Australian Red Cross

National Office
155 Pelham Street
Carlton Victoria 3053
PO Box 196
Carlton South Victoria 3053
Telephone: (03) 9345 1800
Facsimile: (03) 9348 2513
ABN 50 169 561 394

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Mr Grant Harrison
Secretary
Joint Standing Committee on Treaties
Parliament House
Canberra
ACT 2600

Dear Mr Harrison,

Thank you for your letter of 09 August inviting me to respond on behalf of the Australian Red Cross National Advisory Committee on International Humanitarian Law to specific requests for clarifications on the *Rome Statute* for the International Criminal Court from members of the Committee. These specific questions arise from our additional written submissions to the Committee following the request for extra information as a result of our oral submissions to the Committee in Melbourne on 14 March 2001. I have again consulted with Reverend Professor Michael Tate AO, as I did for the last submission to the Committee, because it was his oral evidence in March which originally evoked the request for additional information from the Committee.

I reiterate Senator Cooney's questions and provide our responses to them in turn:

1. Would a provision in Australia's implementing legislation indicating an intention to exercise exclusive national jurisdiction over persons engaged in operations authorised by the Government be consistent with the ICC Statute's envisaged *contingent jurisdiction* (particularly Articles 17 and 20)?; and, if there is an inconsistency, could the domestic law be held to be invalid?

   In our view, such a reference would constitute an explicit interpretation of Australia's understanding of the "complementarity" formula envisaged by the *Rome Statute* in Articles 1 and 17 and would not raise an issue of "inconsistency". A legislative reference to Australia's intention to exercise its primary jurisdictional competence in specific factual scenarios will alert the new International Criminal Court to the importance States Parties, including Australia, attach to the formula negotiated in Rome for the relationship between the new Court and national criminal courts.

   Of course, the expression of intent to exercise exclusive national jurisdiction in specified cases must be predicated on an intention to rely on the proper exercise of the national criminal trial process in relevant cases. As long as Australia acts in a *bona fide* manner to apply our normal domestic criminal trial processes in any future cases involving alleged war crimes by Australian personnel in an authorised

operation, the ICC will have no basis for overriding Australia's primary jurisdiction. That is precisely the intended effect of paragraph 10 of the Preamble and Articles 1, 17 and 20 of the *Rome Statute*.

Given Australia's independent and well-functioning investigative, prosecutorial and judicial agencies and processes, any trial conducted according to our criminal justice system will always satisfy the inadmissibility tests in Article 17 of the *Rome Statute* precluding the ICC from overriding Australian jurisdictional competence. Similarly, a proper trial under Australian criminal law would preclude the ICC from dealing with the same case on the basis of the *ne bis in idem* protection for the accused in Article 20 of the Statute. It is inconceivable that a decision by a properly constituted Australian court would be ignored by the ICC on the grounds that the intention of the judicial process was to "shield the person concerned from criminal responsibility" or "not conducted independently or impartially in accordance with the norms of due process" (Article 20(3)(a) and (b)).

However, the Australian Government could not use the legislative reference as a shield to evade the ICC's exercise of *contingent jurisdiction* in circumstances where Australia was not acting in a *bona fide* manner. Consider the following scenario, for example: the Australian Government ordered the commission of war crimes by ADF members, then refused to try the individuals involved and attempted to preclude the ICC from exercising its *contingent jurisdiction* on the basis of the legislative claim to exclusive national jurisdiction. In the event of such unlikely circumstances, the ICC could step in to deal with the case because the circumstances for declaring the case inadmissible pursuant to Article 17 would be absent. Neither Australia nor any other State Party can legislate domestically to alter the capacity of the ICC exercising its *contingent jurisdiction* in respect of alleged war crimes committed by the armed forces of the State Party where that State Party chooses either not to prosecute or to act *mala fides*.

In our view a legislative indication of intent to exercise national criminal jurisdiction in respect of the authorised actions of Australian personnel is desirable. The *Explanatory Memorandum* to the legislation could make clear that the clause constitutes an interpretation of the effect of Articles 1 and 17 of the ICC *Statute* predicated upon the normal exercise of domestic criminal trial processes. Australia can very properly, and with the highest compliance with the intentions of the drafters of the *Rome Statute*, declare its intention to always assert its primacy in the exercise its own national jurisdiction and to prosecute domestically in cases of Government authorised operations.

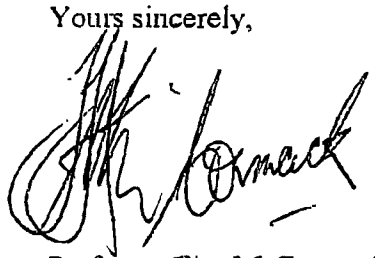
2. Would a legislative clause of the kind envisaged conflict with Article 33 of the *Rome Statute* and the limited circumstances in which an accused can argue the defence of obedience to superior orders?

No. The Australian Government position at the Rome Diplomatic Conference was that obedience to superior orders should never be an exculpatory defence to a charge of war crimes, crimes against humanity or genocide. Under existing Australian criminal law, an ADF member cannot argue the defence to escape criminal liability. The High Court has established this position in its decision in *Hayden* and the ADF publications on the Law of Armed Conflict substantiate it. Current ADF doctrine is that ADF members are open to prosecution for violations of the Law of Armed Conflict and that "compliance with unlawful orders of a superior officer is not a justifiable excuse" (ADFP 37, para. 1306). Consequently, the existing position under Australian Law is entirely consistent with the formula encapsulated in Article 33 of the ICC Statute.

As already indicated above, in the unlikely event that the Australian Government or the ADF ordered the commission of a war crime both the ordering and the implementation of the order would constitute international crimes. Any attempt by the Australian Government to shield behind a legislative clause declaring an intention to exercise exclusive national jurisdiction in such circumstances would not remove the possibility of the ICC dealing with the situation. In our view, neither it should. The Australian public would rightly demand that those responsible for such an atrocity be brought to account.

I trust that Senator Cooney and other members of the Committee find these comments helpful.

Yours sincerely,



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