Australian Red Cross

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Submission No. 26

SUBMISSION TO THE JOINT STANDING COMMITTEE ON TREATIES IN RELATION TO THE INTERNATIONAL CRIMINAL COURT

INTRODUCTION

The Australian Red Cross National Advisory Committee on International Humanitarian Law thanks the Joint Standing Committee on Treaties for the opportunity to make this submission in relation to Australia's participation in the Rome Statute for the International Criminal Court. The National Advisory Committee on International Humanitarian Law advises the National Executive of Australian Red Cross on all matters relating to International Humanitarian Law (Law of Armed Conflict) – including issues of the enforcement of International Humanitarian Law through institutions such as the proposed International Criminal Court. The Chair of the Committee, Professor Tim McCormack, was a member of the Australian Government Delegation to the Rome Diplomatic Conference for the Establishment of the International Criminal Court. The Executive Officer of the Committee, Dr Helen Durham, was a member of the Delegation of the International Committee of the Red Cross to the same Rome Conference. Our Committee strongly supports the establishment of the International Criminal Court and urges the Joint Standing Committee on Treaties to recommend that the Government: (1) ratify the Rome Statute; (2) enact relevant implementing legislation; and (3) provide its full support and co-operation to the Court.

The purpose of this submission is to argue the case for Australia's involvement in the International Criminal Court. In our view Australia's ratification of the Rome Statute is very much in our national interest and will in no way result in a diminution of Australian sovereignty. Our intention in the submission is to avoid detailed technical discussions about the Rome Statute. However, we do offer two academic articles written by the Chair of our Committee jointly with other authors to provide additional analysis of the Statute. The first article, published in the *Melbourne University Law Review*, constitutes an overview of the jurisdictional aspects of the Rome Statute. The second article, published in a symposium issue on the International Criminal Court of the *University of California Davis Journal of International Law and Policy*, exposes the gaps in existing Australian Law *vis-à-vis* the substantive crimes within the Court's jurisdictional competence.

Australia's ratification of the Rome Statute will facilitate the achievement of the following benefits:

SUPPORT FOR FUTURE AUSTRALIAN DEFENCE FORCE PEACE OPERATIONS

In the context of several recent overseas peace operations, the Australian Defence Force (ADF) has been specifically mandated to exercise a law and order function in societies in which normal structures of authority have become dysfunctional and criminal violence is rife. This situation prevailed in Somalia and in East Timor and in both cases, the ADF was forced to allocate substantial resources to the detention of alleged criminals pending their proper trial. It would have been much less expensive, less dangerous and more efficient for ADF personnel to have transferred custody of individuals to the International Criminal Court if it had been in existence at the time of both deployments. The sooner the International Criminal Court comes into existence, the sooner the Court will be able to deal with alleged war criminals in conflicts where national police forces, courts, judges, prison facilities and prison administration personnel no longer operate. This new institutional resource will substantially reduce the responsibilities of militiaries such as the ADF in Peace Operations.

CATALYST FOR MUCH NEEDED DOMESTIC LEGISLATION

During the INTERFET Operation in East Timor, it was alleged that some members of East Timorese, pro-Jakarta militia had entered Australia with East Timorese refugees temporarily housed in Darwin. Many groups and individuals within this country called for trials under Australian Domestic Law for these alleged militia members. However, this particular incident exposed the lack of relevant criminal legislation in Australia because neither crimes against humanity nor genocide are criminalised under Australian Law. Furthermore, we have two pieces of legislation, the *War Crimes Act 1945* (amended in 1989) and the *Geneva Conventions Act 1957* (amended 1991) in Australia which allow Australian courts to try individuals for war crimes committed outside Australia but neither legislation applied to the East Timor situation. These weaknesses in Australian criminal legislation do not mean that all international crimes are not covered by legislation in this country. The situation is simply inconsistent and *ad hoc*. Interestingly, had General Augusto Pinochet come to Australia for medical treatment rather than to the UK, Spain could have requested extradition from Australia because the specific international crimes of torture and hijacking for which he was charged happen to have been implemented into Australian Criminal Law through the *Crimes (Torture) Act* and the *Crimes (Hijacking) Act*.

