COMMONWEALTH OF AUSTRALIA

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JOINT STANDING COMMITTEE ON TREATIES

Reference: Statute for an International Criminal Court

THURSDAY, 19 APRIL 2001

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JOINT COMMITTEE ON TREATIES

Thursday, 19 April 2001

Members: Mr Andrew Thomson *(Chair)*, Senators Bartlett, Coonan, Cooney, Ludwig, Mason, Schacht and Tchen and Mr Adams, Mr Baird, Mr Bartlett, Mr Byrne, Mrs Elson, Mr Hardgrave, Mrs De-Anne Kelly and Mr Wilkie

Senators and members in attendance: Senator Ludwig and Mr Baird, Mr Hardgrave and Mr Wilkie

Terms of reference for the inquiry:

The Committee shall inquire into and report to Parliament on whether it is in the national interest for Australia to be bound to the terms of the Statute for an International Criminal Court.

WITNESSES

Committee met at 9.09 a.m.

ACTING CHAIR (Mr Hardgrave)—I declare open this meeting of the Joint Standing Committee on Treaties.

Resolved (on motion by **Mr Wilkie**):

That submissions Nos 175 to 188, 8.2, 8.3 and 18.1 be received as evidence to the committee's inquiry into the Statute for an International Criminal Court and authorised for publication.

Resolved (on motion by **Mr Wilkie**):

That exhibits Nos 6 to 19 be received as evidence to the committee's inquiry into the Statute for an International Criminal Court and authorised for publication.

ACTING CHAIR—Today, as part of our review of Australia signing the Statute for an International Criminal Court, the committee will hear evidence from two non-government organisations and from an interested individual. Like our earlier hearings, some witnesses support the statute while others have concerns. I welcome members of the press and members of the general public to this hearing. To begin our hearing, I call Mr Richard Egan from the National Civic Council.

[9.10 a.m.]

EGAN, Mr Richard John, State President (WA), National Civic Council

ACTING CHAIR—Mr Egan, although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House or the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as contempt of parliament. Before we proceed to some general and specific questions, would you like to make some introductory remarks and perhaps precis your submission?

Mr Egan—Rather than precis my submission, which raises matters which I think, from following your proceedings, the committee has canvassed quite broadly, including questions of national sovereignty and so on, I want to raise three specific points which, as far as I have noted from your proceedings, you have not focused on specifically. The first has to do with the definition of genocide and I allude to some of this in my submission. The case in the Federal Court of Nulyarimma v. Thompson gives us an indication of what could happen if this statute is signed, either in proceedings before the International Criminal Court or, if it is enacted into Australian domestic law, in proceedings in the Federal Court or the High Court.

In one of the two Nulyarimma cases, the complainant wanted to have the ACT police charge four members of parliament—if I recall correctly, they were Mr Howard, Mr Fischer, Senator Harradine and Pauline Hanson—with genocide for conspiring to introduce the 10-point native title plan. Whatever one thinks of the 10-point native title plan, the suggestion that it amounted to genocide is somewhat alarming. In the definition of genocide in the statute, the Nulyarimma case relied on the phrase in article 6(b) of the statute referring to genocide by causing serious mental harm, which seems to broaden the question out. While one can conceive of the kinds of serious mental harm that might be connected with a program of genocide, it is also easy to see that that phrase is subject to fairly wide interpretation.

I was also concerned about the elements of crime to do with genocide. I assume you are familiar with this, which is a further document from the group preparing the statute and which specifies what needs to be proved for each crime to be proved. The introduction section on genocide states something that I do not quite follow, but it alarms me, about the mental element required in proving genocidal intent. It says:

> ... recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding the circumstance will need to be decided by the Court on a case-by-case basis.

The idea of a court deciding on a case by case basis what exactly was needed to prove genocidal intent is a fairly alarming prospect. Enough on that point; I can comment on it further if it is of interest.

My second point relates to the statute itself. Article 7.1(h) relates to one of the varieties of crimes against humanity which is defined very broadly as persecution against any identifiable group. It lists various grounds and then says:

> ... or other grounds that are universally recognized as impermissible under international law.

So it is introducing the concept of a group that could be persecuted, but that group could be defined now by what is really a movable feast, namely international law as it progressively develops. What is persecution? We are told in article 7.2 (g) that persecution means:

... the intentional and severe deprivation of fundamental rights contrary to international law.

