Secretary
Joint Standing Committee on Treaties
Australian Parliament House
Canberra
ACT 2600

Submission No. 217

4 July 2001

Dear Secretary,

Re: Recommendation of Ratification of the 1998 Statute of the International Criminal Court - the enhancement of Australian sovereignty

I write to you, and through you to the Joint Standing Committee on Treaties (the "Committee"), to urge you to recommend ratification of the Rome Statute of the International Criminal Court. Rather than address the numerous political and legal arguments in favour of ratification, which have been addressed in numerous other submissions, I am writing to address specifically the question of the effect of ratification on Australian sovereignty.

Some submissions to this Committee have vociferously asserted that ratification of the International Criminal Court ("ICC") Statute would result in the erosion, surrender or abdication of Australia's "national sovereignty". These assertions are without basis, and are usually predicated upon an inaccurate understanding of the ICC Statute. From my personal experiences at the International Criminal Tribunal for Rwanda, and as an ordinary Australian citizen, it is my belief not only that the ICC is a necessary step to protect human dignity everywhere, but also that ratification would not erode Australian sovereignty, but enhance it. I write to you to lay out the reasons for this belief, and to urge the Committee, in the strongest possible terms, to recommend ratification of the ICC Statute.

A. How the ICC Statute enhances sovereignty

Many of the submissions to the Committee have suggested that ratification of the ICC Statute would lead to an erosion of Australian sovereignty. By considering 10 of the central features of the ICC, we can see that, on the contrary, ratification would enhance Australian sovereignty.

1. A cooperative exercise of independent sovereign powers

The ICC is created by a treaty that, upon its ratification, becomes part of the national law of the ratifying State. Consequently, the ICC is *not* a supranational institution, but an international institution, a cooperative mechanism underpinned by Member States'

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independent exercises of sovereignty. The ICC exercises a function that Member States individually and collectively confer upon it by treaty and by national legislation. The ICC does not promulgate laws that override those of national legal systems. The ICC does not, therefore, infringe upon national sovereignty.

2. *Complementary jurisdiction*

The ICC's jurisdiction is "complementary" to national legal systems (ICC Statute Article 17), but is founded in the contractual treaty-making process and is, as a consequence, an extension of the jurisdictions of the Member States.

The Statute specifies the basis upon which jurisdiction in a specific case can shift from a state-party's national jurisdiction to the ICC. The court may exercise jurisdiction when the Member State - which always has *primary* jurisdiction - is either unwilling or unable to exercise its national criminal jurisdiction. The determination of inability or unwillingness is made by a three-judge panel subject to a review on appeal before the appellate chamber, consisting of five judges. The triggering of this mechanism shifting jurisdiction is, therefore, subject to transparent legal processes, made operative by Member States' ratification of the Statute. Most importantly, the ICC will not be able to prosecute Australian citizens where they have already been properly prosecuted within the Australian criminal justice system.

The complementarity provisions offer almost no opportunity for the ICC to takeover an existing Australian prosecution. Article 17 of the Statute explains that "unwillingness" requires evidence that the decision not to begin proceedings was made for the purpose of shielding the person concerned from criminal responsibility, that there was unjustified delay or that the proceedings were or are not being conducted independently or impartially, while "inability" refers to a total or substantial collapse or unavailability of the national judicial system. Accordingly, given the current state of judicial affairs in Australia, the only occasion on which an Australian prosecution could pass to the ICC is: a) if it concerns a crime within the ICC Statute, and b) the criminal justice process was being manipulated to manifestly protect someone from conviction. If anything, this enhances Australian citizens' access to criminal justice in war crimes cases by providing them with another forum for their prosecution when the Australian system is being abused.

The principle of complementarity is the most important protection of national sovereignty within the Statute. The States in question in any given case continue to have the primary duty for handling the case. The ICC will become involved *only if* the State fails to handle the case in a manner that brings the person to justice.

3. Extradition

Every State has the right, in accordance with its constitutional norms, to transfer jurisdiction over an accused individual to another State or to an international judicial body with which it has signed a treaty. Jurisdictional transfer is an entirely valid exercise of national sovereignty, if it is done in accordance with international human rights norms. Few of the opponents of Australian ratification of the ICC would object that Serbia's extradition of Slobodan Milosevic was an invalid exercise of its sovereignty, yet exactly such a process of surrender to an international judiciary was involved in his transfer to the International Criminal Tribunal for the former Yugoslavia ("ICTY").

