

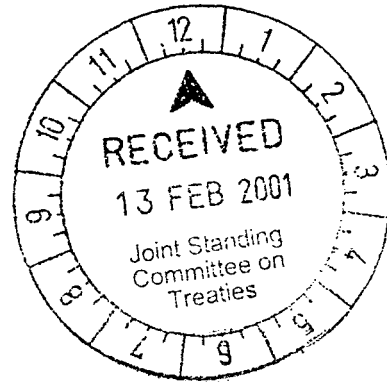


amnesty international australia

7 February 2001

Submission No. 16.1

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



BY FAX AND POST: 02 6277 4827

**Attention Mr R. Morris**

Dear Secretary,

As you are aware, representatives of Amnesty International are to appear before the Committee on the 13<sup>th</sup> of this month in Sydney.

I am setting out below, in a short supplemental statement Amnesty International's concerns about the restrictions upon the Court's jurisdiction in Article 12 of the Statute.

In its preliminary submission, Amnesty International indicated its wish to present a supplementary submission after examining the proposed legislation giving effect to the Statute. It seemed to be preferable to defer dealing with this particular matter until then, because our concerns with Article 12 could be minimised by the legislative provisions conferring jurisdiction. Unfortunately, we have not had an opportunity of examining the proposed legislation.

Article 12 limits the Court's jurisdiction to crimes within the territory of a State Party (or to its ships and aircraft) or to crimes committed by nationals of a State Party, unless a non-State Party consents to the Court having jurisdiction in relation to its territory or unless the matter involves Security Council Resolution under Chapter VII of the Charter in relation to the territory of a non-State Party.

The restrictions imposed by Article 12 are not consistent with the principles of jurisdiction under international law. International Law prescribes that jurisdiction for war crimes and crimes against humanity is universal. In the case of those crimes, jurisdiction is not confined to offences committed on the territory of or by the nationals of a State. Universal jurisdiction applies in the case of war crimes, such as breaches of the Geneva Conventions, as historically it did to piracy. It was applied to crimes against humanity in the trial of Eichmann<sup>1</sup> and Extradition of Demjanjuk<sup>2</sup>. Its

<sup>1</sup> (1962) 36 I.L.R.18

<sup>2</sup> (1985) 776 F2d 571

<sup>3</sup> (No3) 1999 2 AER 97 at 108-109

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basis, in relation to torture specifically, was explained in the House of Lords in *Ex parte Pinochet*<sup>3</sup> as follows:-

" ever since 1945, torture on a large scale has featured as one of the crimes against humanity ....[which] justifies States in taking universal jurisdiction over torture wherever committed. International law provides that offences ... may be punished by any State because the offenders are 'common enemies of mankind and all nations have an equal interest in their apprehension and prosecution...

The Torture Convention was agreed not in order to create an international crime which had not previously existed but provide an international system under which the international criminal -- the torturer -- would find no safe haven".

An important practical consequence of universal jurisdiction arises from the fact that crimes against humanity are typically committed by officials or by those who have been officially authorised. Universal jurisdiction denies to such an offender the assurance that by remaining in or moving to jurisdictional 'safe havens' he or she can evade justice.

The question arises in the light of all this, why Article 12 of the Statute was not framed to confer universal jurisdiction upon the Court.

This was not because any question arose as to universal jurisdiction being the proper jurisdictional basis for war crimes and crimes against humanity. Universal jurisdiction for the Court was opposed on quite different grounds. The United States of America (USA) held to the view at the Rome Conference that the jurisdiction of the Court should be triggered only by the Security Council, (although it was agreeable to allowing States an option of permitting their own citizens to be tried by the Court). Article 12 emerged as a compromise between opposing views on this issue.

The compromise adopted necessarily leaves an area of impunity. This is because the Court would have no jurisdiction, in the absence of Security Council intervention, where crimes committed by nationals of non-ratifying states take place on the territory of that state, except in the unlikely event of that state's consent. As states disposed to commit or allow crimes against humanity are the least likely to ratify the Statute, the limitations upon the Court's jurisdiction in Article 12 represent an anomalous gap in its coverage. This can be met by national legislation conferring universal jurisdiction upon national courts who, in accordance with the principle of complementarity, are called upon by the Statute to first determine prosecutions for crimes under it.

The merits or demerits of the USA view which led to the Article 12 compromise, does not impinge upon the question of national legislation conferring universal jurisdiction. The USA position was directed to the Court.



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Amnesty International urges Australia to confer universal jurisdiction upon Australian Courts in respect of the ICC offences. New Zealand has done so, by giving effect to the ICC Statute in its domestic legislation.

Section 8 (i) (c) of the International Crimes and International Criminal Court Act 2000 (NZ) provides:-

" (1) Proceedings may be brought for an offence--

(c) against section 9 or section 10 or section 11 [the Statutes offences] regardless of --

(i) the nationality or citizenship of the person accused;

(ii) whether or not any act forming part of the offence occurred in New Zealand; or

(iii) whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence."

If, as Amnesty International urges, a provision to similar effect was included in Australia's implementing legislation it would be in line with the provisions of the Crimes (Torture) Act 1988 which confers jurisdiction upon our Courts in respect of 'any person present in Australia' alleged to have committed extraterritorial torture as provided in the Act.

Thank you for your attention in this matter. We look forward to discussing these and other points at the Committee hearings on the 13<sup>th</sup>.

Yours sincerely

**John Greenwell**

National Legal Group