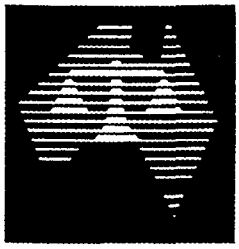

LAW COUNCIL
OF
AUSTRALIA

SUBMISSION

TO

JOINT STANDING COMMITTEE ON TREATIES

ON

1998 STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

20 December 2000

LAW COUNCIL OF AUSTRALIA
(INTERNATIONAL LAW SECTION)

SUBMISSION TO THE JOINT STANDING COMMITTEE ON TREATIES REFERENCE ON THE INTERNATIONAL CRIMINAL COURT

This submission is tendered to the Joint Standing Committee on Treaties (JSCT) in response to its reference *"whether it is in the national interest for Australia to be bound to the terms of the Statute for an International Criminal Court"* (ICC). The submission has been prepared by the International Law Section on behalf of the Law Council of Australia.

The Law Council is strongly of the view that it is in the national interest for Australia to be bound to the terms of the Statute for an International Criminal Court.

Introduction

The concept of a permanent International Criminal Court is not a new one. As early as 1899, it was being discussed by governments at The First International Peace Conference in The Hague. A century later, the world has witnessed unimaginable destruction of human life and enormous suffering inflicted with great cruelty. The cycle of destruction, particularly of civilians, must not be permitted to continue. The establishment of a permanent International Criminal Court is of paramount importance in this objective. Despite teething difficulties, the Rome Statute and the work of the Preparatory Commission represent such an effort of compromise and determination that this initiative must be given a chance to succeed.

The establishment of a permanent International Criminal Court would also overcome the inefficiency and expense of having ad hoc tribunals. If the ICC were not established, there would be a continuing need for the establishment of ad hoc tribunals, with the consequent enormous amount of time and expense.

Sixty countries must ratify the Treaty before the Rome Statute comes into force. As at the date of this submission, twenty five countries have ratified the Statute so far. They include two of our closest allies, New Zealand and Canada, and several of our Pacific neighbours, such as Fiji. In the light of this support for the ICC, despite the reluctance of some nations to become party to the treaty, the Law Council's view is that Australia should ratify and give effect to the Treaty.

Australia has been one of the leading nations in promoting the establishment of the ICC and it should be one of the first nations to ratify the Treaty. This would demonstrate our commitment to the observance of international humanitarian law through the enforcement measures of the ICC. Australia should not wait for the United States of America's decision whether to ratify the Treaty.

This submission addresses some of the concerns that have been raised within Australia in relation to the ICC.

1. The Extent of International Support for the ICC

At a conference in Rome in July 1998, 120 national delegations voted in favour of a Statute to establish a Permanent International Criminal Court. Seven delegations (United States, Libya, Qatar, Iraq, Yemen, China, and Israel) voted against the Statute, and twenty-one nations abstained.

There is, therefore, overwhelming international support for the ICC. The perceived problems with the Statute cited as reasons for their non-support by various States, such as the US and India, are addressed below.

As at the beginning of December, the ICC Statute has 117 signatories and 23 ratifications. South Africa ratified the Statute on 27 November 2000, and Syria became the 117th State to sign the treaty on 29 November 2000.

2. Possible Politicisation of the ICC

At the conclusion of the Sixth Committee of the Preparatory Commission, a number of delegates made statements concerning the potential politicisation of the ICC. Mr Efrat Smilg (Israel) said:*"This Court is too precious. The international community should not allow it to be blemished by any political agendas."* Although this statement was made in the context of a reply to attacks by Syria and Lebanon on Israel's conduct in the Golan Heights, it does reflect the fears of a number of States concerning the possible use of the ICC as a political tool.

Jesse Helms, US Republican Congressman and Chair of the Foreign Relations Committee, has expressed the view that the ICC would be used for politically-motivated prosecutions of US service personnel engaged in peace-keeping missions.

The potential politicisation of the Court by the exercise of the veto power by any permanent member of the Security Council in interference of the work of the ICC has been curtailed by the provision of Article 16 of the Statute. This is further discussed below in Section 4.

