



Newsletter

MARCH 2003

International Criminal Law & the International Criminal Court

Vol 6 Issue 3, March 2003

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The intervention in Iraq by the so-called “Coalition of the willing”, regrettably including Australia, has raised the issue of the amenability of that action to prosecution in the International Criminal Court.

Commentators seem to regard it as a curious and theoretical discussion in which academic international lawyers from various centres of learning disagree about whether it is possible for commanders from the US, UK or Australia to be charged with war crimes. Maybe it is. In his address from the White House announcing American military intentions a week or so ago, President Bush warned Iraqis that war crimes would be prosecuted, although he did not say how, by whom or where.

Such events underline the importance of the International Criminal Court and the likely significance it will have as international criminal law becomes a broader and more involving jurisdiction. Members of this Association should be interested in it, particularly those with most of their careers ahead of them for I suspect, similarly regrettably, that it is the domain of the young and inspired criminal lawyer.

Many young Australian lawyers with skill in language and a knowledge of international law have already ventured into this area but many of our members may still be unaware of the potential opportunities opening up for them internationally. The practice of international criminal law is obviously more than the historical memory of the trials at Nuremberg or Tokyo at the end of World War 2. Youth was a feature of one of the trials at Nuremberg. It was the trial of some 22 Nazi war criminals concerning the murder of more than one million people. The chief prosecutor was an American lawyer from New York - Benjamin Ferencz. He was 27 years of age at the time of the trial.

Internationally, there are a number of criminal tribunals under the auspices of the United Nations to a greater or

International Court (cont..)

lesser extent. The tribunal for the former Yugoslavia at The Hague; the tribunal for Rwanda in Tanzania; the special Court for Sierra Leone and, as of July 2002, the International Criminal Court. Professional organizations have grown around these Courts and will expand in the future. There is an International Association of Prosecutors which covers, among others, those working as prosecutors within the UN tribunal system. Importantly, our Criminal Bar Association is represented in discussions which have occurred in Montreal, Paris and currently in Berlin, for the establishment of an International Criminal Bar Association which is specifically designed to aid those lawyers defending accused persons before the ICC.

Australia is a long way from anywhere. It may be difficult to imagine the possibility of practicing our craft on the other side of the world in an inter-

national forum. However, it is possible and several distinguished Australians have done it. Graham Blewitt is Carla del Ponte's deputy at the Yugoslav Tribunal. Sir Ninian Stephen and Justice David Hunt have taken part as judges. There is an Australian prosecutor at the Rwanda Tribunal in Tanzania. Many others – younger and with a lower profile are also involved.

Members interested in the area generally can obtain further information through the United Nations web site by following the links to the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) or the International Criminal Court (ICC).

More information about the life and work of Ben Ferencz can be found at www.benferencz.org.

LEX LASRY QC

Committee News

2002 Annual Dinner

Once again the Annual Association Dinner was a well attended and entertaining affair. Thanks go to their Honours Chief Judge Rozenes and Judge Hassett for their speeches on the night and for their contribution to the Association generally. The Annual dinner has rightly earned a reputation as one of the premier functions of the Legal year, and a Social sub-committee comprising Jeanette Morrish QC, Michael Tovey QC and Stephen Shirrefs SC has been established to ensure that future dinners maintain previous standards.

It was slightly disappointing that the 2002 dinner could not boast a higher attendance from our more junior members. A greater effort will be made to keep costs as low as practicable to encourage attendance from all members.

Dinner; Thursday 10 April 2003

The first Association Dinner of 2003 will be held on Thursday, 10 April 2003, upstairs at the Metropolitan Hotel, for an all inclusive cost of \$55. Special guest will be His Worship Ian Gray, Chief Magistrate of Victoria.

An invitation and booking form for the April dinner is contained later in this edition.

Summary Crime

Committee member Reg Marron has continued to meet with Association members to address the issues arising from the inadequate funding for criminal matter in the Magistrates' Court. A meeting was held on 22 December, from which a strategy to tackle this seemingly perennial issue are being developed. Those wishing to contribute should contact Reg on ex 6417.

Provocation Seminar

Committee News (cont..)