One of the beneficial consequences of ratification of the Rome Statute for Australia will be the enactment of legislation which will redress the existing gaps in Australian Criminal Law in respect of the crimes contained within the Rome Statute. This new legislation will enable the Australian Government to avoid a repeat of the scenario which arose in relation to the allegations of East Timorese present in Australian territory but beyond the jurisdiction of Australian courts. In any such future cases, following the establishment of the International Criminal Court and Australia's ratification of the Rome Statute, the Australian Government could find itself in the privileged position of choosing either to prosecute the alleged individuals in Australian courts or to deliver those individuals to the International Criminal Court.

AUSTRALIAN SUPPORT FOR A LONG OVERDUE INTERNATIONAL INSTITUTION

Following our return from the Rome Diplomatic Conference in July 1998 we have delivered more than 50 lectures and presentations around the country to school groups, university students, community and non-governmental organisations and Australian Red Cross groups on the International Criminal Court. In the context of every one of those speeches we have encountered no opposition to the Court and only enthusiasm for the concept of the Court and for Australian participation in, and support for, it. Virtually every day in print media and on television screens Australians are confronted with images of brutality and atrocity around the world and are keen to support any initiative aimed at redressing impunity for such outrageous behaviour. The Australian community's unprecedented expressions of support for the East Timorese in the face of obscene brutality and for the deployment of the ADF as lead force in the INTERFET coalition is ample demonstration of the desire of Australians for international support to stop atrocities and to hold those responsible for such acts personally accountable.

The notion of a permanent international criminal court was first raised at the international level as long ago as 1874. Despite many attempts to establish such an institution, including after World War I and after World War II, the international community is only now close to finally realising that goal. The celebrated international military tribunals at Nuremberg and Tokyo following World War II have always suffered from allegations of one-sided "Victors' Justice" and of serious questions of the legal status of some of the specific crimes in the Statutes of the Tribunals. The promise that Nuremberg and Tokyo would act as imperfect precursors to a permanent International Criminal Court has taken more than 50 years to be fulfilled. The two relatively recent tribunals for the Former Yugoslavia and for Rwanda have helped momentum for a permanent institution but they too are limited – dealing as they do with two specific conflicts and not extending to cover a myriad of other atrocities in other parts of the world.

In the absence of a permanent international criminal court since Nuremberg and Tokyo enforcement has been the exclusive domain of individual States and the record of enforcement is far from impressive. Instead the international community has witnessed a litany of ineffective prosecutions, cover-ups, token enquiries and court-martials and often pathetically lenient sentences. Judicial processes have only been followed in a small minority of cases. If ever there was an argument to support the establishment of an international criminal court it is surely the inadequate and inconsistent approach to the national prosecution of international crimes.

Australia has consistently supported international institutions for the trial of those alleged to have perpetrated international crimes. Sir Ninian Stephen, former Governor-General, served with distinction as an Appeal Judge for the International Criminal tribunals for the Former Yugoslavia and Rwanda. Justice David Hunt, formerly of the NSW Court of Appeal, currently serves as a Trial Judge of the International Criminal Tribunal for the Former Yugoslavia in The Hague and is held in high esteem. When the Sixth Committee of the UN General Assembly requested the International Law Commission to prepare a draft statute for an international criminal court it was the Australian, Professor James Crawford - formerly Challis Professor of International Law at Sydney University and now Whewell Professor of International Law at Cambridge University - who produced the initial draft text of the

statute. Since that time, successive Australian Government delegations to Preparatory Committee negotiations on the Draft Statute and at the Rome Diplomatic Conference itself, have taken a leadership role in the promotion of a Statute for the establishment of an effective international criminal court. This established history of Australian support for the Court has always been based on a widespread belief in this country of the need to create an institution to help rein in impunity for atrocity wherever it occurs in the world. It would be entirely inconsistent for Australia to decide now not to ratify the Rome Statute and to support the establishment and the work of the Court.

