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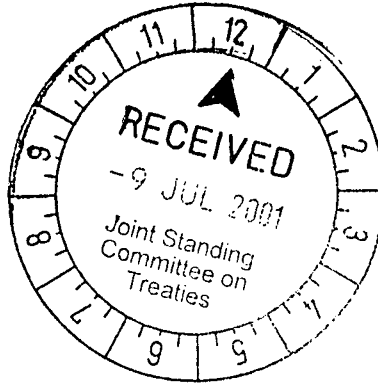

6 July 2001

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

Submission No. 162

Dear Mr Morris,

I am writing to you on behalf of Amnesty International Australia in reference to the recently tabled report of the Joint Standing Committee on Foreign Affairs, Defence and Trade on *Australia's Role in United Nations Reform* to commend the chapter in the Report on the International Criminal Court (chapter 8) and to ask that this be conveyed to members of your committee, together with the comments below upon the minority dissenting view set out at page 273 and the following pages.

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In this connection I refer first to the significance of certain omissions from the provision of the Statute mentioned in paragraph 1.21. Paragraph 1.21 sets out in summary the offence proscribed in Article 8(b) (iv) of the Statute. This is relevant to the minority view, as it is the only offence advanced in support of the thesis that the Statute imposes an undesirable deterrent upon interventions by the United States and our Allies.

As set out in paragraph 1.21, Article 8(b)(iv) reads, "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 ...".

Although no doubt not intended, the effect of the omission from this quotation of the offence is misleading. The clear implication is that the part omitted is inconsequential or insignificant. In substance it suggests that the only ingredients in the offence are (a) the attack (b) the intention to launch it and (c) knowledge that it will cause incidental loss of life or injury etc to civilians.

This implication is not correct. The entire offence is quoted below:

"Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which *would be clearly excessive in relation to the concrete and direct overall military advantage anticipated*" (italics added).

The offence thus applies where a military advantage is anticipated. In that event the prosecutor is required to prove not merely the matters mentioned in (a), (b) and (c) above but -- by virtue of the italicised words -- (d) the anticipated military advantage and (e) that the loss of life etc. was "clearly excessive" in relation to its attainment. This is a very heavy evidentiary threshold for any prosecution to meet. Indeed, the generality of the term 'excessive" only adds to the burden on the prosecution.

One of the concerns mentioned by the minority is that the Statute would deter United States action to prevent terrorism (para.1.2). It is only necessary, in this connection, to note that the offence in Article 8 (b) (iv) and the other offences in Article 8 (b) are "applicable in international armed conflict" and are confined to that.

The letter set out in the minority view and signed by former senior U.S Defence and State Department officials makes no reference to Article 8 (b) (iv) nor to any other offence specified in the Statute as being likely to bring about the possible adverse consequences adverted to.

Reference is made in the minority view to the possible effects upon interventions along the lines of those by NATO in Kosovo and by the United States and its allies on Baghdad. It is to be noted that among major NATO countries some of whom participated jointly and prominently with the United States in these events, legislation has passed the House of Commons enabling the United Kingdom to ratify the Statute and France and Germany have already done so. Canada, whose Defence interests are not inimical to those of the United States, has also ratified the Statute.

It is above all necessary to correct any impression which this suggestion may have conveyed that the offences specified in the Rome Statute relating to attacks against civilians are based upon some new principles or introduce some new rules into international law. Similar prohibitions, if anything less restrictive, are set out in Additional Protocol I to the Geneva Conventions which was adopted in 1977 and to which more than 150 States adhere. The principles upon which the Protocol offences were based, derive from a 1968 United Nations General Assembly Resolution, which was unanimous.

Other matters referred to in the minority report to which we would refer are: -

Paragraphs 1.5 and 1.6:

In addition to Article 17 (1), which is correctly paraphrased in paragraph 5.1, reference should be made to Article 17(2) (a) and (c). These provisions in terms make clear that the issue in determining admissibility of an ICC prosecution is not whether a national prosecution is 'effective' or 'ineffective', nor whether it is competently or incompetently conducted but whether the proceedings are *genuine*. That means, according to the Shorter Oxford, 'not spurious, authentic'. Thus Article 17(2) describes the circumstances of 'unwillingness' in terms of a

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'decision' being "made for, the purpose of *shielding* the person concerned "etc. and of 'proceedings' inconsistent with "an *intent* to bring the person concerned to justice" (italics added). The question is one of bona fides.

Paragraph 1.7:

There is simply no issue as to the domestic status of ICC decisions for the purpose of Australian law. Such decisions would not bind any domestic court in Australian law, and ICC decisions would not form part of the common law. The only conceivable exception to that position would arise if Australian legislation expressly gave some domestic status to decisions of the ICC.

Paragraph 1.11:

The minority report suggests that the submission made by the Attorney-General's Department as to the non-applicability of Chapter III of the Constitution was misleading. Its suggestion is not correct in law. The passage from the High Court decision in *Polyukhovich v the Commonwealth* in fact confirms the point made by the Attorney-General's Department. Chapter III *may* have applicability to a domestic Australian court considering offences at international law. It does not have any relevance to the exercise of jurisdiction by an international tribunal operating in accordance with international law. In those circumstances "the judicial power of the Commonwealth would not be involved." Mr Justice Deane's further comments related to the entirely different question, unrelated to that before the Committee, of the trial by *local* tribunals of crimes under international law.

Paragraph 1.14:

Neither an investigation nor prosecution can proceed at the instance of the prosecutor alone. They must face pretrial hearings each presided over by three judges, before the case becomes admissible.

Thanking you,

Yours sincerely

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