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

Submission No.2.1.....

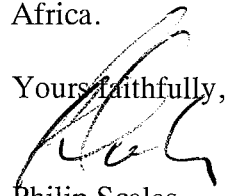
Attention: Mr Morris

Dear Mr Morris,

Re: Permanent International Criminal Court

Further to my letter of 2nd November last I **enclose**, for what interest it may be, a copy of my observations to which I intend to refer when chairing a plenary session at the 14th International Conference hosted by the International society for the Reform of Criminal Law entitled "The establishment of an International Criminal Court", on the 7th December in Johannesburg South Africa.

Yours faithfully,


Philip Scales

Enclosure

THE INTERNATIONAL SOCIETY FOR THE REFORM OF CRIMINAL LAW
CONFERENCE, SOUTH AFRICA
3-7 DECEMBER 2000

PLENARY SESSION – establishment of an International Criminal Court

As you probably know, in July 1998 a conference was held in Rome, at the conclusion of which the united nations agreed to adopt a statute for the establishment of this court.

There are now 116 signatories to the statute, but before the statute can come into force 60 states must have ratified it. There are now 23 countries which have ratified, the most recent being South Africa.

Non government organisations have played a significant part in bringing about this result. There are over 1,000 civil society organisations from around the world representing millions of people who have formed a coalition working together to achieve the establishment of the court.

Accordingly, one might think that, after so long, we now have international agreement for the establishment of a just and effective permanent international court which will assist in bringing to justice those accused of the worst crimes imaginable.

The reality is however not the case. 7 countries voted against the statute, (being the USA, Israel, China, Singapore, Mexico, Turkey and Qatar) with a further 21 countries abstaining.

The lack of support from the USA which voted against is somewhat puzzling, considering the role it has played in the past in incorporating human rights into our international law.

Reasons given for its opposition include the fear that it would provide a weapon for opponents of US intervention abroad to take legal action against American personnel, accusing them of war crimes. In addition opponents say that as the United States is an exceptional country because of its military might, its status as a super power, and its qualities, it should be exempted from the rule of law which would apply to other countries. These reasons are not accepted by the vast majority of states of the United Nations and are regarded as somewhat arrogant and damaging to its reputation abroad.

There is no question that the statute will come into force. It is only a matter of time.

Accordingly the thought is that America would have a lot to gain by joining in the agreements as it has the power to intellectually dominate the ICC and international regulatory system, while providing the world with moral leadership.

Admittedly, if the Americans do join, American citizens could be tried by the ICC, but the structure of the court would make it very difficult for American citizens to be harassed for political reasons. For example the ICC will only act when the national courts are unable or unwilling to do so in appropriate cases - the principle of "complementarity" - and the USA is most unlikely not to so act. In addition there are substantial protections under the statute to ensure that investigations and prosecutions are pursued solely in the interests of justice and not politics.

It will be up to the prosecutor to decide whether to seek authorisation to open an investigation.

The prosecutor is required to act independently, but must request authorisation from the pre trial

chamber, both to open an investigation and to begin a prosecution and those requests can be challenged by states.

Even if a state has not ratified the Rome statute, the ICC will still have jurisdiction if the UN security council asks the prosecutor to investigate a situation where one or more of the crimes within its jurisdiction has been committed, even if the crime has occurred in a territory of a state which has not ratified the statute, or was committed by the national of such a state. It is then up to the prosecutor, not the states or the security council, to decide whether to open an investigation and, based on that investigation, whether to prosecute, subject to judicial approval.

We have seen the establishment of ad hoc courts, but they would not appear to be the answer.

To establish an ad hoc court after an event may not only appear to pre judge the outcome of the trial, but may also take a long time to become appropriately established, which mitigates against a promised effective dealing with those who are accused.

Because of the numerous problem areas involved, and the need to ensure due process to accused persons, ie a fair trial, it is important that substantial periods of time are not allowed to elapse before such trial occurs.

The fear is, that in the quest for ensuring due process, the establishment of the ad hoc jurisdiction may necessitate aspects of it being formulated on the run.

In addition there may be perceptions that:

- (a) The court has been hastily put together and that mistakes have occurred as a result
- (b) It has been media driven

- (c) It has been politically motivated
- (d) A country has been singled out when there are so many others of the world demanding similar attention, or that
- (e) Due process has not been accorded to the accused

At the UN's millennium summit, held in New York between the 6th and 8th September this year, over 150 world leaders recognised the necessity for a permanent international criminal court being established and resolved to make the UN and I quote, "more effective in maintaining peace and security by giving it the resources and tools it needs for conflict prevention, peaceful resolution of disputes, peace keeping, post conflict, peace building and reconstruction". The millennium declaration called upon all 189 UN member states to sign and ratify the Rome statute of the international criminal court.

The summit has been described as the largest ever gathering of world leaders. It was attended by 100 heads of state, 48 heads of government, dozens of vice presidents, deputy prime ministers and foreign ministers.

Accordingly, it is only a matter of time before the court is established and I would urge delegates to pressure those governments which are yet to sign and ratify the treaty to do so as soon as possible.

After December 31st this year, a country will have to ratify before it can join. Before that date a nation can participate by signing the treaty even if ratification is not immediately likely.