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STRATHFIELD NSW 2135  
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The Secretary  
Joint Standing Committee on Treaties  
Parliament House  
CANBERRA ACT 2600

*By Facsimile. (02) 62 77 4 82*

**Re: INQUIRY INTO THE INTERNATIONAL CRIMINAL COURT**

I refer to the invitation for submissions in relation to the Standing Committee's inquiry into the International Criminal Court.

The Committee's mandate is to consider if it is in Australia's national interests to ratify the Rome Statute for the International Criminal Court ("The Statute"). I note that this inquiry is part of a broad review of Australia's participation with a number of International Treaties, and as such, it is relevant to address not only issues specific to the Statute's ratification, but also issues concerning Australia's role in the international community generally.

The following submissions are provided in relation to the Committee's inquiry:

***The Role of the International Criminal Court & International Cooperation***

The International Criminal Court (ICC) will be an international judicial institution. There is no sovereign to command over international law, so the effectiveness of an international body is dependant on a multilateral commitment to acknowledge, abide by, and enforce international law. The fact that 160 States participated in the Statute's Committee in Rome indicates that there is cooperation from a broad cross-section of States and a commitment to the principle of establishing an international criminal court.

The ICC is intended to be a permanent judicial body with responsibility to investigate, prosecute and punish international crimes, The ICC will follow the footsteps of past judicial bodies like the Permanent Court of Arbitration, the International Court of Justice, and the International Criminal Tribunals for Rwanda and the Former Yugoslavia.

The Tribunals in Rwanda and the Former Yugoslavia were, in essence reactionary bodies set up to deal with specific situations that arose and as a result of international condemnation of crimes committed in both countries. Their role was not to deliver justice on an extensive scale.

The ICC's role will be inherently different. It will be given jurisdiction to adjudicate on matters concerning four types of international crime (Part 2). Exhaustive definitions have been given as to what types of behaviour constitute a crime under the Statute (Articles 5 & 6), which have been widely accepted amongst the international community. The Court will have a far more comprehensive jurisdiction than any criminal tribunal or court before it. Further, the Court

purely by its existence will play a role in deterring international crimes from being committed & perpetuated from generation to generation. It would be a symbol of cooperation within the international community and commitment to punish crime.

A permanent judicial body entrusted with only criminal jurisdiction should lead to improving the manner in which the world deals with criminal matters. It is a far better option than having a division of a larger judicial body responsible or setting up temporary military tribunals in an ad hoc fashion. It is evident that a court of this nature, where resources can be consolidated, an administration structure established, and expert knowledge be utilized, is needed to effectively investigate and prosecute crime.

A multilateral approach to crime with an international body able to punish such acts will be far more effective and the repercussions of its authority far reaching than any effort made by a State because it will have superior resources and the backing of the international community's cooperation. The ICC would be better able to make parties accountable for atrocities and bring them to account for human rights abuses, and in Kofi Annan's (UN Secretary-General) words, "to provide universal justice".

The importance of international cooperation can be highlighted in relation to the variety of approaches taken to the extradition of an accused. There are regional customary laws such as those that exist in South America, and multilateral or bilateral Treaties on extradition that may not accord with the ICC's Statute. In such circumstances the ICC will have to rely upon State's commitment and assurance that municipal laws will not preclude a State from adhering to their responsibilities to the ICC to extradite an accused. It is a balance of State interests and international responsibilities. Some may say that this is not an issue specific to Australia, however the intentions of other States is a relevant consideration to how effective the ICC will be.

Australia needs to be confident that it's support of the ICC is not support for a "toothless tiger". It is evident that throughout the Statute that there is a determination for the ICC to be effective. For example, some may argue that the Court's jurisdiction should not be limited to individual accountability, but should attack the mechanisms that enable individuals to commit crimes. By not limiting it's scope to those below a certain military rank or diplomatic level the Court will be able to prosecute not just the foot soldiers, but also the intellectuals and decision makers creating the mechanisms behind the acts. It is also an acknowledgement that an essential element of international crime is that it is facilitated by public officials and leaders with power and position.

Further, Part 10 of the Statute dealing with enforcement provisions expresses that the ICC's rulings are definitive. States have no right to modify sentences or determine applications for appeal. ICC decisions will have a necessary degree of authority and finality that is beyond State interference.

