A dissenting view

1.1 Dissenting Members and Senators cannot support recommendations 10 and 11, which relate to the proposed International Criminal Court (ICC).

The proposed International Criminal Court

1.2 Dissenting members have several concerns about the proposed International Criminal Court. These concerns are the implications for Australia's domestic criminal justice system, Australia's sovereignty, the potential for politicisation of the ICC and the effect this may have on United States unilateral action against terrorism.

1.3 We recognise the ICC is an evolution from war crimes tribunals such as Nuremberg, Tokyo, Rwanda and Former Yugoslavia. We support the goal of the ICC in ensuring atrocities do not go unpunished but remain concerned about some of the implications for the conduct of international relations.

1.4 These concerns are not isolated. The United States, India, Israel and China were among the countries which voted against the Statute of Rome.[1] Although the United States and Israel both signed on 31 December 2000, it is clear that neither country has any intention of ratifying the Treaty.

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1 Attorney-General's Department, Submission, No.143, p. 1802.

Sovereignty

1.5 Article 17 of the *Statute of the International Criminal Court* determines issues of admissibility under the principle of complementarity. It states:

> The Court shall determine that a case is inadmissible where:
>
> - The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
> - The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision has resulted from the unwillingness or inability of the State genuinely to prosecute.[2]

1.6 This article will govern the interaction of the jurisdiction of domestic courts with that of the ICC. Gary Dempsey of the Cato Institute pointed out that in determining whether a domestic criminal justice system is unwilling or unable to prosecute, the ICC will have the power to invalidate national trials by declaring what constitutes an 'effective' or 'ineffective' trial:

> if the ICC gets to invalidate national trials by deciding what constitutes an 'effective' or 'ineffective' trial, the international court will exercise a kind of judicial review power over national criminal justice systems. In other words, the ICC will have de facto supreme judicial oversight.[3]

1.7 This observation illustrates the concern shared by dissenting Members and Senators that the constitutional ramifications of this treaty have not been fully considered in the normal political process in Australia. What will be the status of decisions of the ICC. Will they be binding or persuasive? This appears to be a puzzling contradiction. The Australia Acts of 1975 and 1986 abolished the Privy Council as a court of final appeal for Australian courts. Although the Judicial Committee of the Privy Council is no longer part of the Australian legal hierarchy, and its decisions are therefore persuasive only, the proposed ICC and its decisions would appear to constitute binding precedent in Australian common law by virtue of the ICC's paramountcy over any Australian investigation or prosecution. We find this paradox unacceptable.

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2 *Statute of the International Criminal Court,* Article 17.

3 Dempsey, G T, 'Reasonable Doubt', Policy Analysis, No. 311, July 16 1998.

1.8 The supplementary submission from the Attorney General's Department states:

> The ICC will have no authority over any Australian court and in particular will not become part of the Australian court system and will have no power to override decisions of the High Court or any other Australian court.
>
> The ICC will not be subject to the provisions of Chapter III of the Australian Constitution, which governs the provision of the judicial power of the Commonwealth.[4]

1.9 The submission goes on to say that:

> The High Court has stated (in the Polyukhovich case) that Chapter III would be inapplicable to Australia's participation in an international tribunal to try crimes against international law.

1.10 This assertion is misleading.

1.11 What Justice Deane said in Polyukhovich v The Commonwealth of Australia and another (172 CLR 501 F.C.) 91/026 was:

> The Court has not had occasion in the past to examine the extent to which Ch III of the Constitution is applicable in relation to the trial and punishment of persons accused of crimes against international law. In so far as Australia's participation in the establishment and functioning of an international tribunal for the trial and punishment of such alleged crimes is concerned, the provisions of Ch III would be inapplicable for the reason that the judicial power of the Commonwealth would not be involved. Australia's participation would be as a member State of the International Community and the judicial power involved would be the judicial power of that Community. The position is not so clear in a case where a local tribunal is purportedly vested with jurisdiction in relation to an alleged crime against international law. It may be arguable that, in such a case, the judicial power of the Commonwealth is not involved for so long as the alleged crime against international law is made punishable as such in the local court (see, e.g., Brierly, The Basis of Obligation in International Law, (1958), p 304). Alternatively, at least where violations of the laws and customs of war are alone involved, analogy with the disciplinary powers of military tribunals and largely pragmatic considerations might combine to dictate recognition of a special