It has been argued that the principles of humanitarian intervention have not survived the Article 2(4) prohibition of the use of force in the UN Charter. On these grounds, it was submitted to the International Ad Hoc Criminal Tribunal for Yugoslavia (ICTY) by academic lawyers from Osgoode Hall Law School, University of York, Toronto, and others, that the UN-NATO 78-day bombing campaign of Serbia in response to the humanitarian emergency in Kosovo was illegal at international law. The campaign was carried out without Security Council sanction under Chapter VII. These submissions urged the ICTY to indict President Clinton, Secretary Albright, Prime Minister Blair, Foreign Secretary Cook and others on charges of war crimes arising out of this bombing and the doctrine of command responsibility.

Opponents of the ICC on the grounds that such an international criminal tribunal will be used as a political weapon against the United States of America and others should consider the response of the ICTY Office of the Prosecution to these calls to indict Western leaders over the bombing of Serbia. If one interpreted the Statute of the ICTY strictu sensu, President Clinton and those named above, would fall under the ratione personae, and the bombing of Serbia under the ratione loci and ratione tempore of the mandate of the ICTY. Without discussing the complexities of the emerging law of intervention, the ICTY was not set up to prosecute the commanders-in-chief of a multilateral force, the express mandate of which was the enforcement of international humanitarian law.

Carla del Ponte, the Chief Prosecutor of the ICTY, responded to these submissions without action. On 28 December 1999, the Prosecutor stated that the reports were *"not at the top of her priorities and that she had more important things to look at."* It was reported in the Observer newspaper in London that the NATO probe was not her priority because she had *"inquiries about genocide, about bodies in mass graves."* In an ICTY press statement

of 30 December 1999, the Tribunal announced that the NATO actions were not being investigated and that the Prosecutor simply met with and received information from a variety of individuals and groups urging investigation and prosecution.

3. The Accountability of the ICC

The ultimate arbiter of justice in any judicial system is the court of last appeal. The ICC will have an appeals chamber as do the ICTY and the International Ad Hoc Tribunal for Rwanda (ICTR). The increase of Tadic's sentence on appeal by the ICTY from 20 to 25 years should prove a salutary lesson to those wishing to appeal sentences for serious violations of humanitarian law.

The level of "judicial activism" in the jurisprudence of the ICTY has been a cause for some concern amongst those who hold conservative views on the judicial function. The ICTY has made decisions on its own competence (Tadic) and the limits of its jurisdictional mandate (Simic). The Preparatory Commission of the ICC has released two documents, "The Elements of Crimes and the Rules of Procedure and Evidence" that substantially address perceived ambiguities in these areas.

Ultimately, the funding of the ICC comes from the UN. If it were the international judgment that the ICC should be held accountable for some gross breach of judicial function, its funding could be cut off by means of a General Assembly Resolution.

4. The Independence of the ICC from the UN and the Security Council

There are three triggering mechanisms for the exercise of the ICC's jurisdiction over crimes in Article 5 of the Statue:

* reference by a State party under Article 13(a) and Article 14;

* reference by the Prosecutor who may initiate investigations proprio motu under Article 15; and

* reference by the Security Council under Article 13(b).

The authority of the Security Council to refer a case to the ICC derives from the right conferred on it under Chapter VII of the UN Charter to act in situations that represent a threat to peace and security. Article 42 of the UN Charter empowers the Security Council to use force as an exception to the prohibition on force in Article 2(4) in order to protect international *"peace and security"*.

The Security Council under Article 16 of the Statute may exercise a power to defer prosecutions and investigations by the ICC under its Chapter VII authority:

"No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions".

At the Rome Conference, the "like-minded States", which included Australia, objected to allowing the Security Council control over the docket of the ICC on the grounds that it would threaten the Court's judicial independence and politicize its function. The Singaporean delegation put forward a compromise proposal which is partly reflected in Article 16. This Article operates to prohibit a single permanent member of the Security Council from exercising its power of veto to block an investigation or prosecution by the ICC.

