

Submission No. 33



THE AUSTRALIAN NATIONAL UNIVERSITY

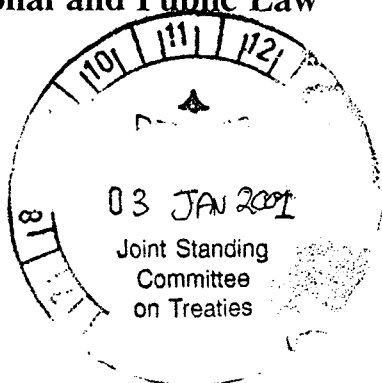
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22 December 2000

The Secretary
Joint Standing Committee on Treaties
Parliament House
Canberra
ACT 2600

Dear Secretary,

Statute of the International Criminal Court

I hope it is not too late for you to accept this submission supporting Australia's ratification of the Statute of the International Criminal Court (ICC).

In my view, this international treaty is one of the most significant in the post World War II era and will create a safety net to ensure that those responsible for international crimes are held to account. Ratifying this treaty is in Australia's short and long-term interests. Australia has played a key role in the development of the Statute: Professor James Crawford was responsible for an initial draft, and Australian delegations have been very active in the drafting process, including chairing the 'Like-Minded' group of countries which were keen to promote an effective Statute.

The UN High Commissioner for Human Rights, Mary Robinson, has said recently:

The appropriate response to all allegations of serious violations of human rights and humanitarian law -- wherever in the world they are reported -- is that they be rigorously and independently investigated. Where proven to be well-founded, those responsible have to be brought to justice. There can be no lasting protection of human rights, or any respect for the rule of law, without a coherent international criminal justice system with a permanent criminal court at its core. There must be no selectivity, no sanctuary, no impunity for those guilty of gross human rights violations. (30 November 2000)

Up till now, the international community has often responded to atrocities by creating ad hoc special tribunals, which are limited to particular situations. These include the Nuremberg and

Tokyo Tribunals after World War II and the International Criminal Tribunals for Yugoslavia, Rwanda and Sierra Leone. While these tribunals have provided a valuable forum to deal with international crimes, they have only responded to specific atrocities and provide no permanent structure. The ICC is the first permanent body to deal with international crimes and for this reason is historic.

The ICC (to be based in The Hague) will have (non-retrospective) jurisdiction over natural persons with respect to:

- Crimes of genocide
- Crimes against humanity
- War crimes (there is a limited opt-out regime for seven years if a crime is committed by a state's nationals or on its territory)
- The crime of aggression

The 'triggers' for ICC jurisdiction include:

- Referral to the Prosecutor by a state party, or
- Investigation by the Prosecutor (with authorisation of a pre-trial chamber), or
- Referral by the UN Security Council (the Security Council can also suspend an investigation or prosecution)

Unlike the other international tribunals, the ICC operates on a principle of 'complementarity'. This means in effect balancing ICC jurisdiction with that of national criminal justice systems. The ICC jurisdiction is complementary to national criminal laws and will operate only where a national legal system is unable or unwilling to carry out a genuine investigation or prosecution of persons alleged to have committed crimes. Thus states retain the primary opportunity and obligation to prosecute international crimes. The ICC determines whether a national jurisdiction is unwilling or unable to deal with the alleged crimes.

The principle of complementarity was devised to respond to concerns about the impact of an international criminal regime on state sovereignty. It preserves a state's right to deal in the first instance with allegations of international crimes, but provides a fall back if a state does not carry out a proper investigation for some reason.

The ICC Statute sets out rules for investigation and prosecution, arrest, summons, rights of accused persons and witnesses (for example, responsibility of commanders for acts of subordinates under their effective authority and control (article 28); no defence of 'superior orders' unless order was not manifestly unlawful (articles 31, 32)). States parties are required to cooperate with requests for assistance from the ICC (for example, taking evidence, provision of records, protection of victims and witnesses, arrest and surrender of a person on its territory).

Penalties include life (or less) imprisonment as well as fines and forfeiture of proceeds of crimes (imprisonment takes place in states which have agreed to accept sentenced persons). The Statute also provides for reparation for victims.

The United States has not yet signed the ICC Statute, along with other countries such as the Peoples' Republic of China, Libya, Algeria, Yemen and Israel. During the drafting process, the US attempted to ensure that a state could veto prosecution of its own nationals. The reason for this was the US fear that the ICC could complicate US participation in military operations abroad through frivolous or politically-motivated war crimes prosecutions against

US soldiers. The US also sought to have 'opt-out' provisions in respect to crimes against humanity and war crimes. It resisted the definition of an independent role for the Prosecutor and argued for an enhanced role for the Security Council.

While the US was not successful in these endeavours, it did achieve significant compromises. For example prosecutions not referred by the UN Security Council require approval from either the state of nationality of the accused or the country in which the alleged crime committed.

In my view, the US objections to the ICC Statute should not be supported by Australia. They appear to be prompted by US isolationism and internal political agendas rather than any valid fear that the ICC would engage in a vendetta against US forces. The principle of complementarity is designed to prevent such possible abuses.

Australia's ratification of the ICC Statute will allow us to continue to play a leading role in human rights protection in our region.

I would be happy to speak to the Committee if this were thought useful.

Yours sincerely

A handwritten signature in black ink that reads "Hilary Charlesworth". The signature is written in a cursive, slightly slanted style.

Hilary Charlesworth