4 AGD Submission no. 143, p.1810.

> jurisdiction standing outside Ch III. Those are, however, questions which it is unnecessary to answer for the purposes of the present case.[5]

1.12 The ratification of the ICC represents an important shift in the international system away from a system based on states to one based on individuals. Gallarotti and Preis confirm that '(t)he prosecution and adjudication of international crimes has traditionally been conducted through the sovereign nation-state'.[6] We support this traditional position. Chapter III of the Constitution never anticipated a supranational court for Australian citizens. Ratifying the ICC represents a surprising excursion into law making based on notions outside the normal constitutional arrangement, as reflected in Chapter III of the Constitution. This profound shift in the operation of our domestic court system requires long debate before any such move could be contemplated.

Politicisation of the prosecutor and court

1.13 Independent bodies within the United Nations system such as the United Nations Human Rights Committee have shown themselves to be more prone to politicisation than some of the overtly political organs in the international system. Another concern for dissenting Members and Senators is that the ICC is not accountable to any executive structure. It is, in effect, subject to no real government. While the statute does provide for referral by the Security Council, dissenting members are concerned an independent prosecutor could be unduly political.

1.14 In an overall positive review of the ICC, Gallarotti and Preis concede that:

> the statute allows significant possibilities for states and individuals to politicise justice.[7]

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5 *Polyukhovich v the Commonwealth of Australia and another*, (172 CLR 501 F.C.) 91/026, Deane J, para 53.

6 Gallarotti, G M & Preis, A Y. 'Towards Universal Human Rights and the Rule of Law: The Permanent International Criminal Court.' Australian Journal of International Affairs, Vol. 53, No.1, April 1999.

7 *Ibid*., p.107.

Impact on United States

1.15 During the 1990s the United States was one of the strongest proponents of a permanent standing international court. Following the conclusion of the Statute of Rome in 1998, the United States did not sign due to the following objections:

- Fundamental disagreement with the parameters of the ICC's jurisdiction
- Desire for an 'opt out' provision
- Opposition to a self-initiating prosecutor
- Disappointment with the inclusion of an undefined 'crime of aggression'
- Displeasure with the Statute's 'take it or leave it' approach.[8]

1.16 Far from protecting service personnel, the proposed ICC has given rise to misgivings among US Government officials. In a letter to the Honourable Tom DeLay, Majority Whip of the US House of Representatives, several former foreign policy leaders outlined their concerns about the ICC and endorsed the American Servicemembers' Protection Act of 2000, H.R. 4654 which seeks to protect American service personnel from the ICC.[9] This bill passed the US House of Representatives on 10 May 2001. The letter states:

> This legislation is an appropriate response to American sovereignty and international freedom of action posed by the International Criminal Court (ICC). The many obvious defects in the treaty establishing the ICC compelled the Clinton Administration to withhold signature of the treaty when it was concluded two years ago in Rome … Naturally we think it is essential that our nation's military personnel be safely beyond the reach of an unaccountable international prosecutor operating under procedures inconsistent with our Constitution. War crimes and other human rights violations have long been subject to criminal penalties under U.S. Law, and the United States has a far better record of enforcing its laws against human rights violations than some of the countries that support the ICC.

8 Council on Foreign Relations, pp. 52-53.

9 http://www.senate.gov/~foreign/2000.