Again, that seems to be an open door: as international law develops, any deprivation of a fundamental right, perhaps not now recognised in international law, but subsequently recognised, is going to amount to persecution, and the infliction of persecution amounts to a crime against humanity triable by the court.

That has two effects: firstly, if the International Criminal Court tries the cases, it means that, when we ratify it, we do not know what we are giving the court jurisdiction over; and, secondly, if, as the government has indicated, the entire statute is enacted into Australian domestic law and our domestic courts get jurisdiction over the same set of crimes, it means that all the assurances we have been given over the last few years that international law can only be incorporated into Australian law by explicit legislative action are completely nullified, because we now have what I describe simply as a funnel—the entire international law gets funnelled into Australian domestic law. Is the point clear?

Senator LUDWIG—What about Teoh? How do you then—

Mr Egan—It overcomes Teoh, because there will be a statute of the Australian parliament that says—

Senator LUDWIG—I see; you are assuming that it is—

Mr Egan—I am assuming that the statute—

Senator LUDWIG—On what basis do you assume that, though?

Mr Egan—The media release that pre-empted this committee's work in October—

Senator LUDWIG—Touché.

Mr Egan—and the problem that we are caught between the two problems: either we enact the statute into domestic law to avoid the problem of being unwilling or unable to carry out a prosecution under the statute; or, if we do not, we surrender sovereignty and put Australians at risk of being tried by the International Criminal Court rather than by our own courts. That is, through that funnel, we import this rather shoddily drafted statute into domestic law and, with it, the entire body of future international law without its being subject to any scrutiny of the parliament. As an illustration, a similar thing happened in the Family Law Act in which parliament used the phrase 'best interests of children' and the full bench of the Family Court, in A v. B, or something—I have forgotten the name of the case—

Senator LUDWIG—It is A and B.

Mr Egan—determined that the phrase 'best interests of children' could only be properly interpreted by the court in the light of the Convention on the Rights of the Child. By that simple phrase, the full bench of the Family Court held that the parliament had imported the entire convention into Australian domestic law, just by using four words, which I found absurd, and was a conclusion come to in opposition to a submission by the Attorney-General, Mr Williams. I think the phrase that persecution means 'the severe deprivation of fundamental rights contrary to international law' is one of the most alarming things in the statute. You can get your mind around other things such as genocide by killing—you know what they involve. What this involves, I do not know—I do not think that anyone knows—and it will change from year to year.

My third point is on the immunity of parliament—I thought it might be of interest. As came out in the Nulyarimma case, one of the reasons that Justice Merkel dismissed the claims—although he was of the view that genocide was in fact a crime under international law and the court could have heard it on that ground—was that section 16 of the Parliamentary Privileges Act 1987, which in turn is based on article 9 of the 1688 Bill of Rights, prohibited the court from inquiring into the propriety of the exercise of legislative power conferred on parliament by the Constitution. By contrast, article 27 of the statute specifically states:

> This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute ...

The second part of that article states:

> Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

So a similar complaint on some future native title plan that is held by some complainant to amount to genocide by causing serious mental harm could be heard by the International Criminal Court, notwithstanding that the charges are laid against members of parliament in carrying out their parliamentary duties, including speeches given in parliament or their acts in voting for a piece of legislation. That is an entirely subversive surrender of parliamentary sovereignty to an international court. Again to make the point, either the international court will have jurisdiction or, if we enact article 27 into Australian domestic law, parliament will be surrendering its own immunities to the tender mercies of the Federal Court and High Court. I have just those three points to make.

ACTING CHAIR—Thank you for making those points, Mr Egan. I should introduce my colleagues: Senator Ludwig from Queensland and Mr Wilkie who is the member for Swan in Western Australia. I am the member for Moreton in Brisbane, Queensland. The observation that West Australians and Queenslanders are carrying the parliamentary load should also be noted on the record. There are obviously a few questions that I imagine colleagues would like to ask. I will yield to any colleague who has a question.

Senator LUDWIG—I am curious about your argument in relation to the constitutional point that you raised. I refer to section 73 of the Constitution:

> ... or court exercising federal jurisdiction—

You say that is the section that would give the International Criminal Court the inroad they require. How do you rely on that phrase? I am trying to understand—

Mr Egan—If I recall correctly, my argument is that ratification may be ultra vires on the grounds that chapter III of the Constitution restricts the Commonwealth—

Senator LUDWIG—Negatively, in that there is no other court?

Mr Egan—Yes, it restricts the Commonwealth from vesting its judicial power in any court except the High Court or a Federal Court from which an appeal to the High Court lies.