The Association thanks Justice Phillip Cummins and Professor George Hampel for their fine presentation of the "Provocation" seminar held at the reader's lecture theatre on the 25th of November 2002. The seminar was a vital first step in establishing an Association submission to the Victorian Law Reform Commission, who are undertaking a review of the law relating to provocation. The Committee is keen to hear any views of the membership on the issue. It was clear from the seminar that the area is complex.

Committee members Michael Tovey QC and Jeanette Morrish QC have attended meetings with the VLRC and have established an excellent working relationship with VLRC chair Marcia Neave regarding the Homicide defences reference.

VLRC are currently undertaking and analysis of 170 cases over a spread of three years to try and determine the number and circumstances of cases where self defence or provocation was the central issue in determination of the case. VLRC are being assisted in that task by Aaron Schwarz and David Brustman, with further input from Peter Morrissey.

Continuing Legal Education

In accordance with the Victorian Bar Continuing Legal Education program the Association will hold at least five seminars this year, with possible topics ranging from Propensity evidence, Search Warrants, Federal and State Terrorism legislation and the Juvenile Justice system. The Committee welcome members suggestions as to other possible seminar topics.

Upcoming Seminar

The next Association seminar will be on the Victorian Drug court and will be held at the Neil Forsyth room, 13th floor, Owen Dixon Chambers East. Further details are contained later in this edition.

Legal Aid

The new year and the election result has meant that the promised increase to legal aid funding is now a reality. It is essential that the new funding goes some way to redress the woeful situation for summary crime. The Association representatives on the Legal Aid taskforce are seeking to secure agreement from Legal Aid for a fair split of the new funding for barristers. The Association believes this to be essential notwithstanding the competing priorities for the new funding, such as the new Horsham Legal Aid office and funding for Community Legal Centres.

Project Innocence

Jeanette Morrish QC has agreed to be the Association nominee on the founding committee of "Project Innocence". Details of the organisation are contained later in this edition.

County Court

The Chief Judge of the County Court is proposing "A New Approach to Criminal Trials in the County Court", the proposals of which are to streamline criminal trials in the County Court.

Roy Punshon SC and Nicola Gobbo will be the Association representatives on a working party.

Firearms Bill

The Association has made submission to the government on the proposed new legislation dealing with the ownership of handguns. Overall, it was agreed that the initiative was a reasonable response to the community concerns on handguns and crime, however a number of points of concern were identified by Oscar Roos on behalf of the Association and they have been incorporated into the response.

Cross-Border Powers

A Discussion Paper has been received from the Department of Justice regarding cross border investigative powers for law enforcement. The issues are concerned with four areas of

Committee News (cont..)

multi-jurisdictional investigations and seek to establish a uniform set of provisions to apply Australia wide regarding controlled operations and undercover police activities, providing and protecting assumed identities, covert electronic surveillance, and the capacity to allow witnesses to give evidence under assumed identities. Ed Lorkin appeared on behalf of the Association, along with representatives from the Bar and Liberty Victoria has attended a briefing on the topic and submissions on the discussion paper are due 28 March 2003. A sub-committee comprising Michael Tovey QC, Phillip Dunn QC and Roy Punshon will formulate the the Association submission and mem-

bers will be advised in due course.

Terrorism Legislation

As you would be aware, the proposed *Terrorism (Community Protection) Bill* has been the subject of Association scrutiny for some time. Debate on the bill has been adjourned until the end of March. The Association will continue to air its concerns during this time.

Commonwealth Conference

Members are reminded that the Commonwealth Law Conference is being staged in Melbourne this coming April. Speakers include Cherie Blair QC and Geoffrey Robertson QC.

In the Court of Appeal By Paul Holdenson QC

Lists of Authorities

The Court recently expressed grave concern at the manner in which counsel had prepared (and filed) their Lists of Authorities.

In that case, a number of the authorities in the Lists had not been correctly cited.

The Court stated that "it would be good if the message [could] get around the profession" that the Court expects counsel to ensure that:

- the names of cases are spelt correctly;
- where cases are reported in the authorised reports (for example, CLR's, SASR's, QdR's, etc.), citations from the authorised reports must be provided;
- correct volume numbers are provided; and
- where a case has been reported, then it should not be listed as unreported.

