a crime has been committed, use of the emotionally loaded term "victim" presumes victimisation. The tendentiousness of the Statute is evident in Article 53(2)(c) which refers to the "alleged perpetrator" but simply to the "victims" (not "alleged victims"). The presumption of victimisation is dangerous because it can lead to a witch hunt for a perpetrator.

Consider the case in which two members of the so-called "Stolen Generation", Mrs Lorna Cubillo and Mr Peter Gunner, claimed that, as young children, they were forcibly removed from their families by employees of the Commonwealth Government.[65] At the conclusion of the hearing in the Federal Court of Australia, the judgment given by Justice O'Loughlin in Darwin on 11 August 2000 accepted Mr Gunner's evidence that "he had a most unhappy childhood" and that "he was the victim of a sexual assault". He noted that the law at the time permitted the Director of Native Affairs, a Commonwealth public servant, "to undertake the care, custody and control of a part Aboriginal child if, in the Director's opinion, it was necessary or desirable in the interests of the child to take the child into care." He found that a patrol officer with the Native Affairs Branch, Mr Harry Kitching, was involved in the removal of young Peter Gunner but that he did so at the request of Mr Gunner's mother. Consequently, Justice O'Loughlin dismissed the claim.

What might have been the result had the patrol officer Mr Kitching been prosecuted by the ICC? Firstly, the charge could have been the horrendous-sounding crime of genocide, using the UN definition that includes "causing serious ... mental harm" to members of a group. Secondly, Mr Kitching might have been found guilty of genocide if the mother's consent was considered irrelevant to a consideration of mental harm. Thirdly, a defence that he was acting in accordance with the law at the time could have been dismissed by the ICC because the Statute says that being a government official "shall in no case exempt a person from criminal responsibility under this Statute..."[66]

The heady combination of vaguely defined "crimes" in Articles 6, 7 and 8, the irrelevance of official duties under national laws asserted in Article 27 and the presumption of victimisation render the so-called "presumption of innocence" in Article 66 meaningless.

Rules of procedure

The Australian legal system incorporates carefully balanced rules of evidence drawn from our common law heritage, whose origins are found in biblical law. For example, hearsay evidence is not allowed - only eyewitness evidence, which must be corroborated. This follows the biblical injunction: "One witness is not enough to convict a man accused of any crime or offence he may have committed. A matter must be established by the evidence of two or three witnesses."[67]

While Article 67 asserts the right of the accused to a fair and public hearing conducted impartially, that "right" is qualified in Articles 68 and 69. The "right" to a public hearing may be overturned to allow the Court to conduct "any part of the proceedings in camera..."[68] In deference (again) to "victims", their "views and concerns" may be presented by their legal representatives.[69] Why does the Statute refer to the "views and concerns" of "victims" rather than to "evidence"? Is the accused prosecuted for defined crimes or for offending the "views and concerns" of "victims"? The presentation of such "views and concerns" by legal representatives rather than by the "victims" themselves removes the opportunity for the accused to have these "views and concerns" tested by cross-examination. The Court may also permit witnesses to avoid being questioned by allowing them to use audio or video recordings or written transcripts.[70] Such constraints on the opportunity of the accused to question his or her accusers can have the effect of reversing the onus of proof.

The exceptions to a fair and public hearing set out in Articles 68 and 69 are in some cases required to be "in accordance with the Rules of Procedure and Evidence,"[71] which is a separate document of 100 pages that elaborates provisions of the Statute. For example, Rule 87 on *Protective measures* allows the Court to hide the identity and location of a victim or witness by conducting proceedings *in camera*, expunging names from public records, using audio-visual technology with altered pictures or voice, and suppressing publication. Application of this rule could leave the hapless accused facing accusations by a faceless and nameless secret informer and denied any opportunity to cross-examine the accuser. Furthermore, he could be denied the freedom to explain his predicament publicly. Such unjust procedures could easily translate into an effective presumption of guilt.

The rules of procedure and evidence proposed for the ICC would deny Australians (and citizens of other countries) fundamental protections of our freedom that we tend to take for granted: the right to a trial by jury and based on evidence not hearsay, the right of an accused to know and confront his accusers, and the right of a trial to be public so that justice may be seen (not injustice hidden).