Senator LUDWIG—You cannot use your external affairs power?

Mr Egan—The external affairs power cannot, as I understand it, be used to violate the Constitution.

Senator LUDWIG—It can certainly expand on the Constitution.

Mr Egan—It has operated significantly to transfer heads of power from the states to the federal parliament.

Senator LUDWIG—It can also expand the heads of power that the Commonwealth cannot always deal with, as I understand it. I am open to correction.

Mr Egan—Chapter III specifically deals with the separation of powers between the legislature, the executive and the judiciary. The Commonwealth has a judicial power but the Constitution limits the kinds of courts. For example, chapter III was effective in the Brandy case where the Human Rights and Equal Opportunity Commission was stripped of its judicial powers on the grounds that it was not a chapter III court but was exercising judicial powers. The argument here would be that the International Criminal Court was, through the active ratification, being vested with Commonwealth judicial power to try Australian citizens for crimes committed on Australian soil. As the statute says—

Senator LUDWIG—Does it have that effect?

Mr Egan—Yes.

Senator LUDWIG—That is what I was trying to explore.

Mr Egan—It certainly has the effect that Australian citizens can be tried before the court for crimes committed on Australian soil.

Senator LUDWIG—They could be sought to be extradited to appear before the International Criminal Court to be tried, assuming that they committed such crimes or there was a case laid against them. Examining that, is it the International Criminal Court that exercises the jurisdiction?

Mr Egan—It is, but it is only—

Senator LUDWIG—And it is a question of whether or not we allow the person to be extradited as to whether they would face the International Criminal Court. I am just trying to examine how you then say—

Mr Egan—It is a Commonwealth judicial power.

Senator LUDWIG—That is what I am trying to establish.

Mr Egan—I think it is a disputed point there. Either Attorney-General's or Foreign Affairs have been citing Mason's dictum from Polyukhovich—

Senator LUDWIG—I saw that.

Mr Egan—It says that Australia's participation would be as a member state of the international community and the judicial power involved would be the judicial power of that community.

Senator LUDWIG—That is what I was trying to get to—how you get around Polyukhovich.

Mr Egan—That is a dictum. The High Court, as far as I can find out, has not considered the actual question on point.

Senator LUDWIG—No, not on point.

Mr Egan—It is interesting that Dawson, in the same judgment, although he does not specifically address that point, does say:

... it is beyond the competence of the Parliament to invest with any part of Commonwealth judicial power any body or person except a court created or invested with jurisdiction pursuant to Ch III.

The difference between Mason and Dawson seems to be the question of whether an international court is getting Australian judicial power. I would maintain, as a plain man, that if it is not Australian judicial power to try Australian citizens for crimes committed on Australian soil, what is? The other problem is that if chapter III allows—

Senator LUDWIG—What if it was a crime that was not committed on Australian soil?

Mr Egan—That is a different matter and clearly comes under the external affairs power. There is no constitutional problem with the Rwanda tribunal or with the former Republic of Yugoslavia tribunal.

Senator LUDWIG—Yes, but in the event that there was an Australian in there.

Mr Egan—Sure. Otherwise, chapter III could be circumvented by Australia entering into a cosy arrangement with Nauru, for example, to set up a whole court system held to be the joint

courts of Australia and Nauru—or something like that—and circumvent all the requirements of chapter III.

Senator LUDWIG—But, from a practical point of view, would we continue to participate in the International Criminal Court if it did that? I can see the legal argument that you put, and there are obviously counter arguments to it. It is a matter that may remain for the High Court to dispute. One of my concerns from a practical level, if you want to take the practical course, is whether Australia would participate in an international criminal court that had the view that it could then arbitrarily 'pluck'—if I can use that word—people out of Australia and arbitrarily try them before the International Criminal Court. The practical person's solution is that, no, we would not continue to participate. If we chose not to participate, there ends the jurisdiction.

Mr Egan—We may not get to that point until some Australian has been extradited to The Hague and is in jail in Spain, which is the only country I have seen that has expressed its willingness to accept prisoners from the court at this stage, for perhaps 30 years for causing serious mental harm to people. We are running a risk. I would not rely on the constitutional argument. I think I would put it as raising a doubt, and it is certainly a matter for legal minds.

Senator LUDWIG—No, I was not taking it beyond that.

Mr Egan—Whether or not it formally violates the Constitution, it is certainly a surrender of our sovereignty to try our own citizens for crimes committed in Australia.

