The New South Wales Bar Association

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1 December 2000

The Committee Secretary
Joint Standing Committee on Treaties
Department of House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

NSW Bar Association submission to the Joint Standing Committee on Treaties in respect of ratification of the Rome Statute for the International Criminal Court

The NSW Bar Association supports the establishment of an International Criminal Court and Australia's ratification of the treaty by the passing of legislation.

The Court results from complex multi-lateral negotiations between 160 countries over the past six years. It is intended to be a permanent Court, located in The Hague, with jurisdiction to prosecute international crimes of genocide, crimes against humanity and war crimes and crimes of aggression (once a definition of "aggression" is settled).

The Court will be a permanent institution, unlike the ad hoc tribunals such as the Yugoslavian and Rwandan Tribunals that the UN Security Council has established pursuant to its powers in Chapter VII of the UN Charter. Presently, any of the five permanent members of the Security Council may veto the establishment of such a tribunal. The Rome Statute of the International Criminal Court empowers the Court's prosecutor, the Security Council and a State Party to refer cases to the Court.

It is one of the most significant advances in international human rights law in the last fifty years.

We will address some of the concerns raised by the committee in its hearing on 30 October

2000.

The first sixty to ratify

During the hearing, some committee members questioned why Australia should be among the "first" countries to ratify the treaty.

The treaty enters into force sixty days after the sixtieth ratification. These sixty countries comprising the Assembly of State Parties - the managers of the Court - will then meet. The Assembly will choose the Court's eighteen judges and its prosecutor and deputy prosecutor. If Australia has not ratified it will be unable to vote, although as a signatory to the treaty it may attend as an observer.

Australia is one of the architects of the court and has taken a leading role in the negotiation of the Rome Statute establishing the Court and in formulating its rules of procedure and evidence and the elements of the crimes. Australia has chaired the "like-minded" group in the negotiation process - 69 countries united to promote the Court's establishment. The 69 include: from South America - Argentina, Brazil and Venezuala; from North America - Canada; most European countries including - Germany, the United Kingdom & Ireland and the Scandinavian nations; from Africa - Egypt, Ghana, Gabon & Malawi; the former Soviet states of Croatia, Bulgaria, Estonia, Lithuania, Georgia, Poland, Slovakia, Slovenia; of our near neighbours - Fiji, New Zealand and the Philippines; and from the Middle-East - Jordan. It is a very broadly based group.

Australian judges, lawyers and investigators have been prominent in both the current ad hoc tribunals and the post WWII War Crimes Tribunals. Presently in the International Criminal Tribunal for the Former Yugoslavia in The Hague the Deputy Prosecutor Graeme Blewitt and senior appeals chamber judge, Justice David Hunt, are Australian. A former AFP officer is the head of investigations. The NSW Bar Association has two members working as senior prosecutors at the tribunal.

If Australia is one of the first sixty it may continue to exert this sort of influence on the Court and it process. If it does not its influence will be minimal - even as one of the Court's architects.

It is important for Australia to maintain its current influential position in international human rights law and in international criminal law. Ratification is entirely consistent with Australia's participation in international peace-keeping missions, most recently in East Timor. In fact, the crimes committed following the 1999 independence referendum are the very types of crimes over which the International Criminal Court would have (future) jurisdiction.

We also note the committee's comments about the countries that have to date ratified the treaty. As of 30 November 2000, 117 countries had signed the Statute and 23 had ratified it. We emphasise that the speed of signature and ratification is, in international treaty terms, quite astonishing. The Statute has been open for signature only since July 1998, yet 117 of the UN's 189 member states have signed it. The relative slow speed of ratification vis a vis signature in many cases is due to the constitutional, executive, or parliamentary process necessary to approve ratification (as in Australia's case). Some countries, including France

and Germany, have had to change their constitution to ratify. Australia fortunately does not.

Twenty-three countries have already ratified the treaty, but the following 36 are in the process of ratifying - Angola, Argentina, Austria, Benin, Bolivia, Brazil, Bulgaria, Cape Verde, Central African Republic, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Finland, Germany, Greece, Hungary, Latvia, Lichtenstein, Madagascar, Malta, Netherlands, Panama, Paraguay, Poland, Portugal, Republic of Korea, Slovenia, Sweden, Switzerland, Thailand, Uganda & the United Kingdom (which introduced its ratification bill into the House of Commons on 25 August 2000).

South Africa ratified the treaty on 27 November and Germany announced this week that it will do the same on 12 December 2000.

The following countries are currently considering ratification - Bangladesh, Bosnia & Herzogovina, Burkino Faso, Burundi, Cambodia, Colombia, Comoros, Estonia, Gambia, Guyana, Haiti, Ireland, Jamaica, Kenya, Lithuania, Malawi, Mexico, Nigeria, Philippines, Slovakia, Ukraine, Uraguay & Zimbabwe. (This information is from CICC - the Coalition for an International Criminal Court's home page at www.igc.org/icc/html/country.)

From this it is clear that ratification is proceeding rapidly and Australia runs a real risk of being left behind it if does not introduce the relevant legislation soon. It is therefore just as important to consider those countries that are in the process of ratification as the 23 that have actually ratified.

Another consideration is the importance of the swift establishment of the court. The court's jurisdiction is prospective and it cannot come into operation until sixty countries have ratified. Australia's ratification may influence other countries in our region to do the same - including those of our neighbours who are not yet signatories to the Statute. The very existence of a Court with jurisdiction to try the leaders and senior military officers of totalitarian States for the commission of crimes against humanity should have a high deterrent value. For this reason alone the Court should be established as soon as possible.

