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Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra
ACT 2600

Re: Review of *Criminal Code Amendment (War Crimes) Bill 2016*

Thank you for the opportunity to provide a written submission to the Parliamentary Joint Committee's Review of the above-named Bill. I am pleased to attach my submissions to this letter.

For the members of the Committee's benefit, I am a Professor of International Humanitarian Law at the Melbourne Law School and an Adjunct Professor of Law at the University of Tasmania. I also serve as the Special Adviser on International Humanitarian Law to the Prosecutor of the International Criminal Court in The Hague. Given that the subject matter of the Bill under review concerns proposed amendments to Australia's implementing legislation for the Rome Statute – the constitutive treaty of the International Criminal Court – it is important that I make a disclaimer. My submission has been prepared in my personal capacity and nothing in it can be attributed either to the Prosecutor of the International Criminal Court or to her Office.

Yours sincerely,

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Submission to the Parliamentary Joint Committee on Intelligence and Security

on the

Criminal Code Amendment (War Crimes) Bill 2016

I wish to make comments on each of the three proposed amendments to the *Criminal Code Act 1995* and also to provide additional observations on some other existing shortcomings in Division 268 of our legislation. My preference would be for the Joint Committee to undertake a systematic review of the existing legislation because there are other issues not identified in the Bill in need of amendment.

The need for the proposed 'Minor Technical Amendment' relating to s 268.65(1) of the legislation and identified in Part 3 of the Bill is clear. The term 'military' should not have been included in the original legislation because, in the context of this particular provision, its inclusion is inconsistent with international humanitarian law. The remaining proposed amendments are more substantive and worthy of more detailed comments.

PROPOSED SUBSTANTIVE AMENDMENTS:

Part 1 – Membership of Organised Armed Groups (ss. 268.70, 268.71 and 268.72)

I agree with the rationale for the proposed amendments to the identified sections expressed as follows in the Explanatory Memorandum:

> Under international law, members of organised armed groups are recognised as a category distinct from civilians, such that they do not benefit from the protections afforded to civilians. All members of such an organised armed group can be targeted with lethal force at any time, subject to the ordinary rules of international humanitarian law. Accordingly, this Bill amends Division 268 to clarify that the war crimes offences in sections 268.70, 268.71 and 268.72 will not apply where the person targeted is a member of an organised armed group.

This view of international humanitarian law, that members of organised armed groups are recognised as a category distinct from civilians, is a view held by Australian and a number of other nations but it is not a universally held view. An alternative view of the law is that because there is no concept of combatant privilege (and concomitantly no such thing as prisoner of war status) for members of organised armed groups in non-international armed conflicts, all people are civilians and only those taking a direct part in hostilities can be lawfully targeted with lethal force. This is not a view of the law that I share but it is a view that exists.

The Rome Statute for the International Criminal Court is silent on the view to be taken on the legal status of fighters from an organised armed group in a non-international armed conflict. However, I note that the first war crime listed in Article 8(2)(e) of the Rome Statute – Other Serious Violations of the Laws and Customs Applicable to Armed Conflicts Not of an International Character (and implemented into the *Criminal Code Act 1995* in s. 268.77 as the War Crime of Killing Civilians) involves 'intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.' It is not obvious to me how an individual could be charged with an offence of directing an attack against the civilian population if the entire population is civilian. The inclusion of the war crime in Article 8(2)(e) of the Rome Statute is surely predicated on a distinction between civilians and fighters (including members of organised armed groups). If this interpretation of the Rome Statute is correct, perhaps the treaty impliedly endorses the approach inherent in the proposed amendment.

My primary observation is that the amendment reflects a valid view of international humanitarian law but that, whereas the rest of Division 268 implements the crimes within the Rome Statute, here the proposed amendment constitutes a departure from that approach. There is no reason in principle why Australian implementation of Rome Statute crimes cannot include material additional to that in the Rome Statute, particularly where the additions provide helpful clarification on the scope of the law. My desire is to explicitly identify that the proposed amendment goes beyond, but is not inconsistent with, the terms of the Rome Statute.

