

## AUSTRALIAN SECTION

### INTERNATIONAL COMMISSION OF JURISTS

#### SUBMISSION CONCERNING THE INTERNATIONAL CRIMINAL COURT

##### 1 SUBMISSION

1.1 The Australian Section of the International Commission of Jurists (ICJ) strongly urges the Joint Standing Committee on Treaties (JSCOT) to support Australia's early ratification of the Statute for the International Criminal Court.

##### 2 SUPPORTING ARGUMENTS

2.1 Prompt ratification is the position of the ICJ in Geneva. The ICJ Secretariat was also very heavily involved in negotiations to establish the Statute.

2.2 It is not until the Court is established that it will be possible to instil in the minds of the leaders and senior military officers in totalitarian States, those most likely to commit genocide, war crimes and crimes against humanity that there may be personal consequences for their criminal acts before the Treaty comes into effect. That cannot occur until the Statute comes into effect.

2.3 There are still some thirty-seven ratifications required.

2.4 It is a clear practical example of the application of the Rule of Law to situations that are presently (with few exceptions) not amenable to it.

2.5 At the time of preparation of this submission (prior to the November-December 2000 PrepCom), 117 countries have signed the Statute and 23 countries have ratified it. The treaty will enter into force 60 days after the 60'h ratification is made. That target is expected to be reached by 30 June 2002. The Assembly of State Parties will then meet to elect the 18 judges, the Prosecutor and the Deputy Prosecutor. There are advantages to Australia's being included in the first meeting of the Assembly and

participating actively thereafter (which it would be less able to do if it is not there at the beginning)

2.6 Australia will be able to nominate candidates for judge, Prosecutor and Deputy Prosecutor. It will be able to be involved, through Australian nationals, in the work of the Court at all levels from its inception (in judicial, prosecutorial, investigatory and various support capacities- counsellors, psychologists, administrators, interpreters, etc). This will continue a fine tradition, of Australian involvement with distinction in the ad hoc tribunals and enable Australia to play a significant role in shaping the form and functions of the Court.

2.7 It should also be noted that even after the completion of the 60 ratifications, there will be an ongoing process of ratification. It will be a matter of history as to the order in which countries sign and ratify the treaty for many decades to come. It is inconsistent with Australia's stance, already expressed thus far on the ICC Treaty, that it be a long way down the list of those countries that ratify the treaty.

2.8 The most important issue at this stage is that those countries who are wishing to delay ratification, can point to Australia's failure to do so. The obverse of this is that those that are encouraging countries to sign will be able to point to Australia's ratification and the endorsement that that gives. Australia's obligation is to encourage as many countries as possible to ratify.

2.9 Australia has already expressed itself publicly about its views on ratification, and is worthy of commendation, for the prompt manner in which it expressed 'those views.

### 3 AUSTRALIA'S STATED POSITION

3.1 On 12 December 1999, the Minister for Foreign Affairs, the Attorney-General and the Minister for Defence issued a joint media release announcing that the Government has decided to ratify the Statute of the International Criminal Court.

The Minister for Foreign Affairs stated"

"Given Australia's leading role in promoting the Court, it is fitting for Australia to be making an early commitment to ratify the Statute".

The Attorney-General said.

"... the Court will be capable of bringing to justice those persons who commit the grave crimes within its jurisdiction and, by doing so, it will serve notice to all who would commit such crimes that they cannot do so with impunity'

The Minister for Defence stated:

I am confident that the International Criminal Court will prove to be an effective instrument in the enforcement of international humanitarian law.

3.2 On 29 March 2000, the Minister for Foreign Affairs, in a letter to myself, referred to the need for Australia to have the necessary legislation in place prior to ratification of the Statute and stated:

I am advised that the Attorney-General expects to be ready to bring his proposals for the Government's legislative approach to Ministers in May. We would consequently hope to introduce the legislation later this year.

"Once our legislative approach has been confirmed, we will submit the Statute to the Joint Standing Committee on Treaties (JSCOT) and table the Statute in both Houses of the Federal Parliament. As part of the JSCOT process we will be conducting additional consultations with interested parties in the community and with the States and Territories. We would welcome the contribution of the ICJ Sub-Committee on the International Criminal Court...