Due process

Some committee members also asked questions of officials about due process before the Court.

The NSW Bar Association is satisfied that the Statute and its draft rules of procedure and evidence provide appropriate safeguards to the rights of the accused. In fact the combination of the Statute and its draft rules provide probably the most sophisticated and comprehensive codified right to a fair trial of any court system in the world.

The Statute contains fundamental rights for the accused common to common law countries, including a presumption of innocence (art 66); the right to a speedy trial; a right of silence; a right to make an unsworn statement; the right to legal assistance if the accused lacks sufficient means to pay for legal representation (art 67). It mandates important procedural rights during the trial. The prosecutor must also disclose exculpatory material to the defence (art 67(2)).

The Statute also provides victims with significant rights, including some rights of participation in the trial process (art 68) (which is closer to the civil than common law model) and empowers the Court to make reparation orders against accused persons (art 75) - common to both systems.

The draft rules of procedure and evidence (being considered at a Preparatory Commission in New York in November/December) compel the Court's Registry to organize itself in a manner that promotes the rights of the defence consistent with the principle of a fair trial (rule 20). One such example is that the Registry must assist arrested persons with obtaining legal counsel and must assist defence counsel and provide them with "such facilities as are necessary for the direct performance of the duty of the defence" (rule 20((1)(e)). It must also co-operate with national defence and bar associations to promote the specialization and training of lawyers in the law of the Statute and its rules. It also provides for the assignment of legal counsel of their own choice to accused persons from a list of counsel (rule 21).

The draft rules also contain highly sophisticated rules for the acceptance of evidence in the new Court which are consistent with Australia's own procedures. The Court too has a comprehensive appeals mechanism the Court's Appeals Chamber. The main difference between the world's common law and civil law systems is the right under Article 81 of the prosecutor to appeal an acquittal.

A major right, missing from our own system, is an enforceable right to compensation for unlawful arrest or detention or an acquittal on appeal on the grounds of a miscarriage of justice after the discovery of new evidence unknown at the time (art 85 Statute and Chapter 10 of the rules).

The Crimes

We also note the concerns expressed as to the court's jurisdiction and what it will try. It is important to emphasise that its jurisdiction is limited to major international crimes - "the most serious crimes of international concern" (art 1) of **genocide, crimes against humanity, war crimes, and aggression**. These crimes are comprehensively defined in the draft elements paper. They will codify existing customary international law and incorporate the provisions of treaties including the Genocide Convention, the Apartheid Convention, the Torture Convention and the Geneva Conventions. The establishment of the court is the first attempt to codify these crimes and their elements and to establish international procedures to prosecute, try and punish international crimes.

The Statute and the draft elements of crime define **crimes against humanity** to include murder, extermination, enslavement, torture, rape, slavery, enforced prostitution, forced pregnancy, enforced sterilization, sexual violence, persecution and apartheid. **War crimes** include wilful killing, biological experiments, compelling service in hostile forces, unlawful deportation and transfer, attacking civilians, mutilation, pillaging, sexual slavery, starvation as a method of war and conscripting children. **Genocide** is defined to include killing, causing serious bodily or mental harm, imposing measures intended to prevent births, and forcibly transferring children "in a particular national, ethnical, racial or religious group".

The committee's chair expressed concern about the "breadth of some of the crimes, for example, genocide".

The proposed definition of "genocide by killing" (art 6(a)) set out in Part II of the Finalized draft text of the Elements of Crimes contains the following elements, each of which must be proved. These are: the perpetrator must kill more than one person; the persons must belong to a "particular national, ethnical, racial or religious group"; the perpetrator must have intended to destroy in part or in whole that "national, ethnical, racial or religious group"; and the conduct must have taken "place in the context of a manifest pattern of similar conduct directed against that group or was the conduct that could itself effect such destruction".

This definition is anything but broad. It is clearly directed to conduct such as "ethnic cleansing" and the events in Kosovo obviously are within this proposed definition. The offence is strictly rather than broadly defined. Genocide is not the easiest crime to prove because the prosecution must specifically prove each element. However, if the conduct falls short of genocide it may be for example a crime against humanity (art 7) or a war crime (art 8).

Issues of sovereignty

We note too the concerns that some members expressed about Australia's possible loss of sovereignty by ratifying the treaty. We believe that these concerns are misplaced. State parties retain the right to try any of these crimes domestically.

The Court is essentially a court of last resort. Article 17 of the Statute enshrines the important international law principle of "complementarity". The Court will not be able to prosecute a case if another country has already prosecuted or investigated the case or is doing so, unless it is clearly shown to be unable or unwilling genuinely to proceed to do so. A State may also refer a case to the Court's prosecutor for investigation or prosecution.

It is extremely difficult to envisage circumstances in which Australia would be unable or unwilling to prosecute under its domestic law war crimes, genocide and crimes against humanity committed in Australia or by its citizens.

The Statute obliges the Court to defer to Australian national criminal proceedings, although it may ask Australia for periodical progress reports. The Court will only have jurisdiction if Australia has referred the case to the Court or its investigative or prosecutorial authorities have decided not to investigate or prosecute for the purpose of shielding the person from criminal responsibility in a manner inconsistent with an intent to bring the person to justice. When is this ever likely to happen in Australia?

For these reasons the NSW Bar Association believes it is in Australia's national interest to enact legislation to enable ratification of the treaty. We have representatives who are available to give evidence to the committee in support of this submission: in fact two of our practising members attended the Rome treaty conference in 1998 as observers for Australian Lawyers for Human Rights.

Yours sincerely

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President