1998 STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

Submission to the Joint Standing Committee on Treaties

from National Civic Council (Western Australian Branch).

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Introduction

The National Civic Council is of the opinion that it is NOT in Australia's national interest to ratify the 1998 Statute for an International Criminal Court on the following grounds:

1) It may violate the provisions of Chapter III of the Constitution.

2) Regardless of its constitutionality it represents an unwarranted and unjustified surrender of Australia's sovereignty in the judicial sphere.

3) The definitions of the crimes made subject to the jurisdiction of the International Criminal Court are, in some cases, so vague as to give rise to possible abuses.

4) The appointments process and the rules for exercising prosecutorial functions leave the International Criminal Court open to undue influence by pressure groups with their own agenda.

1. Constitutionality

Chapter III of the Constitution deals exhaustively with the judicial power of the Commonwealth.

Section 71 vests that judicial power in "the High Court of Australia and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction."

Section 73 provides that "the High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgements, decrees, orders and sentences ... of any other federal court, or court exercising federal jurisdiction ... and the judgement of the High Court in all such cases shall be final and conclusive."

In contrast to these provisions by ratifying the Statute for the International Criminal Court the Executive Government would be purporting to invest the International Criminal Court with judicial power over Australian citizens and over certain crimes committed in Australia.

Article 1 of the stature states that the Court "shall have power to exercise its jurisdiction over persons for the most serious crimes of international concern ... and shall be complementary to national criminal jurisdiction".

Article 17 empowers the Court to investigate or prosecute cases when the State which has jurisdiction over the case "is unwilling or unable to genuinely to carry out the investigation or prosecution". This provision could apply for example to the prosecution of the crime of genocide which is unknown in Australian law (see further below).

Part 8 of the Statute provides that appeals against any decisions of the Court may only be made to the Appeals Chamber of the International Criminal Court.

The purported vesting by the Executive Government (by means of ratification of the Statute) of federal judicial power, including original jurisdiction over certain crimes in a manner said

to be “complementary” to the jurisdiction to the High Court of Australia and other Australian courts, and denying Australian citizens the right of appeal from the International Criminal Court to the High Court of Australia is, in our submission, contrary to the Constitution and *ultra vires.*

2. Surrender of Sovereignty

The judicial power, particularly as exercised in determining and punishing criminal offences, is a key aspect of national sovereignty. In a democracy like Australia the Parliaments make laws and the independent judiciary enforces them.

A well-functioning, independent, sovereign democracy has no valid reason for surrendering its sovereignty in either the legislative nor the judicial spheres.

We are repeatedly told by the Executive Government that the ratifying of international treaties does not involve any surrender of Australian sovereignty because such treaties have no legal force in Australia unless specifically enacted into law by the Federal Parliament. (The High Court’s decision in *Teoh* and other judicial decisions have cast serious doubt on this proposition but at least the assertion represents a proper sense of the importance of legislative sovereignty.)

In the judicial sphere Australia, as a functioning and free democratic nation, should be and is capable of exercising the judicial function without let or hindrance, and without assistance, from any alien court.

It may be claimed that no case involving an Australian citizen or a crime committed on Australian soil need ever be brought before the International Criminal Court, but this is uncertain (see further below) and in any case does not justify a surrender in principle or *de jure* (even if it never materialises in fact) of Australian judicial sovereignty.

In the past Australia has, rightly in our judgement, co-operate in the creation of international courts with specific jurisdiction relating to crimes against humanity or war crimes committed in particular places in the course of particular wars or other events. It has done so precisely when particular facts have made it clear that there is no national court able to appropriately investigate and prosecute these crimes.

In the absence of a complete breakdown of democracy and government in Australia none of these precedents justify the extension of the jurisdiction of any such international court to include crimes allegedly committed by Australian citizens or in Australia. We should not surrender our judicial sovereignty because there are other, less fortunate nations, where the availability of justice is more precarious.

3. Definitions of crimes.

3.1 Genocide

Genocide is defined by Article 6 of the Statute in terms identical to those of the Convention on the Prevention and Punishment of the Crime of Genocide which was ratified by Australia in 1949. However, this Convention has not been enacted into domestic Australian law and, as the Federal Court found in the September 1999 case of *Nulyarimma v Thompson* no offence

of genocide is known in Australian law.