Senator LUDWIG—On that point itself, we could try them ourselves. There is no demand that we actually do not try them ourselves but hand them over.

Mr Egan—We can try them ourselves satisfactorily only if we enact the entire statute. As I have suggested, I think there are problems with enacting the entire statute into domestic criminal law—the open-ended definitions, the abolition of parliamentary immunity and so on.

Senator LUDWIG—Yes, I see your point.

Mr Egan—Insofar as we enact only part of the statute, the parts that we do not enact are then subject to the overriding jurisdiction of the International Criminal Court. I find their definition of 'unwilling' quite open-ended and open to political manipulation. If the composition of the International Criminal Court is such that they are down on Australia in some foreseeable period of time—and this could be in 30 years, 50 years or whatever—it would be very easy to simply declare that the trial in Australia was trumped up and that we were letting the person off because they were Australian and so on. There are really no adequate procedural tests there that I can see that give any protection to Australians.

Senator LUDWIG—Thank you. That has been helpful.

Mr WILKIE—You have talked about the issue of definitions of crimes. Because the treaty has not been finally ratified and a lot of work needs to be done on that, do you think that a more closely defined list of crimes would assist the process? There is the possibility of that occurring.

Mr Egan—My understanding is that the articles defining the crimes are now fixed. Twenty-nine states have ratified in the terms that presently exist. There may be some process for revising those. I think there is a fairly lengthy amendment process. The definitions of elements of crime are still at the draft stage, although I understand it to be something like a final draft, so there may be parts in the elements of crimes that we could still have some input into. But the statute itself, as I understand it, is fixed, subject to the normal amendment processes which would take some years. Typing up the definitions would certainly meet one of my concerns, but by no means all of them.

ACTING CHAIR—I am also a very practical sort of fellow, and I am trying to get to the heart of the politics as you mentioned in your comments a moment ago—the political manipulation of this process. Where is the pressure for all of this coming from? We keep hearing that the major NGOs are hot to trot about this.

Mr Egan—I think this reflects a general increase in the dominance of certain non-government organisations in UN and parallel circles over the last 15 years. For example, Professor Wilkins, professor of law, I think, from Brigham Young University, has monitored the process leading up to the negotiation of the statute. He said, for example, that the representative of Samoa at the conference was a prominent lawyer from an NGO with a particular axe to grind, and he had given his services to the sovereign nation of Western Samoa to represent them at the convention in which they had no particular interest themselves.

ACTING CHAIR—And nobody in Western Samoa with the expertise to counter what this person might have been putting forward.

Mr Egan—That is right. The Women's Caucus featured quite prominently in arguments leading up to it, and at one stage a prominent lawyer associated with them was being touted as the likely first prosecutor. There was a spat, for example, over the definition of 'forced pregnancy' where the Women's Caucus made a very determined effort, with support probably from the European Union countries, to define it in such a way that nations which had laws against abortion would be in violation of the forced pregnancy things, so denying a woman access to abortion would have come under the definition of 'forced pregnancy'. I think the Vatican and probably some of the Latin American countries managed to get that changed so that a forced pregnancy now more clearly relates to the kind of situation we have with Serbs raping Bosnian women and so on. But that is an example of the kind of agenda that is being used. There are numerous groups you can think of—the child's rights groups, the gay rights groups, indigenous rights and so on—whatever one thinks of their particular causes, who are certainly all very excited about the idea of an international enforcement agency with teeth compared to the UN human rights committees that can slap countries on the wrist but the country can basically choose to ignore them. They are very excited about the idea that they have got an institution that will actually be able to put people in jail.

ACTING CHAIR—So they see this as a vehicle for change, but down their particular vested path?

Mr Egan—Yes. Very much so.

ACTING CHAIR—Until you told me that—in fact maybe even after you told me that—a lot of those particular vested interests, on stand alone, may well be admirable causes, may well be worthwhile things to pursue.

Mr Egan—Yes. I think the problem that this government certainly has been awake to about the UN human rights committees is that they have tended to focus, of course, on the soft targets, the Western democratic countries, where a UN human rights committee report is actually going to make some splash because it gets reported in the free press and so on, whereas if you read the reports on China, Cuba or whatever you would think they were wonderful places to live and you would want to move there. So they are selective. An international criminal court is going to have the same problem. China has not signed and is unlikely to ratify.

ACTING CHAIR—So what you are suggesting perhaps is that the countries that might be the real targets for those of us from Western democratic traditions to try and change are not necessarily going to be signing up to or adhering to anything being put forward.