Conclusion

The main reason given for establishing the International Criminal Court is to deal with war criminals such as Pol Pot in Cambodia and the mass killings in Rwanda and the Sudan. But as Brett Schaefer says: "There is no question that such heinous crimes should be investigated and punished. But the answer is not a supranational court that could violate the constitutional rights of Americans... instead, the answer is that *ad hoc* UN tribunals be applied with greater impartiality and, perhaps, frequency."[72]

Festival of Light opposes ratification of the Statute for an International Criminal Court in the strongest possible terms for the following reasons. The Statute would override Australian laws thereby hindering or preventing Australian governments from protecting the people who elected them. Ratification of the Statute would involve further abuse of the much-abused External affairs power of the Australian Constitution. The crimes described in the Statute are sufficiently vague that they could be exploited for social engineering against the beliefs and values of Australians. The proposed procedures of the Court are fundamentally unjust, effectively deny presumption of innocence and would be open to manipulation, corruption and injustice.

References

1. Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremburg,* 10 Pace Int'l L. Rev. (1998).

2. *Ibid.*

3. UN General Assembly resolution 47/33 of 25 November 1992.

4. Marcus R. Mumford, *Building Upon A Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 J. Int'l. L. & Prac., **151**, pp 166-170 (1999).

5. European Law Students' Association, Handbook on the Draft Statute for an International Criminal Court (2d ed. 1998). For a listing of the "customary international law of human rights" at the time the ICC Statute was adopted, *see* Restatement (Third) of Foreign Relations Law, § 702 (1986) (asserting that a "state violates international law if, as a matter of state policy" it "practices, encourages or condones" genocide, slavery, murder, torture, prolonged arbitrary detention, systematic racial discrimination or engages in "a consistent pattern of gross violations of internationally recognised human rights").

6. www.austlii.edu.au/au/other/dfat/nia/2000/2000024n.html.

7. ICC Statute, Art. 1.

8. Richard G. Wilkins, "Doing the Right Thing: The International Criminal Court and Social Engineering", www.law.byu.edu/NGO_Family_Voice/index.html.

9. Ian Henderson, "Vote on treaties: Burke", *The Australian*, 3 November 2000, p 2.

10. ICC Statute, Art. 12(2).

11. Vienna Convention on the Law of Treaties, Art. 34.

12. Final ICC Statute, Art. 1.

13. Final ICC Statute, Art. 17(1)(a).

14. UN Charter, Art. 2 ¶7. *Compare* Manual for the Ratification and Implementation of the Rome Statute, published by the International Centre for Human Rights and Democratic Development (Montreal, Quebec, Canada) and The International Centre for Criminal Law Reform and Criminal Justice Policy (Vancouver, British Columbia, Canada) p 2 (asserting that the "Court will not . . . encroach on an individual State's jurisdiction over crimes covered by the Statute").

15. *Ibid.*, p 9.

16. *Ibid.*, p 10.

17. *Ibid.*, p 12.

18. *Ibid.*, p 91.

19. Women's Caucus for Gender Justice, *The International Criminal Court: The Beijing Platform in Action (Putting The ICC On The Beijing +5 Agenda)* p 8.

20. *Ibid.*, p 9.

21. *Ibid.*, p 22.

22. *Ibid.*, p 25.

23. Colin Howard, "Amending the External Affairs Power", Ch 1 in *Upholding the Australian Constitution*, Proceedings of the Fifth Conference of The Samuel Griffith Society, Vol 5, April 1995, p 16.

24. John Quick and Robert Garran, *Annotated Constitution of the Australian Commonwealth*, 1901.

25. *New South Wales v. Commonwealth* (1975) 135 CLR 337; *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v. Tasmania* (1983) 158 CLR 1.

26. Colin Howard, "Australia's Diminishing Sovereignty", Ch 9 in *Upholding the Australian Constitution*, Proceedings of the Second Conference of The Samuel Griffith Society, Vol 2, July 1993, p 199-200.

27. Colin Howard, "Amending the External Affairs Power", Ch 1 in *Upholding the Australian Constitution*, Proceedings of the Fifth Conference of The Samuel Griffith Society, Vol 5, April 1995, p 3.

28. *Ibid.*, p 11.

29. ICC Statute, Art. 1.

30. ICC Statute, Art. 6(b).

31. ICC Statute, Art. 1.

32. *Bringing Them Home*, by the Human Rights and Equal Opportunity Commission, the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Australian Government Publishing Service, 1997.

33. Kenneth Minogue, "Aboriginals and Australian Apologetics", Appendix I in *Upholding the Australian Constitution*, Proceedings of the Tenth Conference of The Samuel Griffith Society, Vol 10, August 1998, p 368.

