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Introduction

For several hundred years, it has been a basic rule of our legal system that "all crime is local". For another country to seek to punish conduct not performed within its borders has been seen as an unacceptable attempt to undermine the sovereignty and authority of the country of residence of the person accused. The era of colonial power was perhaps an exception to this, but one justified on the basis that the colonial power included all its empire within its own territory.

It was not always so. When the Christian Church held sway across Europe, the canon law was supranational, and breaches of canon law were tried in Church courts, and subject to appeal outside the country of origin. Much of our modern criminal procedure came from church law. But the Reformation in the 16th century removed the widespread ambit of this kind of international criminal law. The one crime of universal jurisdiction after that was piracy - armed robbery on the high seas. Any country could try - and usually execute - a person accused of piracy. But developments culminating in the this new century have brought in a new era of international criminal law and procedure.

The new era of international criminal law

Australia has played a leadership role in the creation and development of an international system of criminal law. In 1949 and in 1977, the United Nations made a series of treaties (known as the Geneva Conventions) on appropriate standards of conduct for countries at war, including the treatment of prisoners of war, soldiers, and civilians. These treaties gave effect to what had been long understood between States, although perhaps more often honoured in the breach than in the observance. Some relate to international armed conflicts: others to non-international conflicts. Australia has included war crimes as an offence under the Criminal Code (Cth) 1995.[1]

After World War II, trials were held in Nuremberg and Tokyo (and in other locations) of those who were accused of war crimes. Those convicted were executed or imprisoned for long periods. These trials were controversial in that the only persons accused came from defeated enemy countries and they were tried by the victorious Allies. It was also argued that the conduct of those accused was considered in their own countries at the time the relevant acts were committed to be lawful and within the policy of the government; and that the conduct was made criminal only retrospectively. But the tribunals declared that those guilty of war crimes could not shelter behind any defence of legality or orders from superiors. They had to take individual responsibility for their own actions. They had breached a higher law - one customarily accepted for centuries.

What was missing in the international system was a permanent court in which persons accused of these crimes could be prosecuted. The International Court of Justice is concerned only with civil matters between States. The post-World War II courts in Tokyo and Nuremberg were created specially for a limited purpose, and similar specific courts were set up by resolution of the UN Security Council in 1993 and 1994 respectively to deal with war crimes in the former Yugoslavia and in Rwanda. Australia has the necessary legal machinery to participate in these specific tribunals in legislation of the federal Parliament, the International War Crimes Tribunals Act of 1995. Australians have been involved in the tribunals at the Hague and in Arusha, as Judges (the former Governor-General Sir Ninian Stephen), as Prosecutors, and in the administration of the system. Australian students have also been involved in this work as interns at the Court in the Hague.

The Emergence of the International Criminal Court

In 1998, the countries of the world met at a Diplomatic Conference in Rome for a period of 5 weeks to discuss the

establishment of an international criminal court. The first attempt to create such a tribunal had been made by Gustave Moynier, one of the founders of the International Red Cross, in 1872. The International Red Cross, which has a special responsibility for international humanitarian law, had been urging the establishment of this court for 130 years.

In Rome, Australia played a prominent role in chairing a group of countries, the "Group of Like-Minded Countries", that were anxious to see the court set up on a permanent and practicable basis. There were more than 60 States in the group, and they came from every legal tradition, and every ethnic and religious grouping of legal systems. The text of the Statute to establish the International Criminal Court (ICC) and the Elements of Crimes to be prosecuted were agreed at the conclusion of the Conference. The Australian government committed itself to support, and the Joint Standing Committee on Treaties of the Australian Parliament also recommended Australia's participation in its Report of May 2002.[2] The International Criminal Court Act 2002 was then passed to provide the appropriate relationship for Australian participation in the Court, in the creation of procedural and evidentiary Rules, and the administrative infrastructure of the ICC.

The Australian Defence Forces Chiefs have throughout been strong supporters of the ICC. Australian forces are instructed in detail in the obligations that they have, wherever they are, to conform to international law in their conduct. They would be liable to prosecution under Australian law for any breach, even if there were no ICC. Australia has a very strong system of military law and justice that applies to the defence forces wherever they are, together with the legal system that applies to all in Australia.

Opposition to the ICC

The United States

The United States has refused to participate in the operations of the ICC, and has withdrawn its signature of the Statute and the approval given to it by President Clinton. Furthermore, the US has refused to permit its defence forces to serve as UN "peacemakers" unless there was an agreement that no member of the US forces would be liable to prosecution before the ICC. On 30 June 2002, the UN Security Council resolution to extend the mandate of the peacekeeping mission to Bosnia and Herzegovina was vetoed by the US. There was considerable opposition amongst Security Council members to the stance of the US but, given the intransigence of the US, some compromise had to be found. The Security Council convened an open meeting for members, and it was resolved that no action (including investigation and prosecution) could be commenced against any member of the peace keeping force (from a State not Party to the ICC Statute) for a period of one year, unless the Security Council agreed otherwise[3]. The US is now negotiating a series of bilateral treaties with States where US forces are based to ensure that those States will not seek to use the ICC against US forces.[4] There is also a widely-held view that the Resolution of the Security Council is beyond its powers.[5]