### **State Sovereignty**

One of the main issues to address when considering whether it is in Australia's best interests to ratify the Statute is State sovereignty. It could be argued that the overriding principle is that

Australia retains its sovereignty, and that by ratifying the Statute sovereignty is partly relinquished.

Conversely, one can argue that it is in Australia's best interests to ratify the Statute, and is not relinquishing its sovereignty by doing so. This argument finds foundation in the Articles of the Statute itself

The nature of the crimes it will investigate means that the ICC will be dealing with matters or conflict often occurring within a State's territory. The ICC will have jurisdiction over a matter where the crime was committed within a State, or the State of the nationality of the accused where the State is a party to the Statute (Article 12). Further to this jurisdiction, the ICC will have the ability to hear cases if the Security Council refers a matter to it under Chapter VII of the UN Charter. Thus the jurisdiction of the ICC will extend to States who are not parties to the Statute.

However, Article 17 provides that a case will be admissible before the ICC only where a State is unwilling or unable to prosecute. Priority is given to a State to investigate and prosecute. The Statute acknowledges a State's right to sovereignty over matters that involve its territory and/or nationals. A State will be given the opportunity to act, and then if they do not do so, the Prosecutor must submit a request to investigate to the Pre-Trial Chamber (Articles 15 & 18) who will consider its merits. The Court's role will be complimentary to State courts, State municipal law & sovereignty,

Some States have ratified the statute annexing declarations, such as France's declaration that it is not precluded from exercising its inherent right to self-defence in accordance with the UN charter, nor precluded from directing attacks against military objectives. This is an example of a State wanting to preserve its sovereignty. The Statute recognizes self-defence as a defence (Part 3) where the response is proportionate to the risk faced. Thus there is an allowance for reasonable acts of preservation, which is arguably an element of State sovereignty. New Zealand declared that Humanitarian International Law applies equally to aggressor and defender States and the application is not dependant on a determination as to self defence. This is an example of the variation on State's views on the issue of self-defence, but not necessarily a divergent view on State sovereignty as a general principle.

### **Political Motives of the United Nations**

The ICC being an international body, will have substantive powers and influence. The Statute provides safeguards so that the Court's power will not be abused. Firstly, the Prosecutor must allow a State who is willing and able, to investigate allegations. The Prosecutor can only investigate where there is a reasonable basis that a crime has been committed and that it is in the interests of justice to do so (Part 5). That power is subject to approval by a Pre-Trial Chamber (Articles 15 & 18). This is to ensure that the Prosecutor's role does not become that of a "witch hunter". The Statute seeks to protect individuals from frivolous, vexatious or politically motivated investigations, and Part 6 of the Statute expresses a presumption of innocence.

The ICC will be a creature of Statute, however intrinsically it's role will be to uphold the UN Charter with regard to Human Rights. The Statute attempts to ensure that the Court will not be a

tool for the UN to wield against opponents. Part 4 requires a 213 majority of voting States to elect a judge, and that there be judges representing a fair and broad based geography of States. There is no mention of race as a relevant factor

For the ICC to be effective it needs to have its judicial function operating without impairment, nor be influenced by extraneous factors, political trends, or to be a puppet of UN itself. It appears that the Statute provides sufficient safeguards in that respect.

**Australia in the International Community**

Australia needs to acknowledge its responsibilities as a member of the international community, By supporting and participating in UN peacekeeping activities, and signing a variety of Treaties and Conventions, Australia has shown its commitment to the world community. Australia is a signatory to a variety of Conventions and Treaties relating to genocide and human rights, so supporting an ICC is consistent with previous commitments given on issues directly relevant to the ICC's operation.

Australia needs to balance international commitment with it's own national interests, including sovereignty. A State's interests will not always be considered paramount in the context of an individual's behaviour. At the Nuremberg trials - ***International Military Tribunal (Nuremberg) 1947***, it was argued that the accused had the protection of State sovereignty when war crimes were committed. The Tribunal held that individuals have a duty to comply with international law, and that the duty transcends obligations of nationalistic character, persuasion or motive.

Finally, there is no statute of limitations to investigate crimes under ICC jurisdiction, however the Statute is not retrospective. Thus, potential for actions brought concerning past actions by the Australian State that may be alleged to be crimes against people of Aboriginal & Torres Straight Islander origin or other races will not be admissible.

I hope that the above comments and issues are of assistance to the Committee in its discussions.

Yours Faithfully

Nicola McDonald