Mr Egan—It will be patchy. I noted that Sierra Leone had ratified and they are in the middle of a horrible civil war with, no doubt, numerous human rights abuses. On a different argument, there is an indication there that ratifying the Statute for the International Criminal Court does not effectively work as a disincentive to commit crimes against humanity. I do not know how Sierra Leone still has enough of a functioning government to actually have got around to ratifying, but it is not stopping them.

ACTING CHAIR—Thank you for that. None of us on this side of the table have any responsibility for Sierra Leone other than in a personal interest sense. I am more concerned about the proposition that the ICC would, in fact, have the power to coerce and change the intentions of laws passed in this country, formulated by good, bad or indifferent governments, but nevertheless formulated as a result of a democratic process. Do you really believe that the ICC would have the opportunity to do that?

Mr Egan—Through what I call the 'funnel provision' of the definition of persecution, it means that, for example, if the paedophile lobby succeeded more in international circles than presently it has and it got an age of consent for children of 10 or 12, or whatever, as they have to have in the Netherlands, a country that was wanting to jail paedophiles could be held to be in breach of article 7.1(h) of the statute by denying them the fundamental right to have sex with children. Perhaps that is an alarmist example but, if you look at the pace of change and what was unthinkable as a so-called human right 40 years ago compared to what is in a lot of the international agreements now, those things are not unforeseeable.

Another way in which NGOs are going to be particularly influential is the provision that the prosecutor can accept donations in cash or in services from non-government organisations for the running of the court. That is an extremely alarming provision. The organisations with the money to do that kind of thing who would have lawyers and money lined up to offer the prosecutor would be some of the ones that I certainly would be most concerned about.

ACTING CHAIR—Do you think that the people who are negotiating these things on this country's behalf actually understand what they are signing us up to and how loose some of these statutes—

Mr Egan—I have read the national interest analysis and submission No. 41 to your committee—a response to matters raised by the Treaties Committee so I guess it is from A-G's—and it seemed to me that they failed to address any of those points that some of the community organisations have raised in concern. It is odd to me that a national interest analysis looks only at one side of an argument. I find this is an odd way to proceed from a Public Service that is supposed to be neutral and ought to be putting the pros and cons of the argument. I do not understand enough of the mentality of the delegates—whoever they are—to the conference. I suppose I was alarmed that there is so little publicity given to something. It seemed to be a treaty that snuck up on the people of Australia and, if it were not for the existence of this committee, it may have been ratified and enacted into Australian law by Christmas last year, as the bureaucrats obviously intended or hoped.

ACTING CHAIR—It concerns me to hear some of the propositions that you have put forward. In trying to test the logic for this organisation the terminology of adhocery keeps coming up in relation to what has happened in the former Yugoslavia and Rwanda. Adhocery is a bit of a put down phrase, I submit, for more of a specialist body that is established on occasions when it is needed, disbanded, and then re-established at another time. Is that a far more responsible way to go about it or, as submissions from others put it, would an organisation like the ICC, in fact, end up with corporate knowledge that it could then apply? Or, to give you a third scenario, would it run out of urgent business and start looking at some of the great causes that you outlined a little earlier?

Mr Egan—One does not suspect that it is going to run out of real crimes against humanity to try—unfortunately, for the future of humanity—but its ability to try those is always going to be more severely hampered than its ability to carry out an investigation into whether refusing to list Lake Eyre for World Heritage listing is directed at the extinction of the Arabunna people, as was charged against Senator Hill. That is going to be much easier to investigate than trying to extract some bloodthirsty warlord from Somalia or somewhere like that.

ACTING CHAIR—They will keep looking for the soft touch—is that what you are saying?

Mr Egan—I think there is going to be that possibility, particularly if the prosecutor is ably assisted by lawyers provided by, say, the Women's Caucus or the world indigenous rights organisation that are funding and providing staff. In terms of the so-called 'ad hoc tribunals', my Latin is not that good but doesn't 'ad hoc' mean 'to the matter'? So there is nothing wrong with that at all—that is, dealing with matters as they arise. That is what the Nuremberg trials and the Tokyo wartime trials were about, as well as those concerning Rwanda and Yugoslavia. In terms of the corporate knowledge, one would think there were ways of passing that on by having some of the staff or perhaps members of the bench from those tribunals sit on subsequent benches.