Since the ICC is complementary to national criminal jurisdiction, a Member State's surrender of an individual to the ICC's jurisdiction pursuant to the Statute does not infringe upon national sovereignty, nor does it violate the rights of the individual whose prosecution is transferred to a complementary criminal jurisdiction, provided that international human rights law norms are observed.

4. Specification of criminal acts and non-retroactivity

The jurisdiction of the ICC is well-defined, extending, at this time, to three well-defined international crimes: genocide, war crimes and crimes against humanity. Although these crimes are not yet all criminalised within domestic Australian law, Australia's sovereignty is in no way eroded by ratifying a treaty which permits for the prosecution of such crimes in a forum which is, in effect, an extension of Australian jurisdiction.

Moreover, Australia has long been party to the Convention on the Prevention and Punishment of the Crime of Genocide which it is now in the process of transforming into domestic law; Australia is a party to the Geneva Conventions upon which the ICC's criminalisation of "war crimes" (Art 8) is based; and Australia was a signatory to the Nuremberg Charter, Art 6(c) of which forms the basis for the ICC provision on crimes against humanity (Article 7). As a Member State of the ICC, Australia would also have the opportunity to participate in the Assembly of State-Parties session which will define the final crime to come within ICC jurisdiction, "aggression" (Article 5). Accordingly, Australian citizens' conduct will only be punishable if it is contrary to laws created by its own government.

5. No opportunity for prosecution of historical crimes against Australia's indigenous peoples

It is crucial to emphasise that ratification of the ICC will *not* permit the prosecution of Australian citizens for historical crimes committed against Australia's indigenous peoples, as some submissions to the Committee have asserted. The ICC Statute will apply only *prospectively*, that is, it will not apply to crimes allegedly committed prior to its

coming into force. Moreover, any alleged crimes against humanity can only be prosecuted in the context of a widespread and systematic *armed* attack on civilians.

6. No law-making power

Nor does ratification involve the "surrender" or "abdication" of Australian national sovereignty with respect to legislative power, as some of the submissions to the committee have asserted. The ICC has no "law-making" power. As a treaty-created body, it is bound wholly by its Statute. It will not be possible for any organ of the ICC, including the Assembly of States Parties, to create "laws" which override Australia's domestic laws in any way.

7. No erosion of common law rights

The process provided for in ICC proceedings satisfies internationally established norms and standards for judicial process, including common law standards. No common law rights will be lost by ratification of the Statute. The statute contains a definition of the crimes (Articles 6, 7 and 8) and their elements (Article 9), elements of individual criminal responsibility (Article 25), conditions of exoneration from criminal responsibility (Articles 31, 32 and 33) and penalties (Article 77) that satisfy the substantive due process requirements of all the world's major criminal justice systems.

Furthermore, the Rules of Procedure and Evidence contained in the Statute provide for fundamental fairness to the accused in a manner that satisfies international legal standards of procedural due process. The rules also provide for certainty of the process before the ICC (Articles 55 and 67).

The court will have 18 judges, elected by the Assembly of State Parties, with carefully articulated qualifications, who meet the highest standards of the world's major legal systems. The 18 judges will represent the world's major legal systems and represent an equitable geographic distribution (Article 36). One chamber consisting of three judges will deal exclusively with indictments and pre-trial matters; three trial chambers consisting of three judges each; an appellate chamber consisting of five judges; and one presiding judge. To maintain a distinction between trial and appellate chambers, neither the five appellate judges nor their colleagues in the trial chambers can rotate between two chambers (Article 39). The Statute provides guarantees for the impartiality and independence of ICC judges (Article 40).

8. Enhancement, not erosion, of enforcement powers

The Statute provides for the channeling of enforcement modalities through the national legal systems of Member States and cooperating non-Member States, rather than acting independently of them. Accordingly, it will not erode national sovereignty through enforcement processes. On the contrary, in certain situations, the ICC mechanism will

enhance states' enforcement capabilities through this cooperative process, accelerating procedures and processes not necessarily available to an individual State within the context of bilateral relations (Articles 86 to 99).

9. Continuing role in the management of the Court

Australian authority over the ICC does not cease with ratification. Under the Statute, an Assembly of State Parties shall be constituted (Article 112) with certain specific prerogatives including the electing judges, the Prosecutor and the Registrar, who is responsible for the ICC's administrative and financial matters. Moreover, it reviews and approves the budget, and provides support for the institution, including the ability to deal with Member States who fail to carry out their treaty obligations. The Assembly also has the power to enunciate rules for the internal functioning of the Court, and to adopt Rules of Procedure and Evidence in conformity with the Statute. Ratification of the ICC Statute ensures Australian participation in this Assembly, and, accordingly, Australian participation in the ongoing accountability and management of the ICC.

