JOINT STANDING COMMITTEE ON TREATIES

INTERNATIONAL CRIMINAL COURT

NOTES

THE HONOURABLE JUSTICE JOHN PERRY

I offer a comment on what I understand to be some of the main arguments being put forward against ratification of the ICC Statute by Australia.

A. THAT WE WOULD SURRENDER A PART OF OUR NATIONAL SOVEREIGNTY

* The jurisdiction of all Australian courts, and the ability to initiate prosecutions in them, would be completely unaffected.

* Our ability to prosecute domestically defined crimes committed in our own States and Territories, or in certain circumstances where crimes committed out of Australia may be justiciable here, would be completely unaffected.

* If an act of genocide, a crime against humanity or a war crime as they are defined in the Statute was to be committed on Australian soil, it would unquestionably incorporate a crime which was domestically punishable, and our ability to prosecute for it would likewise be completely unaffected.

* If an act of genocide, a crime against humanity or a war crime as they are defined in the Statute was to be committed by an Australian national abroad, it *may* be committed in circumstances in which Australian courts could exercise jurisdiction over that person for that crime, in which event our ability to do so would again be completely unaffected. If on the other hand, it was not justiciable in Australia, we have not lost any national sovereignty by countenancing a situation in which some other court or tribunal, be it a domestic tribunal in the country in which the crime was committed or the International Criminal Court, might prosecute.

* If prosecution in Australia resulted in a conviction or acquittal, in either case, the International Criminal Court would not have jurisdiction to do anything further (Article 17). Neither would the International Criminal Court have any jurisdiction in the matter if the relevant Australian authority made a genuine investigation into the matter and decided not to prosecute. In such circumstances, the ICC would ONLY have jurisdiction if Australia was "unwilling or unable genuinely to carry out the investigation or prosecution".

* If in a particular case, Australian authorities considered that it was inappropriate for the ICC to proceed with a matter, Australia could challenge the admissibility of the case before the ICC (Articles 18 and 19).

* The sum total of the above observations means that the proposal does not embody any intrusion upon our national sovereignty.

B. THAT THE COMPOSITION OF THE COURT MAY BE AFFECTED BY POLITICAL CONSIDERATIONS

* The Statute provides for a pool of 18 judges (Article 35 para 1 and Article 36, para 1). No two judges may be nationals of the same State (Article 36, para 7).

* Judges are to be elected by secret ballot at a meeting of the Assembly of State Parties (Article 36, para 6(a)). They must be persons of integrity who "possess the qualifications required in their respective States for appointment to the highest judicial office" and must satisfy the other qualifications set out in Article 36.

* The trial chamber, which is the court of first instance, is to be composed of three judges.

* There is express provision for objection to a judge sitting in any of the three chambers of the court (pre-trial, trial and appeal) if there is any reason to doubt his or her impartiality *on any ground* (Article 41, para 2).

* Trials must be conducted by three judges (Article 39), a provision which, given the diverse national backgrounds of the judges, and the fact that decisions must be by a majority, would suggest that the likelihood of political bias affecting the outcome would be minimal.

* I am not aware of any serious criticism on this ground of the International Court of Justice, which has sat for many years, and which is comprised of judges drawn from diverse jurisdictions.

* The presence of political bias is in any event likely to be less in the case of an ongoing, permanent court, which, when it is established, would necessarily be unaware of the nature of the cases to come before it, than is the case with ad hoc tribunals, such as those for the former Yugoslavia and Rwanda, which are appointed after the event.

* Ad hoc tribunals are likely to carry the additional stigma of being regarded as "victor's" courts presiding over the "vanquished".

C. THAT THE INITIATION OF PROSECUTIONS MAY BE POLITICALLY MOTIVATED

* The Statute contains elaborate mechanisms designed to counter this suggestion.

* There are three "trigger" mechanisms.

* The first of these is a reference by the Security Council (Article 13(b)). The Security Council may currently appoint ad hoc tribunals. When it does so, there are no "filter" mechanisms to guard against political motivation. But with the ICC, if the Security Council makes a referral, it must be investigated by a prosecutor, whose decision will be reviewed by the pre-trial chamber, before a prosecution may proceed. So that in the case of a reference by the Security Council, the chances of political considerations influencing the prosecution is less than is the case with the present system of ad hoc tribunals.

* The same "filtering' process would tend to prevent references by State Parties from giving rise to prosecutions which are politically motivated.

* As for the third trigger mechanism, namely, initiation of an investigation by the prosecutor (Article 13 and Article 15, para 1), in the first place, the provisions as to the appointment of the prosecutor (Article 42) set out stringent requirements as to his or her qualifications and election, which is to be by secret ballot or the vote of an absolute majority of the Assembly of State Parties. Furthermore, even if the prosecutor initiates an investigation, it cannot lead to a prosecution unless it survives examination by the pre-trial chamber.