Part 2 – Proportionality in Non-International Armed Conflict (ss. 268.70(1), 268.71(1), 268.71(2), 268.72(1))

I agree with the rationale for the proposed amendments to the identified sections expressed as follows in the Explanatory Memorandum:

> The Bill also clarifies that these offences (ss 268.70(1), 268.71(1), 268.71(2), 268.72(1)) will not apply where the relevant death or injury results from an attack on a military objective, launched in circumstances where the perpetrator reasonably expects that the attack will be proportionate, and will not cause incidental civilian death or injury that is excessive in relation to the concrete and direct military advantage anticipated. This will align the Australian domestic law position with the position at international law in non-international armed conflict.

Division 268 was originally added to the *Criminal Code Act 1995* pursuant to the *International Criminal Court (Consequential Amendments) Act* 2002. That amending legislation facilitated the implementation of the crimes within the Rome Statute into Australian criminal law as a consequence of the Australian Government's decision to ratify the Rome Statute. Although the Rome Statute makes no reference to the rule on proportionality in the elements of the corresponding crimes that the current proposed amendments now identify, the inclusion of the rule in our legislation is an important clarification of the scope of the offences. Again, this proposed amendment goes beyond, but is not inconsistent with, the terms of the Rome Statute. On the

contrary the amendment is entirely consistent with international humanitarian law and, in fact, draws on the relevant treaty language of the 1977 Protocol I Additional to the Geneva Conventions of 1949 (to which Australia became a party in 1991).

However, the exclusive focus in the proposed amendments on the provisions in non-international armed conflicts would create an unnecessary inconsistency with similar war crimes in international armed conflicts (in Subdivision D and Subdivision E of Division 268 of the *Criminal Code Act 1995*). Precisely the same rationale for amending ss 268.70(1), 268.71(1), 268.71(2), 268.72(1) applies equally to the war crimes in international armed conflicts in ss 268.24, 268.26, 268.28, 268.40(1), 268.40(2), 268.47(1) and 268.47(2).

One potential unintended consequence of only amending the relevant war crimes in non-international armed conflicts and not also amending the relevant war crimes in international armed conflicts could be that a future Australian court interprets the lack of inclusion of the proportionality exception to the relevant war crimes in international armed conflicts as indicative of a legislative intent for the rule on proportionality not to apply. That is clearly not the case and I strongly urge the Joint Committee to request rectification of this oversight such that the amendments are both comprehensive and consistent across all relevant offences in both international and non-international armed conflicts.

OTHER SHORTCOMINGS IN DIVISION 268

Outrages Upon Personal Dignity in Non-International Armed Conflicts (s. 268.74(2))

Division 268 of the *Criminal Code Act 1995* currently includes the war crime of outrages upon personal dignity perpetrated against a corpse (s 268.58(2) in an international armed conflict and s. 268.74(2) in a non-international armed conflict). In the aftermath of World War II this war crime was designated as 'mutilation of the dead' but now the crime finds its expression in the Rome Statute as the war crime of outrages upon personal dignity. Unfortunately, and I am sure inadvertently, s. 268.74(2) of our legislation significantly narrows the scope of the relevant provision of the Rome Statute (Article 8(2)(c)(ii)).

An example from the Syrian conflict is illustrative. Members of the Joint Committee may recall gruesome media images in July 2014 of the Sydney man, Mohammed Elomar, holding severed heads of victims in Syria and gloating about his shocking atrocities. Given the serious limitations to the drafting of s. 268.74(2), it is possible that if Elomar was transferred to the custody of Australian authorities, he may evade prosecution for the war crime of outrages upon personal dignity for these particular acts. Section 268.74(2)(b) of our legislation requires the Prosecution to prove beyond reasonable doubt that 'the dead person or dead persons were not, before his, her or their death, taking an active part in the hostilities'. This requirement should not exist in our legislation. If Elomar's victims were killed while fighting against ISIS forces and only then had their heads severed, he could not be charged with this particular offence. If, on the other hand, Elomar's victims were in

his custody when they were killed and then had their heads severed, or if they were executed by the severance of their heads, Elomar could be charged with this particular war crime. The Rome Statute war crime makes no such distinction – the circumstances of the victim's death is irrelevant. No person should be mutilated after death – regardless of the circumstances in which they died.

