

## WATCHING BRIEF:WB18-6 INTERNATIONAL CRIMINAL COURT

***As Quakers, we seek a world without war. We seek a sustainable and just community. We have a vision of an Australia that upholds human rights and builds peace internationally, with particular focus on our region. In our approach to government we will promote the importance of dialogue, of listening and of seeking that of God in every person. We aim to work for justice and to take away the occasion for war.***

October 2018

*The International Criminal Court has been in focus recently, because of a strong verbal attack by John Bolton of the US Administration against its existence, and a UN report suggesting that Myanmar's top military officials be prosecuted by the Court. This Brief looks at the origins, activities and shortcomings of the Court and examines the ways in which it might be strengthened. Some African countries have objected to what they regard as an undue focus on Africa.*

### **The International Criminal Court (ICC)**

In 1998 the Rome Statute created the basis for the establishment of the Court, which was set up in 2002 "to prosecute and bring to justice those responsible for genocide, crimes against humanity, and war crimes" (*BBC News*, 25 June 2015). It has the support of 123 countries and is a court of last resort, intervening when national authorities cannot or will not. It is different from the World Court (International Court of Justice) which rules on disputes between governments but does not pursue individuals. The ICC has automatic jurisdiction for crimes committed on the territory of a 'state party' to the Statute, or when the United Nations Security Council (UNSC) refers a case to it. The ICC is based at The Hague, has no police force and relies on help from national police. Prosecutors and judges are elected by states parties. The finance for the ICC comes from the states parties, and it has around 800 staff.

Those countries that have refused to sign on to the ICC include China, India, Pakistan, Indonesia, Turkey, and USA. The most notable to have signed but refused to ratify are Egypt, Iran, Israel, and Russia. In the case of the USA, President Clinton signed the Statute in the late 1990s but Congress would not ratify, then subsequent Presidents have withdrawn the signature. The UNSC initially accepted the US demand that its troops be immune from prosecution under the treaty, but this lasted only from 2002 to 2004. Burundi withdrew in 2017. In 2016 South Africa and The Gambia notified their intention to withdraw, but then rescinded that decision in 2017.

The ICC trials are based on a hybrid common law/civil judicial system. With three judges and majority verdicts. Hearings may be public or private. The standard of proof is 'beyond reasonable doubt'. Victims may be invited to present their views to the Court, and may also receive reparation for suffering. The range of cases that can be covered includes the following:

- (a) Genocide – killing members of a group, causing serious bodily or mental harm to group members, forcibly transferring children from one group to another.
- (b) Crimes against humanity – murder/extermination, enslavement, torture, rape, sex-based crimes, persecution, deportation, apartheid.
- (c) War crimes – willful killing, inhumane treatment, biological experiments, sexual violence, unlawful confinement, taking hostages.

The ICC has opened 11 investigations (10 focused on Africa). So far there have been arrest warrants for 34 people and summonses for 8, proceedings are in train for 23, 12 are fugitives, 3 are serving sentences, 6 have had charges dismissed, 2 have had charges withdrawn, 4 have died, and 1 case was declared inadmissible.

After concern in some countries of Africa about the ICC's attention to that continent, Burundi withdrew in 2017. South Africa and The Gambia each decided to withdraw in 2016, but then rescinded that in 2017. The Philippines in planning to withdraw in 2019.

For further details on the ICC see [www.ohchr.org](http://www.ohchr.org)

### **Australia and the ICC**

According to the website of the Department of Foreign Affairs and Trade ([www.dfat.gov.au](http://www.dfat.gov.au)) Australia joined the ICC in 2002 and actively participates in the Assembly of States Parties to the Rome Statute. It also provides financial support, both to the annual budget and for specific initiatives such as the Trust Fund for Victims, the Trust Fund for Least developed Countries, and the 34 Internships and Visiting Professionals Program. The (Australian) ICC Act 2002 establishes mechanisms to help Australia comply with the Rome Statute.

