

Justice Perry - The International Criminal Court

Talk to Legal Studies teachers 31/05/05 (Notes by Robin Aukett)

Australia has a long history of lagging behind Europe in terms of human rights jurisprudence. Contrary to this general trend was Australia's signing and subsequent ratification of the treaty to establish the International Criminal Court.¹ (The ICC)

The initiative came from the United Nations General Assembly in 1998. Meeting in Rome the delegates of 160 nation states (a plenipotentiary – the collection of people with the authority to make decisions on behalf of their governments) debated the proposal and eventually 120 signed the “Statute of Rome”.² Although some nations including the USA, Russia and Israel signed the original agreement and then refused to ratify the statute, 60 other states did and so it was adopted.

The Court is not an organ of the United Nations but is completely independent of it, funded by the nations that agreed to accept it and its jurisdiction. It has 18 judges (11 male, 7 female) nominated by member states for terms of two years. No state can have more than one judge on the ICC bench at one time). Cases are prosecuted by an independent prosecutor, and decided by a panel of 3 judges using a mixture of common law processes and the “continental” commission of enquiry system. There is an “Appeals Chamber” of 5 judges.

The ICC is different from the International Court of Justice which only resolves disputes between states such as boundary and territorial waters disputes. It resolves disputes where real persons are charged with crimes; replacing ad hoc tribunals such as those set up to deal with individuals from World War II (Nuremberg), Rwanda and the former Yugoslavia. These bodies were set up by the United Nations Security Council in response to specific debates and were characterised by dissent about structures, jurisdiction and operation, were slow to establish, expensive and subject to political grandstanding by members of the Security Council. It is also insulated from the power of veto that applies to general matters decided by the Security Council and so its opponents including the USA cannot determine its activities. The ICC is a permanent court which can hear cases referred by the Security Council, by member states, or on its own initiative.

The ICC hears cases where people are charged with

- genocide,
- crimes against humanity and
- war crimes

These are all well described through a substantial body of international case law. They are also defined in the Rome Statute³, the Genocide Convention⁴ and the Geneva Convention⁵. A 4th category – “crimes of aggression” was listed but never defined in the statute and can be largely disregarded.

General principles

¹ The website of the International Criminal Court <http://www.icc-cpi.int/home.html&l=en>

² Full text of the Statute of Rome

<http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/fb2c5995d7cbf846412566900039e535>

³ See notes 1

⁴ See notes 2

⁵ See notes 3

- The presumption of innocence, standard of proof (BRD) and the onus of proof being on the prosecution were specifically incorporated into the original statute.
- Its jurisdiction applies to persons over 18 with no distinction as to status. (So there is such thing as diplomatic immunity, even heads of state could be charged.)
- There is no statute of limitations so that there is no time limit for prosecutions to commence.
- There is no defence of 'superior orders' for crimes of genocide and crimes against humanity.
- Complementarity. From the preamble to the Statute: "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". This means that states will have the opportunity to resolve matters themselves, and only if they can't or won't does the ICC need to be involved. (When Australia ratified the Statute, it was only after satisfying concerns about the loss of legal sovereignty by passing domestic legislation that mirrored the offences defined in the Statute.)
- Signatory states will cooperate when it comes to arresting people and those that are able and willing to accommodate convicted offenders in their prisons have nominated themselves.
- Penalties up to and including life imprisonment can be imposed. There is no provision for capital punishment.

Notes

1. Definition of Crimes against Humanity

The definition of crimes against humanity under customary international law is contained in **Article 7(1) of the Rome Statute**:

"[C]rimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

1. Murder;
2. Extermination;
3. Enslavement;
4. Deportation or forcible transfer of population;
5. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
6. Torture;
7. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
8. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
9. Enforce disappearance of persons;
10. The crime of apartheid;
11. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. The Definition of Genocide

The definition of genocide is contained in the Genocide Convention, adopted by the United Nations in 1948 and ratified by the United States in 1988. **According to Article II of the Genocide Convention**: Genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

1. Killing members of the group;
2. Causing serious bodily or mental harm to members of the group;
3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
4. Imposing measures intended to prevent births within the group;
5. Forcibly transferring children of the group to another group.

Genocide entails the denial of the right to existence of entire human groups. *UN, General Assembly, Official Records, General Assembly Resolution 95 (I), 11 December 1946*

3. Definition of War Crimes

War crimes are against the *customary laws* of war which are applicable in any conflict, regardless of whether the country in question is a signatory to the Geneva Convention. They include the rights listed in the *common article 3* of the Geneva Conventions:

- "First Convention", the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
- "Second Convention", the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
- "Third Convention" the Geneva Convention relative to the Treatment of Prisoners of War
- "Fourth Convention"; the Geneva Convention relative to the Protection of Civilian Persons in Time of War

and the basics of human rights law – freedom from torture, mutilation and rape, slavery, and willful killing. Customary law also forbids genocide, crimes against humanity, as well as war crimes.

common article 3

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.