The Court stated that the failure of counsel to comply with these simple fundamentals meant that the Court

staff were required to spend much extra time tracking down the authorities for the members of the Court.

It seems to this writer that if members of the Association do not comply with the Court's requirements, a rule might be introduced whereby, should counsel wish to rely upon any authority, then 3 or 4 photocopies of same must be lodged with the Registry some 2 days before the hearing date.

Having appeared before both the Queensland Court of Appeal and the Tasmanian Court of Criminal Appeal in recent months, where such is the rule, and in circumstances where solicitors are both unwilling and unable to attend to same, I can assure the members of this Association that we in Victoria are very lucky indeed - and we must ensure that "the generosity" of the Court is not withdrawn.

"Manifestly Excessive"

Late last year, the Court found it necessary to consider the jurisdiction of the Court where the only ground of appeal relied upon was that the sentence

In the Court of Appeal (cont..)

imposed was, in all the circumstances of the case, manifestly excessive; see R v Andrew Mark Norrie [2002] VSCA 232; (unrep., Vic. CA, 12 December, 2002).

In that case, prior to the commencement of argument, the Court reminded counsel of its powers to increase the sentence which had been imposed by the sentencing judge below; see at s.568(4) of the Crimes Act, 1958.

Counsel for the appellant (leave to appeal having previously been granted by a single judge of the Court of Appeal under s.582 of the Crimes Act) was then granted a short adjournment for the purpose of obtaining instructions. Subsequent to the adjournment, counsel abandoned those Grounds of Appeal which alleged specific error, counsel indicating that he was expressly and unequivocally instructed by the appellant himself to proceed upon the Ground alleging manifest excess; see at para. [17].

The course adopted by counsel

prompted a number of questions from the Bench! Counsel for the appellant submitted that, in circumstances where only the one ground alleging manifest excess was relied upon, it would be impermissible for the Court to consider imposing a higher (that is, a more severe) sentence. This submission was quickly rejected by the Court; see at paras. [17] and [28] per Chernov JA and Phillips CJ respectively. The Court subsequently dismissed the Appeal. It seems to this writer (who appeared as counsel for the appellant in the case considered above) that the lesson to be learnt from this case is very simple: when the Court gives the requisite warning that, should the matter proceed, then there is a real chance that the sentence will be increased, then counsel must “ensure” that the (entire) Appeal/Application is abandoned - notwithstanding the fact that, if it be an Appeal, leave has been granted on the basis that one (or more) of the Grounds of Appeal is “reasonably arguable”.

Committee Details

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ReprieveAustralia The Other Victims

Who is the most important person in your life?

Think about that person for a moment...

If you knew this person had only a few days left, what would you say in your prayers in an effort to determine fate?

Imagine that you can actually see the person you are praying to. It is twelve jurors who have the power bestowed on them to determine 'life' or 'death.' You are no longer in the privacy of your own thoughts but in a hostile courtroom giving character evidence as a family member of a defendant who has committed a capital murder and faces the death penalty. The gruesome facts are no longer mere allegations; a finding of guilt has already been reached. There is only one issue left to decide.

As you stumble through the intimacy of your insights and personal experiences, all the attention is fixed on you. Your efforts to avoid the hate in the eyes of the victim's family leave your focus on the empty gaze of strangers; their only thoughts, "thank god I am not in your shoes."

To capture the full measure and essence of a loved one may be the difference between life and death. There is probably no more daunting a task than trying to dissuade a jury from taking the life of your child, grandchild, spouse, parent or sibling. The enormity of stress is only equalled by the heightened guilt that would follow an unfavourable outcome.

The case of Henry Curtis Jackson is a compelling illustration of a mother trying desperately to save the life of her son. He was found guilty of the November 1990 stabbing deaths of four children aged between two and

five. He was in search of money supposedly kept in a safe at the time.

As is the situation with any capital case, the sentencing phase of the trial immediately follows a verdict of guilt. In determining a life sentence or the death penalty, jurors are asked to weigh the 'aggravating factors' against the 'mitigating factors.' Defense attorneys will typically call evidence to humanize their clients to save them from death.

