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19 March 2002

Mr Robert Morris
Secretary
Joint Standing Committee on Treaties
Parliament House
Canberra ACT 2600

Dear Bob,

Australian Red Cross National Advisory Committee Submission to JSCOT on the Proposed Legislation to Implement Obligations Arising Under the *Rome Statute* for the International Criminal Court

I am happy to attach the abovementioned submission for the consideration of the Joint Standing Committee in relation to its deliberations on the Draft Bills to implement Australia's obligations under the *Rome Statute* should Australia decide to ratify its signature of the Statute.

The submission has been prepared by members of the National Advisory Committee on International Humanitarian Law – particularly Rev Professor Michael Tate AO, Dr Helen Durham and myself. We are happy to provide any additional assistance if called upon to do so.

Please pass on our thanks for the opportunity, once again, to provide a written submission to the Committee on a topic to which we attach the utmost importance.

Yours sincerely,

Professor Tim McCormack
Chair
National Advisory Committee on International Humanitarian Law

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Australian Red Cross

Submission No. 244

SUBMISSION TO THE JOINT STANDING COMMITTEE ON TREATIES IN RELATION TO IMPLEMENTING LEGISLATION FOR THE *ROME STATUTE* OF THE INTERNATIONAL CRIMINAL COURT

The Australian Red Cross (ARC) National Advisory Committee on International Humanitarian Law thanks the Joint Standing Committee on Treaties (JSCOT) for the opportunity to express its views in relation to the draft Bills for legislative implementation of the *Rome Statute* of the International Criminal Court (ICC).

It is the general view of ARC that the Bills as drafted comprehensively provide for the national implementation of Australia's relationship with the new International Criminal Court if and when Australia chooses to ratify the *Rome Statute*. The Australian approach of detailing the requisite elements of every individual crime is unique – even amongst those Common Law nations with whom we share the closest legal traditions.[1] While the draft legislation may have a cumbersome appearance, particularly relative to the implementing legislation of other nations, there are some distinct advantages in this particular approach. First, the approach will create certainty amongst all those involved in future trial processes because the elements of each specific offence are spelt out explicitly. Prosecutors and defence counsel will know exactly what must be proved for a conviction to be recorded. Secondly, the approach facilitates the statutory identification of penalties for each specific offence – again reducing the possibilities of uncertainty and ambiguity in the trial process. ARC welcomes the overall approach of the legislation and takes this opportunity to congratulate those responsible for its preparation. The approach taken in relation to the draft Bills is consistent with other amendments to the *Criminal Code Act 1995*.

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[1] For reference to relevant legislation in common law countries see
Crimes Against Humanity and War Crimes Act 2000, c.24 (Canada):www.canlii.org/ca/sta/c-45.9/

International Criminal Court Act 2001, c 17 (UK): www.hmso.gov.uk/acts/acts2001/20010017.htm

International Crimes and International Criminal Court Act 2000(N.Z.): rangi.knowledge-basket.co.nz/gpacts/public/text/2000/an/026.html

The South African approach, substantially similar to New Zealand's, can be seen at 'International Criminal Court Bill 2001 (Draft)': www.parliament.gov.za/bills/2001/b42-01.pdf

ARC wishes to draw JSCOT's attention to a number of relatively small issues of concern, with a view to possible amendment to the draft legislation. ARC will focus the majority of its comments upon the *International Criminal Court (Consequential Amendments) Bill* because it believes its expertise lies primarily in the definition of specific offences. This submission will be limited to dealing with the following issues: the use of the term 'primary' in referring to Australia's national jurisdictional competence; the repealing of Part II of the *Geneva Conventions Act 1957;* the definition of crimes of a sexual nature; and the repetition of certain war crimes found in subdivision H.