Australia

In Australia, comments have been published such as "The ICC"s foundation is fundamentally flawed" Why should we "be subject to an inferior system of justice?" We should want nothing to do with any court on which we may find people serving who have never heard of the rule of law and would not like it if they did"[6]

"The highest court of Appeal in Australia should be an Australian court, not a foreign court in a foreign land, with the power to charge our brave soldiers with genocide just for doing their duty"[7]

The coalition party members in government were deeply divided between those who saw the ICC as being in line with Australian internationalist views held since Federation, and those who saw Australian troops as potential victims of a politicised court. The federal Cabinet finally decided for the third time in 5 years to support the ICC, but only after a public and protracted wrangle. The government also sent an accompanying stipulation with its formal instruments of ratification of the ICC that no Australian would be prosecuted without the consent of the Australian government.

So what is all the fuss about?

If a person is suspected of a crime in Australia, Australian law provides the law that lays down the essentials of the crime (in statute and case law), the process of investigation, how decisions to prosecute are made, the rules of criminal procedure (including appeals, a right to representation in serious crime, and the law of evidence), the range of permissible punishments, and the person or person to exercise the judicial function, either alone or with a jury. In the case of the ICC, so far there is a Court and a Statute that has specified the kind of crimes to be tried (war crimes and crimes against humanity), their elements, and the maximum penalty of life imprisonment. The remaining architecture of the system, including the personnel, is still being decided by those States that are Parties to the Statute. This will be finalised in September 2002. The capacity to participate in these discussions was a powerful argument for Australia to support the ICC during its initial stages - settling procedures and appointing judges and prosecutors.

What are the safeguards against abuse?

But the way that the Court will work has been settled, including the fundamental principles subscribed to by the Parties to the ICC Statute.

First, the ICC will not have jurisdiction over any matter that occurred before the ICC came into existence, 1 July 2002. This means that there can be no dredging back into history to find a claim arising from past hostilities. Because the ICC is a permanent tribunal, there will not be the same problems that have occurred with the tribunals set up for Yugoslavia and Bosnia in trying to collect evidence and arrest suspect war criminals. Subject to this, any person in the world may be subject to the ICC whether their countries are parties to the ICC Statute or not.

Secondly, the ICC has a deterrent role. It seeks to introduce a culture of accountability for actions, rather than one of impunity. It represents a condemnation of the horrendous crimes of genocide and other crimes against humanity and, as such, affirms principles of law and morality espoused for many generations. It provides an effective and just way to punish such crimes, wherever and whenever in the future they occur.

Thirdly, and most important, the jurisdiction of the ICC is complementary to that of national domestic law. The ICC

can try an Australian only if Australia is "unwilling or unable to prosecute crimes of serious international concern. If Australia is investigating or prosecuting a crime under our own law, the ICC is conclusively prevented from pursuing it."[8]

All the crimes that are defined within the ICC Statute are crimes within Australian law. The standing and strength of the Australian legal system are such it is extremely unlikely that any issue of bringing an Australian before the ICC could arise.

Finally, the decision to prosecute under the Statute is not one subject to political control. Decisions to prosecute are to be made by the Prosecutor's Office of the ICC, and are not subject to the control of any of the countries that are parties to the Statute. The one modification of this principle is that the Security Council of the UN can vote to restrain the investigation or prosecution of a person for one year, when the matter can be returned to the Security Council, and it can make a similar decision. The rationale for this is that there may be a situation where for example in order to achieve peace, the Security Council might offer amnesty to a dictator for past crimes against humanity. The larger objective of peace could be achieved although one person allegedly guilty of war crimes may go free. This was a compromise struck during the discussions in Rome before the final text of the Statute was agreed.

Conclusion

The ICC "is a momentous step forward for international justice"[9] It can help to reduce the misery and the horror of the atrocities that have been perpetrated in our world. It removes the situation where countries have stood by in the face of genocide unable to intervene except by diplomatic means or by armed intervention. No one can feel safely above the law now.

[1] Amended- *The International Criminal Court (Consequential Amendments) Act 2002.*

[2] See their Report on www.aph.gov.au/house/committee/jsct/ICC/ICC.htm

[3] Resolution 1422, 12 July 2002.

[4] It is possible for those countries that are parties to the ICC Statute to reach such agreements under the ICC Statute art 98, but this procedure is not available to non-parties such as the US.

[5] Bryan MacPherson, Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings, July 2002, Insights Series, American Society of International law.

[6] Sophie Panopoulos, *The Age*, page 11, 17 June 2002.

[7] Mrs Bronwyn Bishop, *Australian Financial Review*, page 3, 14 June 2002

[8] Daryl Williams Q.C., Attorney-General for the Commonwealth of Australia, *The Age*, pp 13, 25 April 2002.

[9] Editorial, *The Age*, 18 April 2002, quoted by the Federal Attorney-General, Daryl Williams Q.C.