In the light of this finding it would be possible for the International Criminal Court to find that Australia was "unable or unwilling" to investigate or prosecute alleged acts of genocide committed in Australia and to decide to exercise jurisdiction of any such alleged cases.

The two sets of claimants in *Nulyarimma v Thompson* alleged respectively that certain parliamentarians were engaging in genocide through supporting certain changes to the Native Title Act and that certain Ministers were engaged in genocide through refusing to seek World Heritage listing for particular land of interest to an Aboriginal group. They relied on the Convention definition of genocide now incorporated in the Statute including the phrases "causing serious bodily or mental harm to members of the group".

It is impossible to predict what the International Criminal Court would make of these or similar claims.

3.2 Crimes Against Humanity

Article 7 paragraph 1 (h) includes as a "crime against humanity" "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognized as impermissible under international law. "Persecution" is defined in paragraph 2 (g) of Article 7 as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."

Given the burgeoning number and variety of so-called "fundamental rights contrary to international law" there is no obvious limit to the reach of this definition, and therefore to the International Criminal Court's jurisdictional reach.

Certainly this definition would allow any of those cases currently able to be determined by the United Nations Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights to be heard by the International Criminal Court. The difference will be that the Human Rights Committee can only make determinations that amount to a recommendation to an offending State Party to remedy the violation of the Covenant. The International Criminal Court will have the power to arrest, convict and imprison those individuals accused of persecution.

To use the two successful Australian cases as examples, this could have, if the International Criminal Court was then functioning, in the arrest and imprisonment of Tasmanian legislators or members of the Tasmanian Executive Government for their "persecution" of Nick Toonen by preserving the Tasmanian laws on sodomy held by the UN Human Right Committee to be a denial of Toonen's "fundamental right contrary to international law" to privacy, including a right to sodomy. Likewise the Minister for Immigration and immigration and detention centre officials who co-operated in the arbitrary prolonged detention of a Cambodian asylum seeker would also have been at risk of arrest, conviction and imprisonment by the International Criminal Court.

The determination of some powerful and influential non-government organisations to use the International Criminal Court to give more teeth to the kind of social engineering presently carried out somewhat ineffectively by the UN treaty committees (recently subject to

sustained and well-warranted criticism by the Howard Government) is well known. Their attempt to use the terms “forced pregnancy” and “gender” to give the Court jurisdiction over a range of matters, including national laws on abortion and homosexuality, was only defeated by a concerted effort by the Holy See and other concerned powers. While these two specific terms were consequently narrowly circumscribed in the Statute, as we have demonstrated, there are other terms which remain loosely defined and open to abuse.

4. Influence of groups with an ideological agenda

Firstly the independent power of the Prosecutor to initiate investigations, subject only to the agreement of the Pre-Trial Chamber, is a matter of serious concern. Several nations, including the United States, argued that the Statute should provide for investigations to be initiated by the Prosecutor only on referral from a nation state or from an appropriate United Nations body. However, this proposal was defeated.

Far from ensuring objectivity and independence this power of the Prosecutor is potentially dangerous and subject to corruption.

This concern is exacerbated by the provisions of Article 44 (4) which allow the Prosecutor to accept gratis personnel from States and non-governmental organizations to assist the work of the Court. Through this means powerful and well-funded NGOs may come to exercise a disproportionate and unwarranted influence on the deliberations of the Prosecutor.

Conclusion

Australia has recently put the United Nations treaty committee system on notice that we are no longer going to tolerate arbitrary interference with Australia’s sovereignty and unjustified criticism of Australia’s human rights performance.

However, the ratification of the 1998 Statute for the International Criminal Court would represent a much more serious assault on Australia’s sovereignty and license an alien body to interfere directly and powerfully in Australia’s domestic affairs to the extent of being able to arrest, try and imprison Australian citizens for alleged crimes (including crimes unknown to Australian domestic law) committed on Australian soil.

Such a surrender of sovereignty may be unconstitutional. It appears to border on treason by the Executive Government against the people of Australia. It is certainly unwarranted, unjustified, undemocratic and un-Australian.

We urge the Joint Standing Committee on Treaties to recommend firmly that Australia decline to ratify the 1998 Statute for the International Criminal Court.