Primacy of Australia's National Jurisdictional Competence

International Criminal Court Bill (clause 3) and *International Criminal Court (Consequential Amendments) Bill* (Schedule 1, clause 268.1(2))

Clause 3 of the *International Criminal Court Bill* (the Bill) acknowledges the fundamental rejection in the *Rome Statute* of the model of interaction between the International Criminal Tribunals for the Former Yugoslavia and Rwanda and their respective relevant national criminal jurisdictions. Both international tribunals have 'primacy' over the exercise of national jurisdiction. In contrast, the ICC *must* refuse to exercise its jurisdiction where a State wishes to exercise its national criminal jurisdiction and has the capacity and integrity to do so (combined effect of Articles 1 and 17(1) of the *Rome Statute).*

Clause 3(2) does not convey this mandatory pre-eminence of national criminal jurisdiction as strongly as it might. In our view the word 'primacy' should be used instead of the word 'primary' to reflect the significance the Australian Parliament attaches to our national criminal jurisdiction beyond any mere chronological priority. This choice of terminology would also make more explicit the rejection of the model of the two international criminal tribunals. Thus, Clause 3(2) could read:

> "Accordingly, this Act does not affect the primacy of Australia's right to exercise its national criminal jurisdiction with respect to crimes within the jurisdiction of the ICC."

Clause 268.1(2) of Schedule 1 of the *International Criminal Court (Consequential Amendments) Bill* currently only reiterates the intention of Parliament referred to in Clause 3(1) of the *International Criminal Court Bill* and is silent in respect of the clarification of that intention in Clause 3(2). There is no reason in principle why the clarification ought not also appear in Clause 268.1(2) of Schedule 1 of the consequential amendments and, in our view, the suggested amended words above ought to be added to this provision.

The Second Reading Speech should make clear the intention of the Parliament that such primacy *will* be presumed in any case where 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 being a peace-keeping, peace-enforcing or combat operation authorized by the Australian Government.

Of course, it should be made clear in the Second Reading Speech that this is not an exhaustive list of the cases where national criminal jurisdiction will be exercised to the exclusion of the ICC. However, the presumption of the exercise of national jurisdiction would satisfy a considerable concern in the Australian community.

Schedule 3 – Amendment of the *Geneva Conventions Act 1957*

Part II of the *Geneva Conventions Act 1957* (the Act) criminalises grave breaches of the Geneva Conventions of 1949 and of Additional Protocol I of 1977 perpetrated in the context of international armed conflict. These offences are also a separate and distinct category of war crimes within the subject matter jurisdiction of the *Rome Statute*. ARC understands and agrees with the rationale for the proposed repeal of Part II of the Act – namely, that all crimes of international concern within the jurisdictional competence of the International Criminal Court should be grouped together in the Commonwealth *Criminal Code Act 1995*. The benefit of a single Act dealing with all such crimes is obvious.

ARC has, however, major concern about the repeal of Part II of the Act which may have consequences entirely unintended in the drafting of Schedule 3 of the *International Criminal Court (Consequential Amendments) Bill* and which, we believe, justifies an alternative approach to that proposed in Schedule 3.

The *International Criminal Court (Consequential Amendments) Bill* will only take effect after the commencement of the legislation and will have no retrospective effect. Consequently, while the new legislation will cover grave breaches of the Geneva Conventions and of Additional Protocol I allegedly committed after commencement, the new legislation will not apply to the same offences committed between 1957 (the date of commencement of the *Geneva Conventions Act 1957*) and the date of commencement of the new legislation. If the *Geneva Conventions Act 1957* is repealed as proposed, the temporal window of jurisdictional competence currently open to Australian courts may be lost. This is surely not what the legislative drafters intended in their approach to Schedule 3.

Our strong preference would see Schedule 3 explicitly obviate the operation of Part II of the *Geneva Conventions Act 1957* once the enactment of the *International Criminal Court (Consequential Amendments) Bill* commences but without the repeal of Part II in respect of the interim years between 1957 and commencement of the new legislation. The application of Section 8(b) of the *Acts Interpretation Act 1901* entitled 'Effect of Repeal' would presumably have this effect. That sub-section states that:

> Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not affect the previous operation of any Act so repealed, or anything duly done or suffered under any Act so repealed...