Martha Jackson is a large, African American woman. She was an alcoholic for many years but eventually found the lord and devoted her life to him. At the time of the trial, she described herself as a 'missionary' who 'taught the word of the lord.'

When asked about her relationship to Curtis, she promptly replied, "he is my baby son."

As a baby she recalled holding him in bed with the radio on until he fell asleep. He was a "sweet person" and a "good son." He visited me "once in a while" and "helped me with stuff." A smile appears for the first time when she reveals that Curtis was brought up a Christian.

Her face immediately sours when next asked about the crime. She explains, "I feel he entered into there to steal but after things didn't work out, I feel like something went over him." He was "terribly sorry" she stresses before being overcome with emotion.

The level of tension escalates with the final line of questioning from the defense attorney and culminates with the final question: "Mrs. Jackson, Curtis has been found guilty of killing. Should he be punished for that?"

She replies: "I feel like he should be punished but not killed. When they kill him, they are going to be murderers

RepreiveAustralia (cont..)

just like him...we don't know what is going to happen to our mind. I feel like god allowed Satan to attack his mind and he went into a shocked spirit."

What makes this evidence so remarkable is that the four victims were Martha Jackson's grandchildren. How could she support her son in those circumstances? Perhaps she was not aware of the full depravity belying the slayings. The district attorney raised this issue during her cross-examination in the hope that Mrs. Jackson would recant the favourable parts of her testimony if fully appraised of the brutal nature of the crime.

What follows is the relevant exchange between the district attorney and Mrs. Jackson.

Q: Mrs. Jackson, are you aware of the nature of the injuries that your son inflicted on these children?

A: All I know, those children are dead.

Q: Do you know how they died?

A: I know what I heard. I wasn't there.

Q: Do you know that they died painful deaths?

A: I couldn't say that. I didn't feel their deaths?

Q: Did you know that they died not immediately, that they had some conscious thoughts before they died?

A: I couldn't answer that.

Q: Did you know that they suffered?

A: I can't answer that?

Q: Would it make a difference to you Mrs. Jackson?

A: Would it make a difference?

Q: In how you feel about Curtis knowing that he caused the children to suffer?

With all the courage and dignity she could muster she turned to the judge and asked if she was allowed to tell the district attorney how she felt. The court duly granted her the permis-

sion sought.

She began by remembering how she went to church with those "little children." She recalled how little Tony would clap his hands; how little Shunterica would say, 'thank you lord, thank you lord;' and how little Dominique and Andrea would sit on her lap. She raised those children; she had a "special love" for them and like most grandmothers her "family came first."

She loved those little children, she loved those little children...She continued to repeat these words herself as though in a trance. There was a strong sense of discomfort oozing from the body of the court, from members of the public who had never before been privy to such raw disclosure.

The chant came to an abrupt halt. Mrs. Jackson had been gazing out vacantly but then suddenly glared fiercely at the district attorney and with shuddering force said, "I cared for them and I loved them." Pointing at Curtis she then finished her testimony with the words, "just like I love and care for him."

In November 1991, at the Covich County Circuit Court, the jury returned a verdict of death.

Four children are dead and nothing will bring them back. A family is totally shattered. A mother and grandmother will grieve for an eternity. Curtis Jackson languishes on death row awaiting his fate. The state will inevitably execute another of its citizens.

Who wins? What is achieved?

An experienced death penalty lawyer who has spoken to the families of a countless number of victims says, "all they ever want is just five more minutes to say goodbye, a penalty of death is never going to give them that."

Ashley Halphen

Ashley has just returned from a second stint in New Orleans working in the Louisiana Crisis Assistance Centre.

Project Innocence

“There is no place for innocence in prison.”

Ruben ‘Hurricane’ Carter, The American Innocence Project

The Innocence Project is an international pro-bono project which brings together lawyers, academics and law students, who work together to investigate cases and attempt to secure freedom for innocent persons who have been wrongfully convicted.

The American Innocence Project

The Innocence Project originated at the Benjamin N. Cardozo School of Law (NYC) and was developed by Barry Scheck and Peter Neufield in 1992.

The American Innocence Project only handles cases where post-conviction DNA evidence can yield conclusive proof of innocence. Many of the Project’s clients are poor, forgotten and have exhausted all legal avenues for relief. Their last hope is that evidence from their cases still exists and can be subjected to DNA testing.