India was so opposed to this truncated Chapter VII role afforded the Security Council in the ICC that they explained their vote against the Statute on the grounds that the Security Council role violated international law. The head of the Indian delegation based his argument on Article 34 of the Vienna Convention of Treaties, which states that a non-State Party cannot be bound by a treaty. This is a fundamentally flawed argument. First, the UN Charter, and thus the Chapter VII powers of intervention, have the authority of universality at customary international law. Secondly the authority afforded the Security Council by the Statute has already been exercised in the establishment of the ad hoc International Criminal Tribunals, the ICTY and ICTR, under Article 42 of the Charter in order to protect *international "peace and security"*.

5. Jurisdiction over Nationals of Non-State Parties

Article 34 of the Vienna Convention on Treaties 1969 provides that a treaty cannot bind States that are not party to that treaty. Article 12 (2)&(3) of the Rome Statute confers conditional supranational jurisdiction on the ICC. It is incorrect that the ICC might exercise absolute jurisdiction over individuals whose nationality is that of a non-state party to the treaty. In cases other than those referred to the ICC by the Security Council, the Court is empowered to exercise its jurisdiction by Article 12 either with the consent of a State in whose territory the crimes were committed or of the State of nationality of the accused.

This provision is grounded in two jurisdictional principles of international law:

* the principle of territoriality, by which a State may exercise jurisdiction over an individual who is accused of committing an offence within their territory; and

* the principle of active nationality by which a State may exercise jurisdiction over an individual because he or she possesses that State's nationality. This is the ground on which the Commonwealth of Australia has asserted its jurisdiction over Australian nationals charged with sex crimes in Asia.

It is also incorrect that the Statute violates a peremptory norm of international treaty law by potentially allowing the ICC to prosecute an individual whose nationality is that of a non-State party and who is accused of violations of international criminal law. It was held by the House of Lords in the Pinochet case that The Convention Against Torture and Other Cruel or Degrading Treatment or Punishment (which came into force in 1984) confers universal jurisdiction on a signator in the prosecution of an individual accused of offences that fall under the treaty. Article 8 provides that each State Party *"take such measures as may be necessary to establish its jurisdiction over (the offences) in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him"*. This satisfied the principle of double criminality required by the Extradition Act 1989 that the conduct alleged against the accused constitute a crime in both the law of the requesting country and the domestic law of the UK.

The House of Lords may have placed too much weight on the operation of the Torture Treaty in conferring universal jurisdiction, rather than a source in customary international law, (as argued by lawyers representing Amnesty International and the Spanish government). Nevertheless, this judgement demonstrates that the power to exercise universal jurisdiction over crimes of torture, at the very least, is conferred by the operation of treaty law over nationals of non-state parties (Chile).

Other treaties confer such universal jurisdiction. By exercising universal jurisdiction, the United States prosecuted a Lebanese citizen suspected of hijacking a Jordanian aircraft in the Middle East. The US District Court in US v Yunis, 924 F 2d 1086 (D.C. Cir. 1991) claimed authority to exercise jurisdiction over the accused by operation of the International Convention Against the Taking of Hostages 1979 and the Convention for the Suppression of Unlawful Seizure of Aircraft 1970 which had been implemented into domestic law

Each of the Geneva Conventions establishes universal jurisdiction in State Parties in respect of the prosecution of "grave breaches" of the Conventions (war crimes). Under Article 146 of the Geneva Convention Relative to the Protection of Civilian Persons 1949, the High Contracting Parties have the *"obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and bring such persons, regardless of their nationality, before its own courts."* (emphasis added)

The International Court of Justice has determined that the provisions of the Genocide Convention 1948 are binding on all States. This includes the prosecution of persons thought to responsible for acts of genocide as defined in the Convention. [Reservations to the Convention on Genocide 1951 ICJ 23 (advisory opinion].

It is established at international law that, if a group of States has established an international organisation (IGO) through the ratification of a multilateral treaty, that IGO has an independent legal personality in relation to other States. [Reparation for Injuries Suffered in the Service of the United Nations, 1949 ICJ 174 at 179 (Advisory Opinion April 11, 1949]. This principle applies to an international criminal court established by multilateral treaty.