Ratification of the Rome Statute will not result in a diminution of Australian Sovereignty because the following safeguards are built into the Statute of the Court:

THE PRINCIPLE OF COMPLEMENTARITY

The Rome Statute explicitly states that the Court established complementary to national jurisdictions and not with primary jurisdictional competence over them. As a consequence, any country which has a claim to jurisdiction over a particular individual in a specific case can choose to exercise their jurisdiction and trump the authority of the International Criminal Court. The Court can only exercise its jurisdiction in a given case after making the determination that the relevant country is "unwilling or genuinely unable" to exercise its own jurisdiction. The Court does have a limited capacity to determine a national trial a "sham" and so to exercise its own jurisdiction over a defendant already subject to such a trial within a national context. Otherwise, the defendant is protected by the principle of "double jeopardy". Any of these determinations by the International Criminal Court will undoubtedly evoke emotive reactions. The Court will need to have a strong argument to override a national court's determination.

Some have suggested in this country that Australia's ratification of the Rome Statute will leave Australian Defence Force Personnel serving in overseas Peace Operations "vulnerable" to prosecution before the International Criminal Court. We disagree with that assertion. Fortunately, the ADF has an enviable record free of the perpetration of atrocities – no My Lai massacres and no torturing to death of Somali teenagers. If ADF personnel are ever involved in such incidents the Australian public will rightly demand that justice be served and that the individuals responsible for such atrocities be brought to account. As long as proper judicial proceedings are followed and appropriate sentences awarded in any such case tried in Australian courts, the principle of complementarity will guarantee that the International Criminal Court does not usurp the administration of Australian Criminal Law.

It may be that an Australian citizen who serves overseas as a mercenary or for the military forces in that person's, or his or her family's, country of origin could be indicted by the International Criminal Court for the alleged perpetration of atrocities in a conflict in which Australia had no direct involvement. In such circumstances, the Australian Government, as the State of Nationality of the alleged perpetrator, could choose to either try the individual under Australian Law or relinquish their claim to jurisdictional competence and allow the International Criminal Court to exercise its jurisdiction. Similarly, if a person immigrates to Australia and is subsequently indicted by the International Criminal Court in respect of crimes alleged to have been committed in their country of origin, the Australian Government will have a flexibility

it does not currently possess about whether to try that person under Australian Law or to surrender them to the International Criminal Court. There can be sound reasons for the Government wanting to avoid a criminal trial in Australia in respect of alleged crimes in a conflict happening in another part of the world. The trial in Australia, for example, of a Serb or Croatian or Bosnian Muslim during the Balkans Conflict may well have had the effect of inflaming inter-community tensions between the relevant ethnic communities in this country. At least in respect of that particular conflict, the Australian Government may have been able to avoid a trial here by virtue of the existence of the Tribunal for the Former Yugoslavia in The Hague. The International Criminal Court will offer a possible alternative trial forum irrespective of the geographic location of the alleged atrocity.

THE PRINCIPLE OF NON-RETROSPECTIVITY

No country in the world would have voted in Rome for an International Criminal Court with retrospective jurisdiction and this political reality is built into the Rome Statute accordingly. The new Court will only be able to deal with alleged crimes which arise after the Court has been established. This limiting principle is one key reason for encouraging Australian ratification as soon as possible and for pushing for early entry into force of the Rome Statute. Each new atrocity perpetrated somewhere in the world prior to the establishment of the Court and which goes unpunished reconfirms the urgency of the need for an effective international criminal court. Assertions in this country that Australia should not ratify the Statute because the actions of ADF personnel in Vietnam or the policies which led to the Stolen Generation of indigenous children may be scrutinised by the Court at some future stage are completely unfounded.

We appreciate the opportunity to make this submission to the Committee and would be more than happy to appear in person to explain aspects of this submission or answer any specific questions from members of the committee if called upon to do so.

Professor Tim McCormack
Chair, National Advisory Committee on
International Humanitarian Law

Dr Helen Durham
National Manager of
International Humanitarian Law

Attachment 1: McCormack, T.L.H. and Robertson, S. 'Jurisdictional Aspects of the Rome Statute for a New International Criminal Court' (1999)23 *Melbourne University Law Review* 635-667;

Attachment 2: Doherty, K.L. and McCormack, T.L.H. 'Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation' (1999)5 *University of California Davis Journal of International Law and Policy* 147-180.