amnesty international australia

Preliminary submission to the Joint Standing Committee on Treaties

Statute for an International Criminal Court

Amnesty International Australia is a section of Amnesty International which was formed in 1961 and now has over one million members with sections and structures in more than 80 countries. Since 1993 the organization has been in the forefront of campaigning for an International Criminal Court. Amnesty International Australia strongly supports Australia's ratification of the Rome Statute. It draws attention first to certain features of the Statute.

Key features of the Statute:

1. The international character of the Court is fundamental. National judicial organs alone can never adequately enforce international humanitarian law. A special characteristic of humanitarian crimes is that they are state ordained or relate to conduct purporting to be official. Where the impugned conduct has in fact been authorised, the state concerned is likely to be 'unwilling' to prosecute or try the offence. Over and above this, national legality provides cover for a culture of impunity. In the absence of international accountability, leaders assume immunity, [Hitler's comments on the eve the invasion of Poland provide an illustration. Explaining to his Generals at the Obersalzburg the function of the 'Death Units', he added that "only in such a way will we win lebensraum …who, after all, speaks today of the annihilation of the Armenians?"]. International accountability is also important in counteracting the apparent 'moral' justification which

national legality gives to subordinates willing to obey implicitly national law and authority.

2. The Statute sets out in a single instrument 'the most serious crimes of concern to the international community as a whole' (Art.5): genocide, crimes against humanity, war crimes and aggression. Not only will these constitute a universally agreed international legal regime but they will be introduced, in common form, into the domestic law of ratifying States.

3. The Court is neutral. The Statute provides for an independent Court and independent prosecutors. It ensures that humanitarian crimes will be dealt with neither by summary execution nor trade off, but judged according to law.

4. The principle of complementarity requires that the International Criminal Court will only have jurisdiction when a national court with jurisdiction is unable or unwilling to proceed. This is correct. International back-up is crucial, but the Court should not and is not intended to supplant national law enforcement where that is available.

5.The Statute requires State cooperation in the surrender of suspects or of those convicted and in the provision of judicial assistance. Not only is this essential for the functioning of the Court but it is important in combating impunity.

6. The Statute specifies uniform and recognized principles of fairness in the prosecution of offenders and the conduct of trials drawing upon the experience of the existing ad hoc international tribunals.

7.Provision is made for the reparation of victims. This is an important feature, ensuring that victims will have a sense that justice has been done.

National interest considerations:

Amnesty International agrees with the view expressed by the government in the National Interest Analysis that establishment of the Court will contribute to Australia's national interest in the maintenance of 'international peace and security'. The relationship between territorial aggression and other crimes against humanitarian law is clear. Nevertheless, there are, in Amnesty International's view, wider grounds why it is in the national interest for a society such as ours and with its values, to support the Court.

Genocide, torture, systematic murder and 'disappearances' are abhorrent to Australians. The reaction by Australians to the human rights violations in East Timor, witnessed on their television screens, was not only or even mainly a concern for regional stability but more simply that of outraged humanity. In supporting the establishment of the International Criminal Court, Australia would be affirming its most basic values.

The need for an international criminal court – general considerations:

Establishing a system of international humanitarian justice has been an evolving process as events during the last century have made it ever more necessary to modify the principle of sovereignty and non-intervention in its absolute form. Few, at least in the Australian community, would agree that the events such as Kristallnacht or the 'killing fields' were purely internal affairs. Similarly, international law now permits interventions in cases of international crimes since it is recognised that such events threaten international peace and security. All States, including Australia, find it is within their national interest to eradicate such events.

At the time of the horrific but little-remembered massacre of the Armenians (1915) the crime of genocide simply did not exist. A regime of war crimes had been developed and by 1945 extended to the protection of civilians and thereby intruded into what became known as crimes against humanity, but it was the London Charter, establishing the Nuremberg Tribunal (8/8/45), which took the step of isolating this category of offence, expressly defining 'crimes against humanity'. The Nuremberg Tribunal made one other thing very clear: that international criminal responsibility attached not just to States but to individuals. As the Tribunal said, in rejecting a submission to the contrary, 'crimes against international law are committed by men not abstract entities'. In determining individual responsibility the Charter specified that superior orders would be no defence but would go in mitigation of penalty only.