The equivalent war crime of outrages upon personal dignity perpetrated against a corpse in an international armed conflict found in s. 268.58(2) includes no similar requirement that 'the dead person or dead persons were not, before his, her or their death, taking an active part in the hostilities'. Instead, s. 268.58(2) simply and accurately states that:

(2) A person (the ***perpetrator***) commits an offence if:
  (a) the perpetrator severely humiliates, degrades or otherwise violates the dignity of the body or bodies of one or more dead persons; and
  (b) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

The requirements for the offence in 268.74(1) and (2) should correspond exactly with the requirements for the offence in 268.58(1) and (2) except for the second requirement that the conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict.

Omissions from Subdivision G – War Crimes That are Other Serious Violations of the Laws and Customs Applicable in an Armed Conflict That is Not an International Armed Conflict

Given that the proposed amendments go beyond the terms of the Rome Statute, there are at least three war crimes in non-international armed conflicts not included in the Rome Statute that should be included in Subdivision G. All three are already included as war crimes in Subdivision E of Division 268 of the *Criminal Code Act 1995* in the context of international armed conflicts and Australia already accepts that all three constitute war crimes in non-international armed conflicts as a matter of either treaty law or customary international humanitarian law or both. All three of these war crimes appear in Article 8(2)(b) of the Rome Statute (in international armed conflicts) but none of them appear in Article 8(2)(e) of the Rome Statute (in non-international armed conflicts). The omission of these war crimes from Article 8(2)(e) was an oversight in the Rome Statute drafting process. No country in the world argues that any one of these offences is not already a war crime. The lack of inclusion of these offences in the Rome Statute is a major impediment to the jurisdiction of the International Criminal Court and there is no reason why Australia should replicate that impediment to the jurisdiction of Australian courts in the enforcement of Division 268 of the *Criminal Code Act 1995.*

The three war crimes in non-international armed conflicts are:

(1) The war crime of attacking civilian objects

Currently our legislation includes the war crime of attacking civilians in both international and in non-international armed conflicts (ss. 268(35) and 268(77) respectively). However, our legislation only includes the war crime of attacking civilian objects in international armed conflicts (s. 268(36)) and not in non-international armed conflicts because the Rome Statute does not include an equivalent war crime in Article 8(2)(e). The Rome Statute should include that war crime because customary international humanitarian law characterises a wilful attack on civilian property a war crime in both international and in non-international armed conflicts. Australia accepts that legal position and our legislation ought to extend jurisdiction over the offence in non-international armed conflicts.

(2) The war crime of excessive incidental death, injury or damage

Currently our legislation includes the war crime of excessive incidental death, injury or damage in international armed conflicts (s. 268(38)) but not in non-international armed conflicts. Again, the reason for the omission is that the Rome Statute does not include this war crime in Article 8(2)(e). That omission should not have been made. The rule on proportionality applies to targeting decisions in both international and non-international armed conflicts alike and no country in the world argues that it is not bound by the customary international humanitarian law rule on proportionality in non-international armed conflicts. Australia clearly accepts the applicability of this rule. The proposed amendments in the current Bill confirm that position. Our legislation should not replicate this jurisdictional impediment and ought to extend jurisdiction over the offence.

(3) The war crime of starvation as a method of warfare

Currently our legislation includes the war crime of starvation as a method of warfare in international armed conflicts (s. 268(67)) but not in non-international armed conflicts. Again, the reason for the omission is that the Rome Statute does not include this war crime in Article 8(2)(e). That omission should not have been made because as a matter of treaty law and of customary international humanitarian law, the prohibition on starvation as a method of warfare in non-international armed conflicts is an established norm. The prohibition in non-international armed conflicts is included in Article 14 of Protocol II of 1977 Additional to the Geneva Conventions of 1949 (to which Australia became a party in 1991). Australia accepts the prohibition and so the fact that it is omitted from the Rome Statute is no reason for our legislation to follow suit. Of all three war crimes identified here for inclusion in Subdivision G of Division 268 of the *Criminal Code Act 1995*, this is the most significant in light of future possible prosecution of Australian foreign fighters in Syria and/or Iraq. The siege of Aleppo, for example, has involved allegations of the use of starvation of the civilian population as a method of warfare against that devastated city in the context of a non-international armed conflict. Our legislation should not replicate this jurisdictional impediment and ought to extend jurisdiction over this particular offence.

Amendment of Subdivision G to include these three offences would be a straightforward matter. The requirements for each of them need only replicate the requirements in the corresponding

provisions in Subdivision E save for the requirement that 'conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict'. I urge the Joint Committee to request the insertion of these crimes into Subdivision G.

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