C/- Office of P. Roberts,
Barrister's Clerk,
Owen Dixon Chambers,
205 William Street,
Melbourne 3000

1 August 2001

ICC
Submission No. 18.2

Mr. Bob Morris,
Secretary,
Joint Standing Committee on Treaties.

Dear Mr. Morris,

The Chairman has requested an Opinion on the constitutional validity of any purported ratification of the I.C.C. Statute, and we enclose a formal Joint Opinion accordingly. In view of the fact that it deals with national legal issues, and not with confidential matters, the Joint Opinion is provided to the Committee on the basis that copies can be provided by us to the Prime Minister and to other interested persons.

Yours sincerely,

I. C. F. Spry

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

INTERNATIONAL CRIMINAL COURT

LIMITATIONS OF COMMONWEALTH POWERS

JOINT OPINION

We have been requested to advise whether the Commonwealth is empowered to ratify (which term here includes the enactment of effectuating legislation) the 1998 Statute of the International Criminal Court. We note that if the Commonwealth ratifies, it must ratify the Statute as a whole. The Statute cannot be ratified in part or subject to exceptions or reservations.

In our opinion the Commonwealth is not empowered by the Australian Constitution to ratify the Statute, and indeed express terms of the Statute are contrary to the Constitution.

First, we note that the proposed International Criminal Court ("the I.C.C."), to be set up in The Hague, will have an extraordinarily wide jurisdiction which is in many respects vague and uncertain. "Crimes against humanity" are to extend to various "inhumane acts" causing "great suffering" or serious injury "to mental or physical health", "genocide" is to extend to various acts "causing serious bodily or mental harm" to members of a group and "war crimes" are to extend to "outrages upon personal dignity, in particular humiliating and degrading treatment". The I.C.C. will, in its sole discretion, be able to over-ride national courts (including the High Court) by the simple device of finding (on any ground, whether well-founded or not) that the relevant state is "unwilling or unable" genuinely to carry out a prosecution. The "official capacity" (such as that of a government minister, legislator or public servant) of a person will not exempt him from criminal liability, nor will any immunities that are conferred upon him by national legislation.

Secondly, the I.C.C. Statute is clearly inconsistent with section 49 of the Australian Constitution. That section provides for "powers, privileges, and immunities" of the members of the Commonwealth Parliament. In effect, section 49 prevents legislators from being sued or prosecuted for carrying out their functions. Therefore ratification of the I.C.C. Statute's attempted negation of this Constitutional protection is prevented by the Constitution. Indeed, ratification of any provisions removing section 49 protection could not be achieved without an amendment of the Constitution under section 128.

Thirdly, for convenience we set out a relevant passage from the I.C.C. Ratification Manual which deals with the manner in which a constitutional amendment was effected in France in view of three areas of conflict between the I.C.C. Statute and the French Constitution:

> "For example, the Constitutional Council of France identified three potential areas of conflict between the Rome Statute and the French Constitution . . . The French Government decided to adopt the following constitutional provision, which addressed all three areas of conflict: 'The Republic may recognise the jurisdiction of the International Criminal Court as provided by the treaty signed on 18 July 1998.' . . .The advantage of this type of constitutional reform is that it implicitly amended the constitutional provisions in question, without opening an extensive public debate on the merits of the provisions themselves."

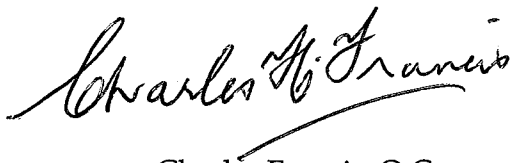
Fourthly, the foregoing is sufficient to demonstrate that a section 128 amendment to the Constitution is required for any ratification of the I.C.C. Statute. However, in addition, further Constitutional objections should be raised:

(1) In so far as ratification is sought to be supported by section 51 (xxix) (the "external affairs" power) it is at least very doubtful whether that paragraph applies. The range of the external affairs power has varied greatly according to changes in attitude amongst various High Court justices. Sir Garfield Barwick C.J., for example, accorded that power an extremely wide ambit, and his views have been followed generally by many other members of the Court. However, first, there have been a number of recent changes in the composition of the High Court, and it may well be that some of the new appointees do not favour the broader construction of the external affairs power, and, secondly, the I.C.C. Statute represents a more extreme case than any comparable treaties that have been considered by the High Court. Under the Statute all Australian judicial proceedings and executive acts could be over-ridden in regard to a very broad range of uncertainly defined criminal offences, and there are strong arguments that this could not be supported by the external affairs power, especially since the Statute contains provisions that are inconsistent with the Australian Constitution. It is certainly our opinion that the external affairs power could not support ratification of the I.C.C. Statute. And there is no other possible empowering paragraph in section 51 or elsewhere in the Constitution.

(2) Further, Chapter III of the Constitution requires the judicial power of the Commonwealth to be vested 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". There are clearly substantial arguments that Chapter III (and especially section 71) merely enables the Commonwealth Parliament to confer jurisdiction upon Australian courts or at least that it does not enable the Commonwealth Parliament to confer upon foreign courts such as the proposed I.C.C. extensive jurisdiction over Australian nationals and extensive powers to over-ride Australian courts. In our opinion Chapter III does not permit ratification of the I.C.C. Statute.

(3) Further, a related difficulty arises under section 80 of the Constitution, which guarantees trial by jury "on indictment of any offence against any law of the Commonwealth". (The proposed I.C.C. will not permit trial by jury.) We do not express any concluded view on the implications of section 80 in the present case, but note that it provides further evidence of the dangers that would arise on an illegitimate construction of the external affairs power or an attempted over- riding of other provisions of the Constitution.

For the reasons that we have set out in regard to section 49, section 51 and Chapter III of the Constitution a treaty purportedly removing the legislative protection set out in section 49 and purporting to confer the extremely wide powers that are set out in the I.C.C. Statute cannot validly be ratified without first amending the Constitution appropriately under section 128.



Charles Francis, Q.C.

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1 August 2001

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