ACTING CHAIR—There is one last thought I want to gain your opinion on: should the Commonwealth look at enacting legislation that makes punishable and triable here in Australia offences such as genocide and persecution—once you have got a definition on the books—rather like the child sex crimes act that has been brought in?

Senator LUDWIG—You have got a genocide bill before parliament—

ACTING CHAIR—I guess the point I am trying to make, Senator, is: are we better to ensure that all Australian nationals—that is, people who carry an Australian passport or are Australian citizens—know that they are subject to Australian law regardless of the jurisdiction in which they actually commit a crime, as is the case with that child sex act?

Senator LUDWIG—The problem with that is we do not have extraterritorial operation of our civil law—or our criminal law, for that matter.

Mr Egan—What you are proposing is similar to what was done in the War Crimes Act in regard to crimes committed during a specific period of time. The particular difficulties with Polyukhovich and so on were to do with the source of the information. Ukraine at the time was under Soviet jurisdiction and there were serious doubts about the veracity of the evidence being provided from those sources who had an interest in discrediting Ukrainians abroad. So there was that problem, and there may be similar sorts of problems. My own view on the anti-genocide bill—it is certainly the one that was before the parliament, but is it still—

Senator LUDWIG—Because it was a Democrat bill—I could be corrected on this—it was in the second reading stage. They have concluded the second reading stage, but it has not proceeded any further at this stage—but give it time.

ACTING CHAIR—It is Senate business. Hence the reason I am focusing on it.

Senator LUDWIG—I am familiar with most of the argument, but it does not follow the war crimes mentioned in—

Mr Egan—It would broaden your definition specifically, I think, because the proponent of the bill had a particular group in mind that it wanted to extend the operation of the bill to.

ACTING CHAIR—Rather than arguing about the specifics or otherwise of business in the Senate, can we get to the concept of Australia enacting legislation that in fact specifies that it has an interest in and would in fact look at prosecuting someone. This treaty states that certain measures should be undertaken, with certain penalties or whatever, and they want Australia to sign up to it. Isn't it a little difficult for us to sign up to it if we ourselves do not even perhaps look at these matters as criminal offences on our books?

Mr Egan—The reality with genocide is that there are plenty of offences in the criminal codes of every jurisdiction in Australia to try anyone who is genuinely engaged in genocide—that is, anyone who is killing people or is torturing them, and so forth. To go further than that is to bring in the dodgy elements of the genocide definition—the serious mental harm provisions, and so on. There is that difficulty with it. In terms of people committing genocide elsewhere, we ought to be willing to extradite them on presentation of—

Senator Ludwig interjecting—

Mr Egan—I know there is a dispute about what is required for extradition at the moment, but we are not going down that track. The relevant standard for extradition is being looked at in the Kalejs case, for example. Further than that, I cannot see any need for Australia to go. When the parliament, unanimously I think, ratified the Genocide Convention in 1947 there was no

suggestion that there was a need to enact its provisions into domestic law because we had adequate offence provisions against what are essentially the elements of genocide.

The ongoing labelling of the removal of Aboriginal children as genocide indicates the kind of problem you face. Whatever you think about that program, and whatever you think the remedies are, the labelling of genocide to me has only served to polarise the debate and to make solutions more difficult to achieve.

ACTING CHAIR—The fact that we are having a debate is one of the basics of the democratic tradition in this country. Isn't this something that the ICC cannot necessarily enjoy in every country that it would like to have reach in?

Mr Egan—People are entitled to call genocide whatever they like, but once they persuade the parliament—and therefore the courts—to adopt their definition, we are in a different ball game altogether.

ACTING CHAIR—But there are no linkages into some of these countries of any democratic nature. There would be no pressure from the citizenry on the head of state or the members of a parliament to abide by any ruling of the ICC. Isn't that the real failing of this?

Mr Egan—That is right. It is very much the case that those who are lobbying for the court are trying to run the pre-emptive argument that the very existence of the court would have dissuaded Slobodan Milosevic from doing what he is alleged to have done to Bosnians and Croats and that it would have stopped Hutus from slashing Tutsis and vice versa. I find this an amazingly naive suggestion. It was quite clear in any case that the community of nations would not have looked kindly on what they were doing. They had enough reason—and they had the various statements of the United States, NATO and so on in relation to the former Yugoslavia—to draw the conclusion that if they ever got hold of him they would deal with him. To think that if there had been an ICC Hitler would not have gone ahead with the final solution is the height of naivety.