The effect of this provision seems to be that the jurisdictional competence of Australian Courts in respect of grave breaches of the Geneva Conventions will continue in respect of the period from 1957 until the enactment of the *International Criminal Court (Consequential Amendments) Bill* and subsequent repeal of Part II of the *Geneva Conventions Act 1957.* If this interpretation is correct, we recommend that the *Explanatory Memorandum* to accompany the legislation explicitly indicate this interpretation of Section 8(b) of the *Acts Interpretation Act 1901.*

The Definition of War Crimes of a Sexual Nature

The *International Criminal Court (Consequential Amendments) Bill* (Schedule 1) provides elements of the relevant crimes. As previously noted, ARC acknowledges the benefit inherent in providing details of the elements of the crimes in the domestic legislation. The *International Criminal Court (Consequential Amendments) Bill* provides a detailed articulation of the elements of the crimes and, in general, reflects the Preparatory Commission for the International Criminal Court Draft Elements of Crimes (Elements), thus encouraging international legal consistency.

The inclusion of a broad range of crimes of a sexual nature in the ICC Statute was seen by ARC as necessary to reflect the reality of armed conflict. ARC acknowledges the constructive role played by the Australian delegation at the Rome Conference in relation to ensuring the full gambit of crimes of a sexual nature were included in the Court's jurisdiction. It is in the area of the definition of these crimes in the Australian legislation that ARC would like to raise a number of issues.

One particular area in which the draft Bill departs from the approach in the Elements of Crimes is in relation to the definition of rape (both as a war crime and as a crime against humanity). The proposed Sections 268.13 (crime against humanity of rape); 268.58 (war crime of rape in an international armed conflict); and 268.81 (war crime of rape in a non-international armed conflict), for example, restrict sexual penetration for the purposes of the definition of rape to certain specified body parts of the victim – namely the genitalia, anus or mouth. In contrast, the Elements of Crimes defines rape to include '...penetration, however slight, of any part of the body of the victim *or of the perpetrator* with a sexual organ...' (Article 7(1)(g)-1; Article 8(2)(b) (xxii)-1; and Article 8(2)(e)(vi) – 1). This definition in the Elements of Crimes envisages the possibility that the victim might be forced against their will to engage in the sexual penetration of another person – whether or not that other person is consenting to the penetration. The proposed Australian definition of rape simply does not include that possibility.

The proposed Australian definition of rape also departs from the approach in the Elements of Crimes in relation to the victim's lack of consent. The proposed Australian definition of rape requires the sexual penetration to occur without the consent of the victim but does not clarify the circumstances in which freedom of choice on the part of the victim is impossible. In contrast, the Elements of Crimes emphasizes the coercive nature of rape and does not necessarily require the Prosecution to prove a lack of consent as an element of the crime. The common provision for each of the three crimes of rape in the Elements (referred to above) specifies that the sexual penetration be:

> 'committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power ... or by taking advantage of a coercive environment, or ... committed against a person incapable of giving genuine consent'.

The approach of the Elements allows for the prosecution to prove the elements of rape in situations where the victim is a 'consensual' participant in the act but only out of fear for their own or others' wellbeing if they indicate their lack of consent. Unfortunately, the proposed Australian legislation does not reflect this approach. In relation to other crimes of a sexual nature which involve coercion (enforced prostitution, forced pregnancy, enforced sterilization and sexual violence), the proposed legislation does follow the approach of the Elements of Crimes and places the emphasis on the coercive environment rather than on the presence or lack of the victim's consent. It is regrettable that the proposed legislation does not also follow this approach in relation to the three separate crimes of rape.

Repetition of Some War Crimes

As noted previously, the *International Criminal Court (Consequential Amendments) Bill* in most instances faithfully replicates both the specific war crimes offences and their particular elements as found in the Elements. However in the section dealing with war crimes there is an addition - a proposed Subdivision H covering 15 extra 'War Crimes That are Grave Breaches of Protocol I to the Geneva Conventions'.