D. THAT THE CRIMES JUSTICIABLE BY THE PROPOSED COURT ARE TOO LOOSELY DEFINED

* Article 5 provides that the court has jurisdiction with respect to:

  (a) the crime of genocide;
  (b) crimes against humanity;
  (c) war crimes;
  (d) the crime of aggression.

* It is unnecessary to deal with the crime of aggression at this stage as jurisdiction over that crime will not be exercise unless and until a provision defining the crime is adopted by the Assembly of State Parties by way of an amendment to the Statute.

* It must be accepted that the Statute defines the crimes which are justiciable by the ICC in terms which are relatively broad. But the Statute draws a

distinction between the definition of justiciable crimes per se and the definition of the *elements* of the crimes. The elements will give greater specificity and certainty as to the justiciable crimes. The certainty which it is suggested is lacking in the description of the crimes in the Statute will be remedied by the adoption of elements.

* I understand that the preparatory commission has already concluded its consideration of the elements which will be submitted for adoption by the Assembly of State Parties at its first meeting.

* As for genocide, the Statute (Article 6) reproduces without alteration the definition of genocide contained in Article 2 of the Geneva Convention which dates back to 1948. I do not accept that it could seriously be suggested that this definition is lacking in specificity.

8 As for crimes against humanity, a number of international law instruments of long standing have been incorporated into specific definitions. The major departure which appears in the ICC Statute, in comparison with what has previously been accepted in international law, is that the crimes against humanity may be committed not only during armed conflict, which is the traditional stance taken by the international law, but may be committed at a time of peace.

* As for war crimes, Article 8 tabulates eight specific acts covered by the Geneva Conventions of 12 August 1949. Again, the definition of these war crimes has a long history of gestation in the context of international law. When coupled with the definition of elements, I would suggest that there is no relevant uncertainty.

E. THAT INSUFFICIENT COUNTRIES ARE LIKELY TO RATIFY THE STATUTE

* When a vote was taken on the very last day of the Rome Conference on 17 July 1998, the Statute was adopted by an overwhelming majority comprising 120 countries, with 7 opposing and 21 countries abstaining.

* Since then, there have been 139 signatories, which include most European countries, the United Kingdom, the United States of America and the Russian Federation.

* Against that background, it would be surprising if the Statute was not ratified by at least 60 of the countries which have seen fit to sign the Treaty.

* The lapse of time since the Rome Conference is in this context not so important. What is more important is to note that some 46 countries did not sign the Statute until 2000, most of them during the latter half of that year.

* Given that with a significant international treaty of this kind the lead time between signing it and completion of the process of ratification can often be quite lengthy, the number of ratifications to date (28 as at 8 February 2001) suggests to me that the ultimate goal of 60 ratifications should be reached.

F. THAT IF THE UNITED STATES DOES NOT RATIFY THE STATUTE, THE COURT WILL BE DOOMED

* In the first place, it cannot be asserted with the confidence which some critics have exhibited that the United States will not ratify the Statute. The United States was very supportive of the Statute during the planning stages for the Rome Conference, and there is much evidence to suggest that its ultimate failure to vote in favour of the Statute was a product of concerns emanating from the Pentagon, more particularly with respect to the position of United States service personnel.

* In any event, the United States is now a signatory. It is on the cards that the United States will use its position as a signatory to attempt to negotiate changes which may well be agreed to by other States which will overcome whatever resistance to ratification may exist in that country.

* In any event, I would be surprised if the Statute was not ratified by the United Kingdom, by the Russian Federation and by the major European powers. It has already been ratified by Canada, New Zealand, South Africa and Argentina.

* If there are at least 60 ratifications, so that the ICC will come into existence, in the unlikely event that by then the United States still remains a non-participating State, the court will in fact be operational. Unless the United States was prepared to go to the extreme step of imposing some sort of sanction or diplomatic pressure against participating States, there is no reason to suppose that it would be other than an effective organ operating within its charter.

G. THAT THERE HAS BEEN INSUFFICIENT CONSULTATION WITHIN AUSTRALIA AND THAT ORDINARY PEOPLE HAVE NOT BEEN MADE AWARE OF THE MOVE TO RATIFY THE STATUTE OR ITS IMPLICATIONS

* The national interest analysis published on the Internet via AUSTLII under the heading "Consultations" indicates the very wide process of consultation which has taken place already.

* It is noted in that document that:

> "There have been no objections from State or Territory Governments to Australian ratification of the Statute."

* There have been a number of press releases given by the Attorney-General and the Minister for Foreign Affairs, and both Ministers have also made a number of speeches over several years.

* Non-government organisations are very supportive of ratification of the Statute. They represent a significant, thinking and caring element of the Australian population.

* Ultimately, the question of ratification will be debated in Parliament when the necessary legislation is introduced.

* It is hard to imagine that much more could be done to inform the Australian population of the significance of the Treaty.