Currently, the Cardozo branch of the American Innocence Project has over 2000 cases awaiting evaluation to determine whether or not DNA testing of evidence could substantiate their claims of innocence. As at 7 October 2002, the American Innocence Project has secured the exoneration of 114 defendants, several of whom were on death row.

The American Innocence Project has developed nation-wide, and more recently has grown into an international project of research, co-operation and activism.

The Griffith University Innocence Project

The Griffith University Innocence Project was initiated by Griffith University and Nyst Lawyers in 2000. The Project has a slightly wider ambit than that of the American Project, and considers applications for assistance from around Australia where:

- ❑ there is a claim of factual innocence;
- ❑ a person has been convicted of an offence and the appeal period to the respective appellant has expired;
- ❑ DNA evidence was relied upon at trial and was questionable and/or no DNA evidence was relied upon at trial and the use of DNA evidence could bring about a possible fresh evidence point; and
- ❑ in exceptional circumstances the Project may investigate other situations of potential injustice with the goal of correcting, exposing, and educating the public about injustices that occur within the Australian criminal justice system.

The Griffith University Project does not accept cases where a conviction would be overturned based on a technicality rather than proof of innocence, nor does it accept sexual offence cases where there is an admission of sexual contact.

The Project is run as a ‘hands-on’ subject at Griffith University in Queensland, with students being involved in the evaluation of cases, research and reporting the results. The students are supervised by solicitors and academics with expertise in the area of criminal law and forensic science. Students also participate in legislative and policy reform work.

The Australian Innocence Network

Project Innocence(cont..)

The Australian Innocence Network, administered by Griffith University, was established to promote state-based Innocence Projects around Australia. Ultimately the Australian Innocence Network aims to have an Innocence Project running in each State and Territory of Australia.

The Victorian branch of the Australian Innocence Project is currently being established.

The Melbourne Innocence Project

It is envisaged that the Melbourne Innocence Project will be run as a subject at a Victorian University. Students will source and evaluate relevant applications from prisoners. The Project will be overseen by an executive committee of academics and legal professionals, which will provide supervision and guidance to the students, as well as being ultimately responsible for making case management decisions.

The preferred model, as is successfully being applied at Griffith University, is for small groups of students to take on the responsibility of several potential cases. Together, they prepare a preliminary report to be presented to the executive committee regarding the potential for further action to be taken. When an application is approved, students research the background information relating to the client's conviction, such as court transcripts, record of interviews and prosecution briefs.

The students will attend weekly lectures on case file management and criminal procedure, and will be expected to maintain the carriage of the files. Additionally there will be a weekly meeting between all students, academics and legal professionals to discuss the progress of each of the files, and to discuss avenues of investigation.

In the Griffith model, all professional case-management decisions are the responsibility of the executive committee.

Once the team has conducted the review of the brief, a decision is made by a suitably qualified legal professional as to whether a challenge to the conviction is possible.

Through being involved in the project, students learn valuable case management skills and gain a deeper understanding of the criminal law system.

Are you interested in becoming involved?

The Melbourne Innocence Project is currently under development. Legal professionals with a particular interest in criminal law are required to supervise junior solicitors and law students in all aspects of file management, from initial assessment of suitable applications, to ongoing research and advice.

Further Information

For further information or expressions of interest about this project, please contact Paul Coady on (03) 9286 6901 or email: pcoady@claytonutz.com.

For further information regarding The Australian Innocence project at Griffith University, please contact Lynne Weathered at innocence-project@mailbox.gu.edu.au, or please refer to the website at <http://www.gu.edu.au/school/law/innocence/>

For further information regarding The American Innocence Project, refer to the website at www.innocenceproject.org/about/mission.php

**Drink Driving Cases in the Supreme
Court and Court of Appeal
By Warwick Walsh-Buckley**

Platz v Barmby [2002] VSC

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Byrne J allowed a motorist's s 92 *Magistrates' Court Act* 1989 ("MCA") appeal against conviction on a s 49(1)(g) offence because the minimum 10 day period for personal service stipulated in s 57(5) *Road Safety Act* 1986 ("RSA") had not been complied with. At par [13] he held that s 57(5) "...is clearly expressed. Compliance with the service requirement is a pre-condition to admissibility of a certificate under this section. There is an evident policy underlying this that the defendant should have the opportunity of considering the content of the certificate well before trial. A certificate which has been short-served in terms of the date of its tender into evidence is inadmissible."