34. ICC Statute, Art. 7(1).

35. Report of the Working Group on Elements of Crimes, PCNICC/2000/WCEC/L.1/Add. 1 at 7 (setting forth the elements for the crime against humanity of persecution); *compare* Final ICC Statute, Arts. 7(1)(h) and 7(2)(g).

36. Report of the Working Group on Elements of Crimes, PCNICC/2000/WCEC/L.1/Add. 1 at 9 (setting forth the elements for the crime against humanity of inhumane acts); *compare* Final ICC Statute, Art. 7(1)(k).

37. *See*, *e.g.*, M. Frug, Postmodern Legal Feminism, p 134.

38. Dianne Post, *Why Marriage Should Be Abolished*, 18 Women's Rts. L. Rep. 283 (1997).

39. *Ibid.*

40. *See generally ibid.* pp 302-309 (describing marriage as an inherent form of economic discrimination and physical and mental abuse of women).

41. Article 7's "crimes against humanity" are *not* limited to actions of a state. On the contrary, individuals who violate any of Article 7's proscriptions are subject to prosecution so long as their actions are pursuant to an "organizational policy." ICC Statute, Art. 7(2)(a).

42. Marcus R. Mumford, *Building Upon A Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 J. Int'l. L. & Prac. 151, 167-168 n. 57 (1999) (detailing the efforts to create an abortion right).

43. *Ibid.*

44. The crime of "forced pregnancy" ultimately was limited by a narrowing definition, which provided that the ICC Statute "shall not in any way be interpreted as affecting national laws relating to pregnancy." That the gender caucus sought to use the ICC Statute to create an abortion right is indisputable. The caucus, in fact, characterises the insulation of national abortion laws from attack under the Statute as "[a]n unfortunate disclaimer." Women's Caucus for Gender Justice, *The International Criminal Court: The Beijing Platform in Action (Putting The ICC On The Beijing +5 Agenda)* p 13.

45. Richard G. Wilkins, "Doing the Right Thing: The International Criminal Court and Social Engineering", www.law.byu.edu/NGO_Family_Voice/index.html.

46. Women's Caucus for Gender Justice, *The International Criminal Court: The Beijing Platform in Action (Putting The ICC On The Beijing +5 Agenda)*.

47. Women's Caucus for Gender Justice, *Recommendations and Commentary to the Elements of Crimes, Submitted to the Preparatory Commission for the International Criminal Court, 13-20 March 2000.*

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49. *See, e.g.*, *Aetna Life Ins. Co. v. LaVoie*, 106 S.Ct. 1580 (1986).

50. *See, e.g.*, Draft ICC Statute, Part 4, Article 37, Para. 4 (Option 2) subparagraph (b)(8).

51. ICC Statute, Art. 36(8)(b).

52. "Of his own volition."

53. ICC Statute, Art. 15(1).

54. Richard G. Wilkins, "Doing the Right Thing: The International Criminal Court and Social Engineering", www.law.byu.edu/NGO_Family_Voice/index.html.

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57. *Ibid.*

58. *See generally* Richard G. Wilkins, *Bias, Error and Duplicity: The UN and Domestic Law*, The World & I, Dec. 1996, pp 287-305.

59. Brett D Schaefer, "The International Criminal Court: threatening US sovereignty and security", *Executive Memorandum* No. 537 (produced by the Kathryn and Shelby Cullom Davis International Studies Center), 2 July 1998, Heritage Foundation, 214 Massachusetts Ave NE, Washington DC, www.heritage.org.

60. ICC Statute, Art. 15.

61. ICC Statute, Art. 39(2)(b)(ii).

62. ICC Statute, Art. 74(3).

63. ICC Statute, Art 39(2) & (4).

64. ICC Statute, Art. 54(1).

65. Cubillo v Commonwealth, FCA 1084 (11 August 2000).

66. ICC Statute, Art. 27, *Irrelevance of official capacity*.

67. Deuteronomy 19:15

68. ICC Statute, Art. 68(2).

69. ICC Statute, Art. 68(3).

70. ICC Statute, Art. 69(2).

71. ICC Statute, Arts. 68(3) & 69(2).

72. Brett D Schaefer, "The International Criminal Court: threatening US sovereignty and security", *Executive Memorandum* No. 537 (produced by the Kathryn and Shelby Cullom Davis International Studies Center), 2 July 1998, Heritage Foundation, 214 Massachusetts Ave NE, Washington DC, www.heritage.org.