Submission No. 26.1

DRAFTING IMPLEMENTING LEGISLATION FOR THE *ROME STATUTE*

SO AS TO PROTECT AUSTRALIAN SOVEREIGNTY:

Additional Written Submission to the Joint Standing Committee on Treaties on the Statute for the International Criminal Court in Response to the Committee's Request at its Melbourne Hearings, 14 March 2001

INTRODUCTION

In response to the evidence presented by the Reverend Professor Michael Tate AO at the Melbourne Hearings of the Committee on 14 March 2001, the Chairman, Mr Andrew Thompson MP, requested an opinion of Australian Red Cross as to ways in which any implementing legislation for the *Rome Statute* could be framed so as to minimise any loss of Australian sovereigno.

We are happy to provide the following written suggestions which form an additional submission in response to that specific request.

CONSTITUTIONAL VALIDITY OF ANY IMPLEMENTING LEGISLATION

Our specific drafting suggestions are predicated on our view of the constitutional validity of any such legislation. Unfortunately some written submissions to the Committee have included arguments to the effect that there is no provision in the Australian Constitution for the Parliament of this country to enact legislation in respect of a foreign court. *Ergo, so* the argument runs, any such legislation would be without Constitutional foundation. Some of these written submissions have been reiterated in oral evidence before the Committee.

Those who make such na~fve arguments fail to mention existing Commonwealth legislation such as the *International War Crimes Tribunals) Act 1995* which, on the basis of the same argument, must be *ultra vires* Commonwealth legislative competence - this, of course, despite the fact that the validity of that particular legislation has never been challenged. It should also be noted that the *Extradition Act 1988 is* predicated upon the notion that the Commonwealth Parliament is constitutionally competent to legislate in respect of the transfer of Australians, and others within our territorial jurisdiction, to foreign courts.

Quite apart from the existence of valid Commonwealth legislation which exposes the fallacy of the argument, the High Court's interpretation of the scope of the External Affairs Power in Section 51(xxix) of the Constitution extends to both the

abovementioned Act as well as to any new legislation in respect of the *Rome Statute.* The contrary argument, that the Australian Parliament has no Constitutional authority to subject Australian nationals to the jurisdiction of a foreign court, is so manifestly flawed as to be undeserving of legal rebuttal. However, since that particular argument has been reiterated so regularly, apparently without express repudiation, we wish to articulate a total and unambiguous rejection of the argument as one entirely devoid of legal substance.

As already stated. our subsequent drafting suggestions are predicated on our view that any implementing legislation would unquestionably fall within the Constitutional legislative competence of the Commonwealth.

ENSURING PRIMACY OF AUSTRALIAN CRIMINAL JURISDICTION

We suggest that any implementing legislation to give effect to the subject matter jurisdiction of the International Criminal Court in Australian Domestic Law explicitly recognise the primacy of Australian Criminal Law in specific situations. In Professor Tate's evidence to the Committee, he distinguished the situation of an ADF deployment (where it is difficult to conceive of any scenario in which the Australian Government would willingly surrender national jurisdiction to the ICC) and the situation where an Australian national, because of love of their homeland or familial ties, individually travelled to a conflict situation to participate on one side or another in that conflict. (In these circumstances, the Australian Government might well be keen for the ICC to try the individual alleged to have committed an atrocity to avoid stirring up inter-communal strife in Australia).

Bearing this distinction in mind we suggest that any relevant legislation could:

Include in the interpretation section of the Bill a provision to the following effect:

Authorized operation: A peace building, peace keeping, peace enforcing or combat operation authorized by the Australian Government;

Include in the operative provisions of the Bill a clause to the following effect:

~Vhere the accused was, at the time of the alleged offence, a member of the Australian Defence Force or an Australian citizen or person ordinarily resident in Australia engaged in an authorized operation, such person shall be exclusivel.i. subject to Australian national criminaljurisdiction.

PVhere the accused was, at the time of the alleged offence, a member of the Australian Defence Force or an Australian citizen or person ordinarily resident in Australia not engaged in an authorized operation, such person shall be exclusively subject to Australian national criminal jurisdiction in such cases as are prescribed under this legislation.

The Explanatory Memorandum to the Bill should make it clear that such a clause, and the foreshadowed related regulation, would be made in the exercise of the primary jurisdiction recognized by the United Nations Diplomatic Conference of Plenipotentiaries in adopting the *Rome Statute* of the ICC on 17 July 1998 (as evidenced by preambular paragraph 9 and Article 1).