Without question the Nuremberg trial was a watershed. In 1948 the Genocide Convention made genocide an international crime 'in time of peace or war' and in the following year

the four Geneva Conventions redefined the law relating to armed conflict. Protocols in 1977 gave the principles of these conventions application to non-international conflicts. In 1984, following Declarations in the General Assembly, and provoked by the death under torture of Steve Biko, the United Nations adopted the Convention against Torture and other Cruel, Inhumane and Degrading Treatment or Punishment.

Accordingly, by the 1980s, a body of international criminal law had been established by agreement and international customary law which imposed on States and individuals certain universal minimum standards of civilised behaviour in war and peace which had been accepted by the world community. But there was no Court to apply them.

It was during that decade that the communist regimes of the Soviet Union and Eastern Europe collapsed; military juntas in Latin America were ousted and the apartheid regime in South Africa crumbled. The governments replacing them - mostly democracies - faced the situation of dealing with the crimes against humanity of the regimes they had replaced.

Peremptory execution after a 'show trial' (as in the case of the Ceausecus in Romania) was incompatible with the democratic societies they were attempting to build. But to do nothing would have allowed deep social wounds to fester. Various expedients were adopted. Most included Truth and Justice Commissions or other forms of inquiry followed by an amnesty or pardon. With the possible exception of South Africa, most failed in according justice or achieving reconciliation. In many instances, the attempt was frustrated by the power still held by segments of the former regime (the military in Chile, the judiciary in the Philippines). Even where the inquiry was thorough, further action was halted by threats of military rebellion (Argentina) or was prevented by the sheer administrative burden of dealing with the number of violations (El Salvador).

A number of conclusions stand out from this period. Whatever part amnesties or pardons might play, they do not constitute an alternative to justice. Amnesties without justice only allow the poison to linger. Amnesties lead to an assumption by the guilty that

humanitarian violations can, if needs be, become the subject of a 'trade off'. Perhaps the most important lesson from this period is the enormous strain transitional societies are put under when endeavouring to establish democracy, if at the same time they have to resolve at the national level, without any international curial support, these serious issues of humanitarian justice.

In the next decade the world experienced some of the worst atrocities since the Second World War. Vicious internal conflict mingled with genocide, ethnic cleansing and other crimes against humanity in such other countries as the former Yugoslavia, Rwanda, Cambodia, East Timor, Guatemala, Iraq, Liberia, Somalia, Sierra Leone, Burundi and East Timor.

The situation in the former Yugoslavia led the Security Council in 1993 to establish the Hague Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law in the former Yugoslavia. In 1994 the Security Council added to the Hague Tribunal a further Court sitting in Arusha to try breaches of international law in Rwanda.

The Hague Tribunals have been increasingly effective but ad hoc tribunals have three drawbacks: first, they are open to a charge of lacking impartiality; second, they are selective – a tribunal for the former Yugoslavia, why not Cambodia? – third, the delayed or retrospective creation of ad hoc tribunals inevitably dilutes their deterrent effect.

These drawbacks were elaborated upon by the United Nations Secretary-General, Mr Kofi Annan, when addressing a ceremony celebrating the adoption of the Rome Statute on the 18th July 1998:

> "Until now, when powerful men committed crimes against humanity, they knew that as long as they remained powerful no earthly court could judge them.
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> Even when they were judged – as happily some of the worst criminals were in 1945 – they could claim that this is happening only because others have proved more powerful, and so are able to sit in judgement over them. Verdicts intended to uphold the rights of the weak and helpless can be impugned as 'victors justice'.

> Such accusations can also be made, however unjustly, when courts are set up only ad hoc, like the Tribunals in the Hague and in Arusha, to deal with crimes committed in specific conflicts or by specific regimes. Such procedures seem to imply that the same crimes, committed by different people, or at different times and places, will go unpunished."

Conclusion:

Amnesty International urges Australia to ratify the Statute. The International Criminal Court will not eliminate the commission of crimes subject to its jurisdiction. No domestic regime of justice aided by the enforcement powers of a police force achieves that ideal. The Court is a monumental step in the attainment of international justice and order. Those who commit the most serious crimes against human beings, often encouraged or permitted by their own governments, will know that one day they might be caught, tried and punished.

Amnesty International would wish to have the opportunity of supplementing this submission when it has seen the proposed implementing legislation.