6. State Sovereignty

The concept of State Sovereignty has often been used to protect individuals responsible for violations of international humanitarian law and human rights. Vaclav Havel, President of the Czech Republic, characterised the US-NATO bombing campaign of Serbia as one in which the multilateral force *"acted out of respect for human rights"*. Havel went on to contend that, although US-NATO forces acted without the authority of the Security Council, this violation of Article 2(4) of the UN Charter did not constitute a breach of international law but *"happened, on the contrary, out of respect for the law, for a law that ranks higher than the law which protects the sovereignty of states: human rights"*.

The ICC has jurisdiction only over the most serious violations of international humanitarian law that shock the conscience of humanity: Genocide, Crimes against Humanity, War Crimes and Aggression. Universal jurisdiction over the prosecution of the crime of Genocide was pioneered by Israel in the trial of Adolf Eichmann. [A G Israel v Eichmann (1968) 36 LLR 277 (Supreme Court)]. As discussed above in section 5, the House of Lords held in Pinochet that, at least since 1984, the crime of torture is subject to universal jurisdiction.

The once absolute concept of state sovereignty has been eroded by developments such as the jurisprudence of the ICTY, Article 8 of the Torture Treaty and the concept of universal jurisdiction, and the jurisprudence of bodies such as the European Court of Human Rights. The case of Soering v UK 1989 (A-161) in the European Court of Human Rights (ECHR) demonstrated the unwillingness of the European Court to allow the extradition of Soering to the US where he might face capital punishment in contravention of the European Convention on Human Rights and protocol 6 to that Convention. Protocol 6 of the Convention prohibits capital punishment in the jurisdiction of its signatory states. Turkey is yet to comply with this mandatory protocol, the outcome of which might be expulsion from the ECHR, membership of which is a necessary precursor to membership of the EU.

The principle of state sovereignty, once so fundamental to international law, may not be used to avoid prosecution for these most serious of crimes that it is the mandate of the ICC to prosecute.

The principle of complementarity which affords States the opportunity to prosecute alleged offenders of international humanitarian law in their domestic courts and will only occasion the intervention of the ICC under certain circumstances is discussed below in section 8.

7. Definition of Crimes against Humanity

Article 7 of the Statute provides a definition of crimes against humanity. A *"crime against humanity means any of the following acts when committed as part of a widespread and systematic attack directed against any civilian population with knowledge of the attack"*. The provision then goes on to list examples of these crimes which include murder, extermination, enslavement, deportation or forcible transfer of population, torture and rape.

Article 7 (2) provides definitions for the purpose of subsection (1). For example, *"forced pregnancy"* under Article 7 (1) (g) is defined as the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

In the ICTY judgment of Tadic [(Case IT -94-I-T, 7 May 1997 at 649], the trial chamber considered that a single act by a perpetrator could constitute a crime against humanity if his acts could be somehow linked to the context of widespread or systematic attack.

8. Principle of Complementarity

Both Article 1 and the preamble of the Statute refer to the jurisdiction of the ICC as complementary to that of the national courts and processes. As mentioned above, the Statute does not override the concept of state sovereignty in this respect except in two situations set out in Article 17 (1):

- the unwilling State - where a State elects not to exercise its jurisdictional competence; and

- the incompetent State - where a State's legal and administrative structures have collapsed or are unavailable.

An example of an unwilling State is that of Serbia which has demonstrated its unwillingness to co-operate with the ICTY or domestically prosecute the leaders indicted for serious violations of international criminal law in Srebenica and Kosovo - Milosevic, Mladic and Karadzic.

Examples of a State in which total or substantial collapse of the judicial infrastructure occurred are that of Rwanda in 1995 and Sierra Leone in 1999.

The principle of complementarity to be observed in the operation of the ICC guarantees that domestic jurisdictions (such as Australia's) that are willing and able to prosecute the crimes embraced by the ICC will be the fora in which liability is determined, according to the domestic laws and procedures in force. It is only if the jurisdiction of the ICC is enlivened, that consideration needs to be given to the way in which it is exercised.