ARC understands that the rationale for this additional Subdivision is to bring all war crimes under Australian Law into one legislative location – the new Division 268 of the *Criminal Code Act 1995*. As a State Party to the Four Geneva Conventions of 1949 and the Two 1977 Protocols Additional to the Conventions, Australia is obligated to provide criminal sanctions for grave breaches of the Conventions and of Additional Protocol I. Until now, those penal sanctions have been provided in the *Geneva Conventions Act 1957*. The intention of the *International Criminal Court (Consequential Amendments) Bill* is to amend the *Geneva Conventions Act 1957* by repealing the operative part of the legislation criminalizing grave breaches on the basis that all grave breaches will henceforth be covered by the *Criminal Code Act 1995*. Because Subdivision D of the draft Bill explicitly covers grave breaches of the Four Geneva Conventions (reflecting Article 8(2)(a) of the *Rome Statute*) it was not necessary to

draft an additional subdivision for those offences. However, the *Rome Statute* does not include an equivalent sub-article explicitly dealing with grave breaches of Additional Protocol I. There is no question that some of the provisions in Article 8(2)(b) of the *Rome Statute* do cover certain grave breaches of Additional Protocol I. However, the ongoing lack of consensus about the customary law status of the Protocol precluded the Rome Conference from comprehensively listing all grave breaches of the instrument in Article 8(2)(b) of the *Statute.* The draft Bill intends a more comprehensive approach and this intention is admirable.

However, one of the potential disadvantages of this attempt to be comprehensive is that some of the specific offences in proposed Subdivision H are, in fact, repeats of offences in either Subdivision D or E. The mere fact of repetition may not necessarily cause problems in and of itself except that the specific elements of the repeated offences are, on occasion, disparate. The inconsistency in specifying elements could easily cause problems as future defendants would justifiably raise objections if they were charged with a specific war crime appearing twice in the legislation with the prosecution choosing the specific offence with the less onerous elements.

Some examples will illustrate the potential problem. Proposed Section 268.96, the war crime of 'medical or scientific experiments' repeats the same offence as proposed Section 268.47 (in Subdivision E). Both Sections 268.96 and 268.47 enumerate 5 similar elements of the specific offence but those elements are not identical. For example, Section 268.96(1)(c) incorporates an objective test for evaluating the perpetrator's conduct such that the conduct is not 'consistent with generally accepted medical standards that would be applied under similar medical circumstances to persons who are nationals of the perpetrator ...'. Since Section 268.47 contains no such explicit reference to an objective standard of conduct, it is arguable that the prosecution may be required to prove a subjective standard – that is, that the accused themselves knew that their conduct was unjustified by the medical condition of the victim. Such a subjective standard may be more difficult to prove beyond reasonable doubt in some circumstances than an objective test of 'generally accepted medical standards'. Disparity in the specific elements of the same crime referred to in two different Subdivisions of the draft legislation cannot be helpful.

Other war crimes covered by Subdivision H which are not repeated anywhere else in the draft legislation include, for example, the war crimes of 'mutilation', 'removal of blood, tissue or organs for transplantation', 'attacks against works and installations containing dangerous forces resulting in excessive loss of life, injury to civilians or damage to civilian objects', 'unjustifiable delay in repatriation', 'apartheid', and 'inhuman and degrading practices involving outrages upon personal dignity'.

Conclusion

We reiterate our support for the basic approach of the Draft Bills and for the overwhelming bulk of the provisions contained within them. In particular, ARC appreciates the commitment

to universal jurisdiction in respect of the substantive crimes reflected in the proposed legislation. This commitment reaffirms the fundamental importance of national jurisdictional competence as a complement to the new International Criminal Court. ARC eagerly anticipates the Australian Government's future contribution to the enforcement of International Criminal Law.

Following the outstanding leadership role the Australian Delegation played in the negotiations of the *Rome Statute* (in the lead-up to the Rome Conference, during the Conference itself and in the post-Rome negotiations in New York), ARC finds it difficult to contemplate the establishment of the new International Criminal Court without Australian participation. We urge the Joint Standing Committee on Treaties to undertake its deliberations on the proposed implementing legislation as expeditiously as possible in the hope that Australia might still be in a position to ratify its signature of the *Rome Statute* in time to participate in the establishment of the new Court.

ARC remains committed to and available to assist in any appropriate way with JSCOT deliberations and processes.

March 20, 2002