Byrne J also allowed the appeal on the s 49(1)(g) offence and a careless driving charge on the further basis that the appellant was not served the charge and summons not less than 14 days prior to the mention date as required under s 34(1)(a)(ii) MCA

The unusual facts preceding the ex parte Magistrates' Court hearing leading to this appeal should be noted.

Day v County Court of Victoria & Anor [2002] VSC 426

Smith J granted certiorari after a motorist's successful judicial review of a County Court Appeal judge's decision to convict on a s 49(1)(b) RSA offence. He held that s 57(9) RSA was intended by Parliament that a driver have a choice to provide a blood sample or not and the driver should express consent before blood is taken or the evidence of the analysis result can be tendered.

In circumstances where more than 3 hrs had elapsed from the time of driving, Smith J held it was not open to the County Court judge to find consent was made following exercise of a choice because the driver remained under the impression that he had no choice thus, when asked by the doctor, his assent amounted to no more than allowing the doctor to take the sample and not the giving of consent.

Smith J did not accept it would have been Parliament's intent that anything short of an *informed* consent would suffice to enable a blood sample to be taken and given in evidence where ss 57(9) and (10) apply.

DPP v Moore [2002] VSC 29

Latest inquiries with the Court of Appeal Registry indicate that the Crown appeal to the Court of Appeal from Balmford J's decision in *DPP v Moore* is unlikely to be reached & handed down until late-2003.

Balmford J heard that a magistrate accepted a defendant's evidence that, after a breathalyser test revealed .074%, the defendant requested a blood test under s 55(10) RSA but took the operator's advice that his blood alcohol level would probably be higher than .07 when the doctor arrived and stated "...if I was you, I'd cop the .07 and forget about the blood". The defendant declined to continue with his right to a blood test. It was not shown the magistrate erred in exercising judicial discretion to exclude the certificate of analysis on grounds of unfairness and dismissing the s 49(1)(b) charge.

**By Warwick Walsh-Buckley
7 March 2003**

The Victorian Drug Court



A review of its operation in the first 6 months

The Victorian Drug Court initiative is an experimental response to the failure of current custodial sanctions to adequately address drug use and related offending. The Victorian model has incorporated the best features of existing drug courts in order to establish a unique Drug Court for Victoria.

The Victorian Drug Court represents a fundamental shift in the way in which the courts will deal with drug offenders. It seeks to focus on the rehabilitation of offenders from drug or alcohol addiction with the ultimate goal of bringing stability to offenders' lifestyles and reintegrating them into the community.

The first Victorian Drug Court is being trailed over three years in Dandenong. It has been underway for 6 months

Magistrate Margaret Harding and Registrar Graeme Ebert will present an introduction to the establishment and operation of this important new initiative.

Please make every effort to attend

Location Neil Forsyth Room 13th Floor Owen Dixon East

Time 5:00 pm

Date: Tuesday 25th March 2003

Further Details Duncan Allen Ph: 92257668 Mb 0414608766
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A component of the Victorian Bar Continuing Legal Education program

CRIMINAL BAR DINNER

“MIX WITH THE MAGISTRATES AT THE MET”



SPECIAL GUEST **IAN GRAY M.** CHIEF MAGISTRATE

Thursday, 10 April 2003
7.30pm

METROPOLITAN HOTEL
cnr William & Lt Lonsdale St
(upstairs function room)

\$55 (all inclusive) - cheques payable to Criminal Bar Association

Members only—(junior members encouraged to attend)

Stephen Shirrefs SC; Clerk Green

I will be attending the **CBA** dinner at **the Metropolitan Hotel** on 10 April 2003

Accordingly, I enclose cheque/cash for **\$55** per person.

Name: _____

Clerk: _____

RSVP by 3 April 2003

Inquiries to Lyn Morton on 8995 of Stephen Shirrefs SC on 8967