A SUBMISSION TO

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

Inquiry into the International Criminal Court

EXECUTIVE SUMMARY

Responding to the invitation (Weekend Australian 4-5 November, 2000) to have our say on whether it is in the national interest to bind Australia to the terms of the 1998 Statute for an International Criminal Court (the Statute), this submission argues that it is not in Australia's national interest to be so bound and RECOMMENDS:

(1) That Australia does not ratify the Statute;

(2) that in terms of Article 127, notice of withdrawal from the Statute should be given immediately with effect at the end of twelve months;

(3) that Australia reiterates its willingness to support the establishment of an international body or successive bodies to prosecute the most serious crimes of international concern provided that such a body or bodies do not involve any surrender of Australia's sovereignty as is clearly the case with the Statute; and

(4) that Australia's treaty making process be amended to make it mandatory for all treaties to be approved by a current resolution of both Houses of Parliament before they are signed or ratified; or alternatively that treaties must be approved by a 75% majority of the Senate before they are signed or ratified.

PREAMBLE

We applaud the decision of the joint Standing Committee on Treaties (JSCOT) to readvertise this Inquiry as the initial advertisement, in which the Statute was grouped with half a dozen other treaties, did not give this Inquiry the prominence and importance that it deserves.

We express our concern at the action of the Attorney General and the Minister for Foreign Affairs and Trade in jointly announcing that the Government intends to ratify the Statute and will introduce legislation to enact into Australian law the crimes

described in the Statute. This would appear to be an attempt to pre-empt the valuable and informative work of JSCOT and is to be deplored. As we have argued consistently, when previously addressing JSCOT, the situation, which now exists, where the Parliament can "jump up and down all it likes" but cannot stop a treaty being signed or ratified is clearly unsatisfactory and undemocratic, hence the fourth recommendation of this submission.

Quite properly, in our view, the Government has taken steps to curb the behaviour of various United Nations Committees due to the failure of the Committees to give proper recognition to the official views of the Government, preferring to give undue weight to the biased views of Non Government Organisations with a perceived self interest.

These circumstances show how naive and ill-advised it was for the executive government to sign the Statute as recently as December 1998, particularly as the body to be created by the Statute is now to be separate from the direct control of the United Nations.

RATIONALE

It is very easy, in fact right and proper, to support the notion of some kind of jurisdictional body with international reach to prosecute the perpetrators of heinous crimes such as the reported atrocities in the Gulf War, Rwanda, the former Yugoslavia, East Timor and elsewhere. It was at the conclusion of the Gulf War in December 1989 that the General Assembly of the United Nations passed a resolution calling for the official creation of a permanent criminal court to deal with war related atrocities.

The body which is now to emerge from the 1998 Statute for an International Criminal Court goes far beyond "war related atrocities" and in fact will transfer a great amount of decision making power from a sovereign nation, such as Australia, to a remote international court. The language by which it does this is vague and thus capable of expansion to include conduct, well beyond war related atrocities whilst at the same time allowing pressure groups to influence prosecutorial functions.(i)

<u>The Statute - a Threat to Australia's Domestic Law</u>

The Statute purports to bind parties who are not signatories to the treaty - the notion of "inherent" or "universal" jurisdiction. It is established in international law practice that "universal" jurisdiction applies to the case of piracy, only. Thus the notion of "universal" jurisdiction adopted in the Statute is a clear departure from established legal theory and therefore strikes a serious blow to the concept of national sovereignty.

By asserting that the International Criminal Court (ICC) can claim jurisdiction over a non signatory state and its citizens, the Statute makes an unabashed claim of international supremacy over the actions of domestic policy makers. The startling conclusion, which is inherent in this claim, is that, the ICC has the power to coerce and command a sovereign state whether or not the state has signed and ratified the Statute. It has been standard law for centuries that "treaties cannot create obligations for states who are not parties."

So much for states who are not parties. Australia is a signatory but there must be serious questions over Australia's ability as a sovereign nation to delegate this sovereign power without the direct consent of the people as the sovereign power itself proceeds from the people. In Australia's case not only does this delegation of sovereign power NOT proceed from the people but it does NOT even

have the approval of the elected representatives of the people, the Parliament. This is clearly NOT democratic and must be open to serious challenge. Even if we concede, which we don't, that the government can delegate this sovereign power to a newly created international body, ratification by less than one third of the recognized nations of the world is a very unsound basis for doing so.

Of further concern is that the Statute is designed to be "complementary to national criminal jurisdictions." On the surface, this would appear to protect national sovereignty. This is not the case however as the manual for the ratification and implementation of the Statute asserts that to comply with "complementarity" "modifications" must be made to a state's "code of criminal law....and human rights legislation" and further "should there be a conflict between the legislation of the ICC and existing (state) legislation", international law established under the Statute "takes precedence." Clearly complementarity will operate as an international supremacy clause rather than protecting national sovereignty.

It follows that the intention is that national law must mirror the terms and conditions of the Statute and ultimately the judicial decisions of the ICC itself. Otherwise, a state will find its law being circumvented by the ICC, which will take jurisdiction because the state will be found "unable" to act. Thus "complementarity instead of being a shield becomes a sword.