"Australia has been active in encouraging the signature and ratification of the Statute by other countries...

"... the Government's commitment to the establishment of the Court and to Australia's ratification of the Statute at the earliest possible time remains firm".

3.3 On 25 October 2000, the Attorney-General and the Minister for Foreign Affairs, issued a joint news release which announced that the Commonwealth intended to introduce legislation by the end of the year to ratify the Statute of the International Criminal Court. It stated:

"Australia's ratification legislation will fully implement the obligations under the Statute. Among other things, the proposed legislation will enable Australia to take full advantage of the principle of complementarity. This means that crimes covered by the court's jurisdiction will also be crimes for the purposes of Australian law. Upon commencement, Australian authorities will be able to investigate and prosecute those persons who are accused of perpetrating the most serious crimes of concern to the international community. These will include genocide, crimes against humanity and war crimes. The jurisdiction of the court will be entirely prospective, meaning it will only apply to crimes committed after the Statute enters into force.

"The legislation will enable Australia to co-operate with the court in its investigations and enforcing its decisions... A similar regime has been in operation for a number of years to enable Australia to successfully co-operate with the Ad Hoc International Criminal Tribunals for Rwanda and the former Yugoslavia".

## 4 ADDITIONAL ARGUMENTS FAVOURING RATIFICATION

4.1 In further support of early ratification, we would point out the following..

4.1.1 The Court is a criminal court (not a human rights court, being established to investigate and try the most serious offences in the criminal calendar- genocide, crimes against humanity and war crimes (including those committed in internal armed conflict)with aggression to be added, once a definition has been settled, and with the facility to add other heinous offences.

4.1.2 These offences already exist in the international calendar and the proposed Australian legislation will create them as offences in this country.

4.1.3 It will be a permanent court, in contrast to the ad hoc tribunals that have been established from time to time to address the most egregious examples of offending of this type in recent history. There are many advantages to having permanent arrangements in place to respond to future needs.

4.1.4 The principle of complementarity is central to the operation of the Court. In practice, this means that the first responsibility for investigating and prosecuting such a crime lies with the country in which the crime is committed or the country of nationality of the offender. It is only if that country, after appropriate notification, has not acted and can be shown to be unable or unwilling genuinely to do so, that the Court may assume jurisdiction.

Therefore, if such a crime were to be committed in Australia, or elsewhere by an Australian, after the Court comes into being, it would be Australia's responsibility, just as it is now, to first consider its investigation and prosecution in the courts of Australia and according to Australian law.

4.1.5 Even if the ICC's jurisdiction does not arise- by State party referral or independent action by the Prosecutor- the independent Prosecutor of the Court must take defined procedural steps, including obtaining the approval of the three-judge Pre-Trial Chamber, before initiating an investigation. The Prosecutor may only initiate action

independently in respect of crimes occurring in the territory of a State party to the Statute or committed by a national of a State party.

4.1.6 The UN Security Council may also refer a situation to the Prosecutor, regardless of where it occurred or who was involved. This in effect replaces the present cumbersome process for establishing ad hoc tribunals.

4.1.7 Clear procedures are specified for all stages of the operation of the Court in the Rules of Procedures and Evidence. The offences are clearly defined. The legal tests to be met in the course of proceedings are the most stringent tests extracted from both common law and civil law systems. Appropriate assistance is required to be given to and safeguards are in place for the rights of accused persons, victims and witnesses.

## 5 SUMMARY

5.1 In summary, early ratification will be an opportunity for Australia to show its strong support, not only for the International Criminal Court, but for the enforcement procedures of international statutes. It will also enable us to overcome the failure to implement the obligations of the Genocide Conventions which Australia has already ratified, but consistently fails to set up appropriate machinery for its enforcement.

30 November 2000

The Hon. Justice John Dowd AO  
President  
Australian Section  
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Mr Nicholas Cowdery QC  
Councillor, Australian Section  
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