In February 2017, Ben Doherty (*The Guardian*, 13 Feb) reported that a group called the Global Legal Action Network and the Stanford International Human Rights Clinic put forward a submission to the Office of the ICC Prosecutor urging that an investigation be launched into the detention facilities in Manus and Nauru because of reports of inhumane conditions, mental illness and sexual abuse, and because the Australian Government was unwilling to investigate. This could lead to prosecution of an Australian government official which would be unprecedented. There has been no formal response from the ICC yet, according to the group that put forward the submission.

### **Analysis and Commentary about the ICC**

Tim McCormack (University of Tasmania Dean of Law and adviser to the ICC Prosecutor), in an article in the *University of Tasmania Law Review* (vol 27/1 in 2008), said the creation of the ICC affirmed the individual criminal responsibility for international crimes, and ensured greater scrutiny of governments for their policies.

The ICC has been a catalyst for national implementing legislation to provide penal sanctions domestically for international crimes. Australia now has a section in the Criminal Code that includes crimes covered under the Rome Statute in the area of genocide, crimes against humanity, and war crimes.

Murtaza Hussain (in an article on-line on 13 September 2018) said that the latest attack on the ICC by John Bolton (US Administration) is motivated by an effort to silence investigations into alleged American war crimes in Afghanistan, as well as alleged crimes by Israel during the 2014 war in Gaza. An ICC report in 2016 made allegations of torture, cruel treatment and rape by soldiers and CIA officials arising from detention programs in Afghanistan in 2003-4. John Bolton denounced the ICC as 'illegitimate' and said the US would not cooperate with it. He threatened sanctions on the travel and finances of ICC officials, and to prosecute them in US courts. In response, the ICC said it would continue its investigations.

Constanze Stelzenmuller of the Centre on the US and Europe wrote (13 September 2018 in the *Financial Times*) that the US attack was consistent with its general attitude to multilateralism. The ICC record is patchy, and most of its investigations have focused on Africa. But the attention now on Afghanistan redresses the balance, and the ICC is currently looking at allegations against the Taliban and the Afghan government. Rather than declare its 'righteousness', the US could avoid ICC attention by conducting its own investigations into allegations against US soldiers. Most countries that have suffered in cruel wars welcome the ICC's work to increase accountability.

Abdul Tejan-Cole of the Open Society for West Africa wrote in 2016 (see [www.booksandjournals.brillonline.com](http://www.booksandjournals.brillonline.com)) that the ICC focus on Africa was justified to enable victims there to have recourse to justice because their own courts have failed them.

### **The Latest Focus on the ICC**

Jen Kirbyjen (*Vox*, 18 September 2018) highlighted the United Nations Report by a human rights panel detailing violations carried out by the Myanmar armed forces against Rohingya people and other ethnic minorities since 2011. The report – based on 875 interviews – revealed many instances of rape, shooting, knifing, and torture. It builds on a preliminary UN finding in August that recommended that top military officials be investigated and prosecuted through the ICC for crimes against humanity and genocide.

Max Pensky and Nadia Ruball from the State University of New York reported (*The Conversation*, 5 September 2018) that the UN analysis shows that the attacks since August 2017 must be named as genocide, and that Aung San Suu Kyi has abetted the military in their actions. Michael Safi (*The Guardian*, 7 September 2018) said that ICC prosecutors argue that even though the acts were committed in Myanmar (not a party to the Rome Statute), the crime would not have been completed until the refugees entered Bangladesh which is a party to the Rome Statute. The ICC has thus begun an initial investigation.

While refraining from any comment on the John Bolton attacks on the ICC, the Australian Government has now indicated great concern about the Myanmar report and supported moves to bring the perpetrators to account. Senator Marise Payne, Foreign Minister, said on 19 September 2018 that “the full report of the fact-finding mission adds to a large body of evidence indicating the commission of the most serious crimes under international law, particularly against the Rohingya. The Australian Government is considering options in response....including targeted sanctions”.

## **Conclusion**

The variable response to the development and activities of the ICC can be seen as part of the ongoing ambivalence and conflict between national sovereignty and international responsibility for atrocities committed across borders and upon defenceless people. Quakers have consistently supported the role of the United Nations and its agencies in setting international standards and practice. The ICC deserves to be defended as one of the institutions that reinforce the basic principles of humanitarian behaviour.

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