ACTING CHAIR—What about the great argument that is always put forward that Australia is a good international citizen and therefore must ratify this treaty to send a signal to Saddam Hussein or to Milosevic regarding their conduct? Is that a valid argument, or are there too many downsides to the Australian side of the legal ledger?

Mr Egan—There are too many downsides to that and to many other matters quite different from this. Tomorrow you will be talking about the World Trade Organisation. I think Australia has damaged its own interests severely by trying to be a so-called good international citizen and rushing to sign on to things, entirely dismissive of Australia's domestic interests. I think other countries are likely to have much more respect for Australia if it is seen to take its own sovereignty and the interests of its own citizens with the utmost seriousness. I think one reason why the United States has some influence in the world—as well as its military force obviously—is that it is seen as a country that takes its sovereignty and its citizenry seriously.

Mr WILKIE—In relation to the matter we were talking about before, obviously a draft rules of procedure and evidence is going to be put in place. Is it your understanding that that is fixed?

Mr Egan—No, I think both the elements of crimes and the rules and procedures are so-called finalised draft text. My understanding is that, until the 60 countries have ratified, they will not reach final form. The process is well down the track. These are not first drafts. I understand that we have no further input by ratifying. I note that President Clinton, as one of his last acts, signed the convention and his justification for it—although he was not recommending ratification—was that that kept the US in the swim in terms of input to the process. So I do not think there is an argument for ratifying based on the ability to engage in the negotiations over the elements of crimes or rules of procedure because I think the signatory countries still have that right. I stand to be corrected on that; I am not an expert on it.

ACTING CHAIR—Would the same argument extend to Australia, that we should still be in the swim?

Mr Egan—We are in the swim because we have signed it. As long as we never ratify it, it has no effect. But, if signature leaves us still able to participate in negotiations, then I do not particularly have any problem with that.

Mr WILKIE—In your opinion, to extend that out, do you believe that, if we stay in the loop and negotiate, it could actually reach an arrangement which would be beneficial for Australia to ratify it?

Mr Egan—I see that as highly unlikely given that some of the problems are with the statute itself. I cannot see that being significantly amended, not in the short or medium term. Perhaps if there is a notorious case when several nations decide the court has overreached its powers, there may be a reaction to that. I note, for example, that France has put on quite serious reservations relating to its rights to self-defence. New Zealand, on the contrary, has said that the relevant articles must be read as applying to nuclear weapons as well, whereas France has said the opposite. So there is a major spat over that. Apart from France and Canada, there are really not many countries that I would be inclined to take that seriously that have ratified to date.

ACTING CHAIR—Are there any final comments, Mr Egan?

Mr Egan—I think our position is fairly clear.

ACTING CHAIR—Thank you very much for appearing before this committee. In due course, you will get a copy of your evidence this morning.

[9.58 a.m.]

KENNEDY, Rear Admiral Philip Graham (Rtd), State Chairman, Western Australian Committee, Council for the National Interest

TAYLOR, Major General Ken Joseph (Rtd), Deputy Chairman, Western Australian Committee, Council for the National Interest

WHITELY, Mr Denis John, Executive Director and Member, Western Australian Committee, Council for the National Interest

ACTING CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I advise you that the hearings are legal proceedings of the parliament and warrant the same respect as the proceedings of the House or the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as contempt of parliament. Are there any introductory remarks that you would like to make before we proceed to some questions?

Rear Adm. Kennedy—I would like to tell you what the Council for the National Interest is about. Eminent people in Melbourne formed it in 1983 or 1984. It took off in 1988 in Western Australia under the chairmanship of Major General Taylor. Initially it was concerned principally with Australia's foreign and defence policy areas. It was concerned that there was not much public discussion on those two things that are vital to the long-term future of Australia. That canvas, if you like, was broadened to include economic and other social questions which all in a way bear on the national health of Australia. We led the way in Western Australia in doing that.

We are non-party political. We have quite a different way of going about it to Queensland, for example, which has a very thriving Council for the National Interest. We have several suburban committees based on political boundaries but are not otherwise political. We use those groups of ordinary Australians to inform, discuss and research issues and to help prepare papers which we then send to committees such as yours. I think it is safe to say that Queensland almost certainly has broadened its canvas too from just foreign and defence policy which bring us here today—or are closely related. Queensland also gets into other areas of public policy.

ACTING CHAIR—I confess that I have had the opportunity to address the Queensland council on the activities of this committee in the past. I am well aware of the CNI.

