NATIONAL OBSERVER

TELEPHONE: (03) 9328 2823 EDITOR: DR I.C.F. SPRY, Q.C.

FACSIMILE :(03)9328 2877 BOX 751, NTH MELBOURNE
VICTORIA 3051

Mr. Grant Harrison.
Secretary,
Joint Standing Committee on Treaties,
Parliament House,
Canberra,
ACT, 2600.

30 November, 2000

Dear Mr. Harrison,

1 enclose a submission in regard to a proposed international criminal court.

This matter is important and 1 request that the submission be distributed to the members of the Committee as a matter of urgency.

1 request that 1 give oral evidence on the matter to the Committee in Melbourne.

Yours faithfully

Dr. I.C.F. Spry, Q.C.

SUBMISSION TO THE JOINT STANDING COMMITTEE ON TREATIES

BY DR. IAN SPRY, Q.C.
EDITOR, NATIONAL OBSERVER

Very serious abrogations of Australian sovereignty are threatened by attempts to set up an international criminal court with wide powers of compulsion.

Recent submissions to a Joint Parliamentary Committee on Foreign Affairs, Defence and Trade from the Attorney-General's Department and the Department of Foreign Affairs and Trade are designed to allay concerns and to provide a sanitised conception of the proposed international criminal court ("the proposed ICC"). These two submissions provide misleading analysis in regard to the possible future effect of the proposed ICC on Australia.

Thus the Attorney-General's Department submission states, incorrectly:

> "1.11 National jurisdictions will have primary. responsibility for investigating and prosecuting the crimes within the jurisdiction of the Court. The Court will only exercise its own jurisdiction when a State is unwilling or unable genuinely to carry out the investigation or prosecution of persons alleged to have committed crimes. *This should ensure that national sovereignty will be protected."* (Emphasis added)

However that submission concedes in the next paragraph that the proposed I.C.C. could override national courts if in its own opinion they were *"unwilling* or *unable* to deal genuinely with alleged crimes by way of investigation or prosecution" (emphasis added). It hence appear's that if by a rule of Australian law it were found by an Australlan court that no offence had been committed, if the proposed I.C.C. did not approve of that rule, it would be empowered to assume jurisdiction and override Australian law. This would be so whether the person being prosecuted was a soldier or airman, for example, who carried out orders in his role as a member of the Defence Force, or a public servant or politician who authorised or encouraged the relevant actions. Likewise this position would arise if the proposed I.C.C. considered that the treatment of Australian aboriginals, for example, amounts to "genocide" or "crimes against humanity".

This position is exacerbated by the vagueness of some of the terms proposed for empowering the court. Very differing views are held as to what particular acts may amount to "'genocide". Even more indefinite is what amounts to an infringement by way of a "crime against humanity". It is evident that an I.C.C. might take a much wider view of these matters than would an Australian court. Two examples may suffice here:

1. An * Australian Defence Force member may be required to engage in armed combat, pursuant to orders. If Australiaa were subsequently regarded as an "aggressor" by an I.C.C., or an enemy or civilian casualty were regarded as involving a war crime, the A.D.F. member would be subject to the jurisdiction of the proposed 1.C.C. The same would apply to his commanders, to his colleagues who abet or incite him and to public service members and politicians who could be brought within the broad catergories of those who incite or abet.

   The threat of proceedings in the I.C.C. would be capable of constituting a significant inhibiting factor in relation to the use of Australia's armed forces, and in relation to particular actions by members of those armed forces. The existing strains of warfare would be added to by the further important consideration in the mind of A.D.F. members that they might be subjected to prosecution in an I.C.C.

This matter is made worse because, in effect, any defence of superior orders would be effectively ruled out. The defence of superior orders would not apply to prosecutions for "genocide", or crimes against humanity, and it would be extremely limited in other cases.

2. A civil servant or politician may be required to approve or carry out policies in regard to Aboriginals. Although it ap ears that claims that there are acts of genocide or crimes against humanity in regard to Aboriginals, who receive many pecuniary and other entitlements not received by other Australians, are without foundation, claims are already being made abroad that genocide or abuses of human rights have been taking place. If the proposed I.C.C. were in existence, politicians determining u on policies and public servants carrying out those policies would need to appreciate that they would be subject to possible prosecution in that court, and that defences of acting in good faith or of carrying out orders would not be capable of applying in this particular context. Thus it is conceded in paragraph .29 of the Attorney-General's Department submission:

> "1n particular, official capacity as a head of State or Government, a member of a Government or parliament, an elected representative or a government official. shall in no case exempt a person from criminal responsibility nor constitute a ground for reduction of sentence."