> As former senior U.S. Government officials, however, we think it is equally important that the President, cabinet officers, and other national security decision makers not have to fear international criminal prosecutions as they go about their work. The risk of international criminal prosecution will certainly chill decision-making within our governments, and could limit the willingness of our national leadership to respond forcefully to acts of terrorism, aggression and other threats to American interests. Indeed we believe that American leadership in the world could be the first casualty of the ICC.

1.17 The letter is signed by:

- Lawrence Eagleburger, Former Secretary of State
- Brent Scowcroft, Former National Security Adviser
- Caspar Weinberger, Former Secretary of Defense
- Zbigniew Brzezinski, Former National Security Adviser
- R. James Woolsey, Former Director Central Intelligence
- Jeane Kirkpatrick, Former Ambassador to the United Nations
- Henry Kissinger, Former Secretary of State,
- Donald Rumsfeld, Former Secretary of Defense
- Richard V Allen, Former National Security Adviser
- George Schultz, Former Secretary of State
- James A Baker III, Former Secretary of State
- Robert M Gates, Former Director of Central Intelligence

1.18 An example of the potential effect the ICC may have on United States action is apparent from the Kosovo crisis of 1999. The NATO intervention which sought to stop the expulsion and massacre of ethnic Albanians from Kosovo was denounced by the Russian Foreign Minister. The Minister called for US and other NATO leaders to be held accountable under international law. Slobodan Milosevic asked the International Court of Justice to deem the bombing illegal.[10] Were the ICC in place, Milosevic would have called for an investigation and prosecution of NATO leaders.

1.19 To understand the true implications of the breadth of offences set out in the Statute it is instructive to consider the circumstances surrounding the

10 Council on Foreign Relations, p. 5.

bombing of Baghdad by the United States as a consequence of Saddam Hussein's refusal to cooperate with UN weapons inspections. Of that incident the following can be said:

- The bombing was not sanctioned by a UN Security Council Resolution
- The bombing was done to try and force compliance with a UN attempt to curb the development of Weapons of Mass Destruction by Iraq
- The bombing occasioned damage or death to the civilian population in Baghdad.

1.20 Were both Iraq and the US parties to the Statute what might have happened in the wake of the bombing?

1.21 Article 8 (b) (iv) proscribes: 'Intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects …'[11] The vagueness of this provision would allow scope for Iraq to demand the investigation and prosecution of the US President and his military commanders who carried out the bombing raid. That such a possibility is contemplated by the Statute's provisions is clearly unacceptable.

1.22 No doubt proponents of the Statute will assert that such interpretation of the Statute would not be entertained by the ICC Prosecutors. But where is the safety in such an assertion compared with the fact of the language used in the Statute? The threshold question is: what is the benefit in restraining the anti-terrorist action often taken by the US Government by the erection of a supranational tribunal. The threat of terrorist states to innocent lives in many countries is an important priority for countries such as Israel and the US. For example, both have taken unilateral action in the last 20 years to prevent Iraq becoming a Nuclear Weapons State. Without action by Israel in 1981 or the US in 1998 would Iraq today be a Nuclear Weapons State?

1.23 The United States has been instrumental in supporting war crimes tribunals in Rwanda and former Yugoslavia. The Bush Administration has no intention of sending the Statute of Rome to the Congress for ratification.[12] In these circumstances the least that can be said is that the Australian Government should pause to consider the full ramifications of what is proposed in the Statute.

1.24 A rules based system governing the behaviour of states is only viable so long as every state obeys the rules. Plainly, this is not the case. That is

11 *Statute of the International Criminal Court*, Article 8 (b) (iv).

12 Transcript of Press Conference with US Secretary of State, Colin Powell, February 15 2001.

why it is wrong to restrain unilateral action by states friendly to Australia such as the US and Israel, against rogue states such as Iraq or against non-state actors such as Osama bin Laden.

1.25 For these reasons we do not support recommendations 10 and 11 of the report, which propose the ratification of the ICC and the persuasion of other member states.

Deanne Kelly

Geoff Prosser

Andrew Southcott

Andrew Thomson