The Attorney General has indicated that the crimes detailed in the Statutes will be enacted into Australian law. The wording of these crimes is vague and the language of the Statute is sweeping. Clearly it will be a very difficult task to draft the legislation with the precision which the Parliament would demand. If the legislation mirrors the Statute then Australia will be caught by the vague, sweeping language and if it doesn't mirror the Statute, it will open the way for the ICC to take jurisdiction because Australia will be found "unable" or "unwilling" to act.

When the crime of genocide includes "causing serious...mental harm to members of the group" and the "crimes against humanity" include "other inhumane acts" and the crime of "persecution" condemns "severe deprivation" of a group's "fundamental rights" "great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act." it is very difficult to know precisely what is meant. It takes little imagination to understand how these vague and imprecise terms will be exploited, in time, in a way which was never envisaged at the time the Statute was signed.

By way of example, Article 14 of the International Covenant of Civil and Political Rights says that a person charged with a crime is entitled to a fair and public hearing by a competent, independent and impartial tribunal. A representative of the United Nations has recently claimed that mandatory sentencing laws are in breach of this Article. Whether one agrees with mandatory sentencing or not, mandatory sentencing does not make the trial less fair or the tribunal less impartial.(ii)

Prosecutorial Abuse

An important characteristic of a sound judicial structure is judicial impartiality. The Statute however grants the prosecutor "proprio motu" (of his own volition) powers. The prosecutor has the power (subject only to a review by a panel of ICC judges) to initiate an investigation and prosecution completely of his or her own authority and without oversight or control by any national or international power. It is extraordinary that Australia has signed up for this, presumably in the belief that it will avoid the prosecutor being swayed by political influence.

Rather than being immune from political considerations, this broad prosecutorial power may be

particularly subject to other and more corrosive kinds of political influence. As Professor Wilkins argues: Article 44 of the Statute allows the prosecutor to accept 'any...offer" of "gratis Personnel offered by States, Parties, intergovernmental organisations and non-governmental organisations." Gratis personnel are personnel paid by third parties. But, while their salary is paid by a third party, such personnel are nevertheless performing the "work....of the organs of the Court." Again, based upon the performance of various UN Committees, it is not difficult to imagine that many of these "gratis personnel" will be supplied by well funded international NGOs who are hostile to traditional values. An independent prosecutor's office free from any real government control is dangerous enough. An independent prosecutor's office staffed by NGOs with ideological axes to grind is positively frightening.

CONCLUSION

"During the past several decades Australia has bound itself to various United Nations treaties, conventions protocols etc which have the effect of binding the nation to conduct its internal affairs according to rules expressed in terms of vague generality, particularly when the meaning and effect of these rules are to be determined by committees constituted by people of no particular qualifications, none of whom are necessarily representative of Australia and some of whom may be chosen from nations whose practices and culture are regarded as inferior or abhorrent". (iii)

The consequent restriction on Australian governments to fulfil their functions within Australia is a serious erosion of national sovereignty. We believe that national sovereignty, apart from being a bedrock principle of the United Nations Charter, is very important. The erosion of national sovereignty must be opposed even though there are many who expect the nations of the world to surrender important aspects of national sovereignty in the name of "human rights."This is a dangerous course. National sovereignty, rather than being inimical to "human rights", is fundamental to the preservation of those rights.
Many "human rights" issues are, fundamentally, political questions which should be addressed and answered by the political processes within Australia. Australia should not be part of any plan to give potentionally despotic power to a court that will be remote from the people of Australia, but will have the power to prosecute and punish them for "social crimes", at some time in the future, when the vague and imprecise language of the Statute is exploited in ways not now envisaged.

RECOMMENDATION

The Council for the National Interest Western Australian Committee is firmly of the view that it is not in Australia's national interest to bind itself to the terms of the 1998 Statute for an International Criminal Court. Accordingly the Council RECOMMENDS;

(1) that Australia does not ratify the Statute;

(2) that in terms of Article 127, notice of withdrawal from the Statute should be given immediately with effect at the end of twelve months;

(3) that, at the same time , Australia reiterates its willingness to support the establishment of an international body or successive bodies to prosecute the most serious crimes of international concern provided that such a body or bodies do not involve any surrender of Australia's sovereignty as is clearly the case with the Statute; and

(4) that Australia's treaty making process be amended to make it mandatory for all treaties to

be approved by a current resolution of both Houses of Parliament before they are signed or ratified; or alternatively that treaties must be approved by a 75% majority of the Senate before they are signed or ratified.

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1 December 2000

References

(i) This statement and much of what follows in this submission draws heavily on the writings of Richard G Wilkins, Professor of Law and Managing Director, The World Family Policy Centre, J. Reuben Clark Law School, Brigham Young University, USA. Professor Wilkins attended the sessions of the Preparatory Commission for the International Criminal Court, which over a period of two years from 1998, completed work on the Rules of Procedure and Evidence. The writings drawn from are "Doing the Right Thing: The International Criminal Court and Social Engineering" and "Bias, Error and Duplicity: The UN and Domestic Law", The World & I, Dec. 1996. Professor Wilkins quotes frequently from Marcus R Mumford, "Building Upon a Foundation of Sand: A Commentary on the International Court Treaty Conference", 8 J. Intn'l L & Prac. 1999 He quotes also from the "Report of the Working Group on Elements of Crimes".

(ii) Gibbs, Harry, Sir "The Erosion of National Sovereignty", An address given to the Samuel Griffith Society on 10th November, 2000.

(iii) Gibbs, Harry, Sir Ibid.