In an address by Rear-Admiral Chris Barrie to the Australian Red Cross Conference on International Humanitarian Law (8 July 1997), he stated that *"Australia has an established regime in its domestic jurisdiction, both civil and military, to deal with offences akin to war crimes."* Despite this, Rear-Admiral Barrie expressed support for the establishment of the ICC on the grounds that *"war crimes committed elsewhere in troubled regions of the world often go unpunished"*. These statements reflect the purpose of the principle of complementarity. It is inconceivable that Australia would not investigate and, if necessary, prosecute members of the Australian Defence Forces who were accused of crimes that fall under the mandate of the ICC.

9. Jurisdiction of the ICC

The Law Council notes that concerns have been expressed in Australia as to the court's jurisdiction and what it will try. The court's jurisdiction is limited to major international crimes. These crimes are comprehensively defined in the draft elements paper.

The Rome Statute of the International Criminal Court provides:

- that there is to be no double jeopardy – *ne bis in idem* (Article 20);
- that the conduct must have been criminal at the time that it was carried out (Article 22);

- against retroactivity of the Statute (Article 24);
- that there is no jurisdiction over any person who was under eighteen years at the time of alleged commission of the crime (Article 26);
- that the material elements of the crime must be committed *'with intent and knowledge'* (Article 30);
- privilege against self-incrimination during investigations and the right to legal assistance, free of charge to those without means (Article 55);
- presence of an accused during trial (unless he or she disqualifies her or himself by conduct) (Article 63);
- presumption of innocence and onus on the Prosecutor to prove guilt beyond reasonable doubt (Article 66);
- the right to a public, fair and impartial hearing with the minimum guarantees provided, in effect, by Article 14 of the ICCPR (Article 67);
- these guarantees include the right to make an unsworn oral or written statement and a prohibition against the reversal of the onus of proof.

10. Practice and Procedure of the ICC

The 'Finalised draft text of the Rules of Procedure and Evidence' (2 November 2000) makes clear provision in its 225 Rules for the following matters which comply with – or exceed – standards that are observed in Australia's own criminal justice system.

The draft rules also contain highly sophisticated rules for the acceptance of evidence in the new court which are consistent with Australia's own procedures. The court has a comprehensive appeals mechanism to an appeal chamber. The main difference between the world's common law and civil systems is the right under Article 81 of the prosecutor to appeal on acquittal. The Law Council highlights the following matters in particular:

- a Victims and Witnesses Unit with wide-ranging responsibilities to assist such persons (Rule 16 ff) and other protections (Rule 85 ff);

- assistance to the defence and the assignment of legal assistance, free of charge to those without means (Rule 20 ff);

- compellability of witnesses (Rule 65);

- admissibility of evidence on relevance and sufficiency of probative value and considering any prejudice that may arise (Article 69 of the Statute) – (which may include hearsay, but not 'innuendo' – not unlike the New South Wales Evidence Act 1995 in overall effect);

- privilege against self-incrimination (Rule 74);

- pre-trial disclosure to the defence (Rule 76 ff);

- limited requirement on the defence to disclose certain defences (eg alibi) (Rule 79 ff);

- hearing by a Pre-Trial Chamber before the Prosecutor may investigate;

- appeal (Chapter 8).

11. Conclusion

It is the principle of complementarity which reveals the true worth and intent of the ICC. The ICC Statute does not violate or significantly erode precious principles of international law, such as state sovereignty. Moreover, the Statute will only operate prospectively – it will not operate retrospectively.

The creation of the ICC is not designed to permit permanent members of the Security Council to operate with impunity, whilst exerting their political will to initiate prosecutions against others. It is a mechanism by which the international community can exercise its political will in maintaining and enforcing peace and security. It is a mechanism by which the international community can replace a culture of impunity with a culture of accountability.

The existence of the ICC may act as a deterrent to the perpetrators of heinous war crimes. It will seek out and punish those responsible for their commission, and represent human solidarity in this venture.

"No man is an island, entire of itself; each man is a piece of the continent, a part of the main. Any man's death diminishes me because I am involved in mankind." [John Donne quoted by Cherif Bassiouni in his history of the ICC].

20 December 2000