10. Consonant with existing Australian treaty obligations

In addition to being a logical extension of Australia's cooperative foreign policy tradition, as I have discussed above, ratification would be entirely consistent with Australia's existing treaty obligations.

Most important among these are Australia's UN Charter obligations, in particular its obligation to abide by Security Council determinations. The relationship between the ICC and the Security Council is a consequence of the Security Council's power as established in the UN Charter. Consequently, the Security Council may ask for a suspension of proceedings before the ICC for 12 months if the Security Council deems that the situation under which the prosecution arises constitutes a threat to "peace and security" as provided for in the UN Charter. Accordingly, ratification would be consonant with Australian obligations under the UN Charter.

B. The ICC as a logical extension of Australia's independent, sovereign cooperative foreign policy tradition

Ratification of the International Criminal Court ("ICC") Statute stands as the culmination of an independent foreign policy tradition, whereby Australian governments have consistently participated in cooperative measures at the international level enforcing the rule of law, and correspondingly protecting Australian sovereignty. This approach is motivated by a belief that the cooperative exercise of sovereignty does not erode that sovereignty, but enhances it, enabling States to achieve collectively what no one sovereign State could achieve on its own.

Australia has a long and proud history in the vanguard of States in the international community working cooperatively to forge institutions and mechanisms that improve the daily lives of people around the world, without reducing their individual or national sovereignty or impinging on their right of self-determination. Ratification of the ICC Statute is a logical extension of that foreign policy tradition.

It is necessary to name only a few of these initiatives to see how the ICC takes its logical place within this tradition of cooperative enforcement of the rule of law at the international level. Australia was a founding member of the United Nations, providing its first General Assembly President, Dr Evatt. We were a signatory to the London Agreement establishing the International Military Tribunal at Nuremberg, and were represented on the Bench of the International Military Tribunal for the Far East. Numerous Australians have served with distinction at both the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), not least amongst them the current ICTY judge David Hunt and, of course, our former Governor General, Sir Ninian Stephen. Even Australia's unparalleled intervention in East Timor was stimulated by a desire to bring an end to the crimes against humanity which occurred in the aftermath of the independence referendum there.

The ICC Statute represents the logical extension of this approach. By signing up to a permanent, independent mechanism for the enforcement of international criminal law, sovereign States protect their own citizens from the horrors of war crimes and aggressive war, not only by ensuring the prosecution and punishment of perpetrators of such crimes, but by deterring their commission. By ratifying the ICC Statute, the Federal Government would be protecting Australian sovereignty from the erosion that is likely if the culture of impunity for war crimes and aggressive war is permitted to continue. At the same time, it enhances that sovereignty by using it to assist in the protection of individuals around the world from the horrors of war crimes and aggressive war, and by promising that Australian sovereignty will be used to bring the perpetrators of war crimes to justice.

C. ICC ratification as a measure of sovereign protection for Australian citizens both at home and overseas

Above all, it is incumbent on our Federal Government as a sovereign State to do everything in its power to protect Australian citizens from the horrors of genocide, crimes against humanity, war crimes and aggressive war, whether they encounter them within our shores or, more likely, while serving overseas.

The horrors of war crimes and aggressive war may seems far off, distant from Australian shores. But to forego the opportunity to participate in an institution which would protect Australian citizens, should armed conflict reach our shores, would be for the Federal Government to fail to fulfill its duty of protection. Moreover, by participating in the establishment of the ICC, the Federal Government makes the likelihood of armed conflict reaching our shores that much smaller, by creating a deterrent for states-men and -women

around the world who consider the resort to violence a legitimate means of conducting international diplomacy. Nor should we forget those Australian citizens serving overseas, as military officers, aid workers, diplomats or in other positions, who are more likely to become victims of such conduct. Ratification of the ICC Statute ensure that they, too, receive greater protection in their valuable service.

D. Conclusion

Ratification of the ICC Statute would not erode Australian sovereignty, but enhance it. It would not make Australian citizens subject to retrospective law, a supranational body, supplant the Australian criminal justice systems, subject Australian citizens to arbitrary arrest, detention or extradition, or in any way impose new standards, laws or even values on Australians without their government's consent. The ICC does no more than what each and every State in the international community can do presently; but by doing it collectively, the effect is greater.

The ICC offers the global community, for the first time, a method of continuously and consistently enforcing the very standards of international law which most fundamentally protect human dignity and individual and national sovereignty. I urge you to recommend ratification of its Statute, to ensure the enhancement of Australian sovereignty.

Yours sincerely,

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