Further, these foregoing considerations would arise in a large number of other contexts. In particular, there is a wide difference of opinion as to what amounts to a "crime against humanity". It must be stressed that this term has no definite meaning: it represents merely a term of strong moral disapproval. Indeed, it is likely that many "abuses of human rights" may eventually be regarded by some persons as crimes against humanity. But even the concept of "abuse of human rights" is itself indefinite. It may, for example, be held by some persons to extend to laws in relation to abortion or laws imposing penalties for offences where there is criticism of either the relevant penalty or law creating the offence. Attempts in the I.C.C. to define these terms would not be effective to give rise to adequate certainty, since the definitions would themselves refer to other indefinite criteria.

Again this position is exacerbated by requirements set out in the I.C.C. Statute. The Attorney-General's Department submission concedes in paragraph 1.39: "For example, State Parties may be called upon to arrest and surrender persons to the Court. The Statute does not provide any grounds upon which a State may refuse to comply with a request for surrender." Moreover the proposed I.C.C. could impose life imprisonment or imprisonment for up to thirty years and also could require the payment of compensation, that is, civil damages.

In this context attempts by the Department of Foreign Affairs and Trade to downplay the significance of politically-motivated referrals or prosecutions are particularly unfortunate. Those familiar with criminal procedures are aware that acquittals occur frequently and that it is by no means correct that an ordinary prosecution case - far less a politically-motivated case - is necessarily well-based. Indeed, the recent history of war crimes trials in Australia, held under intense and unfortunate pressure from elements of the Jewish community, demonstrated the extent to which individuals can be harassed by politically-motivated or otherwise unsatisfactory prosecutions. Certainly it would be incorrect to assume that procedures under an I.C.C. would not result in the subjection of Australian nationals to oppressive and unsound prosecutions in future years.

Further concern arises in relation to the proposed triggers for prosecutions. Referrals may be made by any State Party; the Prosecutor may himself institute proceedings; or there may be a referral by the Security Council. Under the first and second mechanisms, but not the third, the proposed I.C.C. would be able to exercise jurisdiction if either the State where the conduct occurred or the State of which the accused person is a national has accepted the jurisdiction of the Court. But even this limited measure of protection would not apply if the jurisdiction of the I.C.C. is accepted by Australia. On this basis Australia would be

powerless to protect its nationals if prosecutions were commenced by the Prosecutor, either on his own initiative or on a referral by a State Party which might well be inimical to Australia.

There are disquietening aspects of the submissions of the Attorney-General's Department and of the Department of Foreign Affairs and Trade. Both submissions are highly political documents in the sense that they set out determinedly to inflate any possible advantages of an I.CC. and to minimise and gloss over disadvantages. This is so not only in regard to the proposed diminution of Australian sovereignty and the exposure of Australian nationals to uncertain and perhaps politically-influenced foreign proceedings, but also in regard to the details of the proposed court's operation and the absence of particular safeguards.

A difficulty with international utopians is that they commonly place other interests ahead of those of their own country and its nationals. They may readily be drawn into internationalist committees and groups of influence and advance their views at the expense of those whom they represent. It is difficult to avoid the conclusion that internationalist utopianism is a large determinant of both the Attorney-General's Department submission and the Department of Foreign Affairs and Trade submission and of the officers supporting those submissions.

In this context it is of particular concern that Australia signed the Statute in December 1998 and that, as the Department o Foreign Affairs and Trade submission notes with significant approbation, Australia chaired the "Like-minded Group of over sixty States which strongly support the establishment of the Court" and that "Australia continues to play an active role in the post-Rome negotiations, in the Preparatory Conunission which is working on the Elements of Crimes and the Rules of Procedure and Evidence for the Court, as mandated by the Rome Conference" and "continues to chair the Like-minded Group".

One may well ask, Why are representatives of Australia taking such an active - and indeed activist - role in attempting to bring about the institution of a court with jurisdiction that will be able to be exercised against Australians and that will prevent Australian nationals from being protected by their own country? Who are the public service advisers who are responsible for the advice that has led to this position, and why has internationalism rather than the interests of their own country been paramount in their minds? For inter alia, if the court comes into existence, no significant advantage will flow to Australia if it becomes a Party State, as opposed to a non-party. Even as a non-party it would be able to communicate with the Prosecutor, if it were considered desirable in Australia's interests that a particular prosecution should be carried out.

A critical question here is, What is the balance of advantages and disadvantages, from the viewpoint of Australia's nationals, in (1) the creation of an I.C.C. and (2) submitting to its jurisdiction, if an I.C.C. is set up. This question has not been addressed, but has been avoided by obfuscation and special pleading, much of it tendentious, in the Attorney-General's Department and Department of Foreign Affairs and Trade submissions.

It is a matter of concern that, especially in view of the existence of such advice from such quarters, Australia indicated, on 12 December 1999, a decision to ratify the Statute of the proposed court. Clearly a group of individual public servants exists that has shown surprising enthusiasm for this result. In fact, for reasons including those set out herein, submission to the jurisdiction of such a court and ratification would not be in the interests of Australian nationals.