Whilst Article 1 of the *Rome Statute* speaks of the new Court only as a **complement** to national courts, the Article was intentionally drafted by way of deliberate contrast to the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Article 9(2) of the ICTY Statute and Article 8(2) of the ICTR Statute both establish the **primacy** of the Tribunals' jurisdiction over national courts. **That formula** was very **deliberately** rejected in Rome. The exercise of Australian national criminal jurisdiction would require the ICC to hold the case as inadmissible. Article 17 (1) of the Rome Treaty says that in such a case, the ICC **"shall** determine that a case is inadmissible". The treaty makers intended that this determination be mandatory, not discretionary, on the part of the Court in the case of a national criminal jurisdiction functioning well and with integrity. It is impossible to conceive the ICC not recognizing that Australia falls into this category. The Australian Red Cross delegation indicated our position to the Committee at the Melbourne hearings that the *Rome Statute* would collapse if any other line were taken by the ICC.

Australia would be acting entirely consistently with the express intention of the drafters of the Statute if, in addition to legislatively enshrining the primacy of Australian courts, the Government also deposited a Declaration of Australia's understanding of the interpretation of preambular paragraph 9 and Article 1. Australia has taken this particular approach in respect of a number of multilateral treaties in the past and the practice of lodgement of Declarations attached to Instruments of Ratification is common in multilateral treaty making.

Although Article 120 of the *Rome Statute* precludes Reservations to the Statute, a Declaration of the kind described above is not a Reservation within the legal meaning of that term. A Reservation has the effect of limiting or altering the application of some aspect of the treaty to the Reserving State. However, in this case, such a Declaration is entirely consistent with the treaty's terms - it would be, in effect, an affirmation of one of the treaty's existing provisions. In our view, such a Declaration would not alter Australia's position in law - that is, the Declaration would not increase Australia's primacy of jurisdiction in respect of acts committed in its own territory or by one of its own nationals. However, the Declaration would constitute a clear statement to other States and to the ICC itself of the level of Australia's resolve to insist on its primary national jurisdiction in specified situations.

Of course, in cases where an operation is not authorized by the Australian Government. then, in the absence of a regulation (subject to Parliamentary scrutiny). a person accused of a relevant crime could be surrendered to the ICC.

REQUISITE STANDARD OF PROOF BEFORE SURRENDER OF AN ACCUSED

Where a Pre-Trial chamber of the ICC (the *Rome Statute* does not allow the Prosecutor acting alone to issue an indictment - that indictment must be approved by a Pre-Trial Chamber of 3 judges - see Article 15(4)) seeks the arrest and surrender of an Australian national who was alleged to have committed an offence other than in an approved operation, then such an accused should be surrendered only if the relevant Australian judicial officer:

> *"is satisfied that there has been established a* ***primafacie*** *case that the person committed the relevant offence, in other words, that there is evidence that, if uncontroverted wouldprovide sufficient grounds:*
> *(a) to put the person on trial in an Australian Court.*

This is an adaption of the wording of Section 22(3) of the *War Crimes Amendment Act* 1988 (No. 3 of 1989).

In practice, this would be satisfied in the ICC documentation forwarded to the Australian authorities which must be such as is:

> *necessary to meet the requirements for the surrender process in the requested State...---(Article* 91(2)(c) of the *Rome Statute).*

The same material as established to the satisfaction to the Pre-Trial Chamber that there were "reasonable grounds to believe that [the accused committed the crime"] (Article 58(2)(d) of the *Rome Statute)* would be amongst such documentation. Le., there would be more documentation than would be sufficient simply to identify the accused, specify the crime and concisely state the facts.

The establishing of a *prima facie* case can be defended as a requirement of "the surrender process in the requested State" in so far as it is certainly required in many (if not most) of the extradition treaties which Australia has ratified. More conclusively. at the time of the making of the Rome Treaty, the Australian Parliament in the *War Crimes Act* 1998 had provided that in the case of extradition for war crimes, a *prima facie* case must be established despite any contrary provision in a treaty of extradition (s.22(5)).

We understand that the Joint Standing Committee on Treaties is currently undertaking an inquiry into Australia's extradition practices and has expressed concern about the disparity of approach between. for example, Australia's extradition treaties with other Commonwealth nations which usually require a *prima facie* case to be made out and extradition treaties with non-Commonwealth nations which often do not require that same standard of evidence. Perhaps the extradition requirements for responding to a request from the ICC should also be considered in the context of the Committee's inquiry on Extradition.