Rear Adm. Kennedy—Mr Sherlock is speaking here for himself today, but he is also connected with one of the CNI groups east of the city.

Major Gen. Taylor—I would like to make a supplementary statement beyond the bounds of the original submission we put in. There are two areas of expertise and lifelong interest that bring me here today. The first is that, as part of my profession, since the age of 17 I have been studying international affairs in government and politics. I believe I have a very good understanding of governments and these matters.

The second is that the military is the only profession I know that has its own law, and it is quite comprehensive law. It is an essential part of soldiering to understand law and the place of

law in the management of things and people. Very early I reached an understanding about law and had a sense of justice. After leaving the Army with a whole range of legal expertise and experience, I spent 11 years on the federal Administrative Appeals Tribunal and again was closely involved with the law. They are the areas that make me interested in what is happening.

My submission is that this is a sad and, I regret to say, embarrassing matter. It is embarrassing because it is such a bad proposal. It is embarrassing also because the government has allowed this venture to go far too long without a reality check. It is a great idea gone horribly wrong and now, having led the push for so long, it is rather awkward for the government to try to correct such large errors. This is a proposal of fantasy dreamt up by lawyers for lawyers. The realities of life in international affairs have not intruded into this theoretical exercise. Politicians and governments have not provided any commonsense input into this legalistic model. This flawed proposal shows very clearly that there are grave dangers in allowing treaties to be implemented by the executive without the serious scrutiny of parliament.

Turning to some of the details and, in particular, to ratification, I will quote from the Attorney-General's paper on the national interest analysis. The first sentence under the heading 'Obligations' reads:

> The Statute is a comprehensive instrument that essentially establishes a new criminal justice system.

It is almost beyond belief that senior bureaucrats in two federal departments ask us to accept a whole new legal system with enormous implications without going near the parliament. In this country it is the parliament which makes laws, not the bureaucrats. This is at the very heart of the meaning of democracy. I would like to see the legal opinion that gives the bureaucracy the power to usurp the authority of parliament. The actions of these bureaucrats are a classic example of the Versailles syndrome. This is ivory tower stuff. These passionate bureaucrats have become so wrapped up in their little legal world and so remote from the real world outside that they imagine this huge change can be implemented without reference to the people's representatives. And now we come to the sad part: the vision, the dream that was Canberra, is being eroded by these isolated bureaucrats with their ignorance and arrogance.

Turning now to the statute itself, the statute is simply theoretical, impractical, well-meaning, illogical junk. Do the authors seriously believe this court will have any significant effect in China, India, Iraq, Bangladesh, Cambodia, North Korea, Zimbabwe, much of Africa and so on? Its deterrent value is near zero and compares most unfavourably with many other forms of international political and financial pressure. Its jurisdiction is quite limited. The good guys, who will not commit these awful crimes, might ratify the statute but all the bad guys, who do commit the crimes, will not commit to the statute and hence become state parties. The Attorney-General's paper on the national interest analysis goes on to state:

> ... the capacity of the Court to pronounce on the willingness of all States to investigate and prosecute perpetrators of crimes themselves will provide a powerful incentive for States to bring to justice those who commit atrocities. It is thus at once a deterrent for individuals against the commission of atrocities and a deterrent against harbouring the perpetrators of atrocities.

That statement is fanciful rubbish. There is not a single national leader of a country where these atrocities are committed who would agree with such a ridiculous notion.

The next point is on complementary legislation. This is a beguiling falsehood. The ICC legislation would simply be superior and overriding. It would certainly be beyond our effective reach or control.

Next, the proposed legislation is dangerously unclear. When the definition of 'genocide' is extended to include 'causing serious mental harm', there are grave effects on the ability of the Defence Force to protect our national interest with confidence. In summary, this is a dangerous proposal. Its poor quality is a direct result of its very narrow development base. It is unreal and impractical. It takes a huge slice of national sovereignty for a very small and illusory benefit, and ratification would be an insult to parliament. Ratification is certainly not in Australia's interests and the two departments involved should be condemned for their poor attitude and approach. Lastly, on a more general note, I have not seen one public statement from the executive as to why these treaties should not go to parliament. What are they frightened of? Thank you.

ACTING CHAIR—Is that a joint opening statement from the three of you?

Mr Whitely—No. I would like to give a very brief outline of our submission, which you have. Essentially, we are concerned about democracy and the way in which treaties are treated in this country. We have consistently argued that Australia's treaty making process should be amended to make it mandatory for all treaties of this nature to be approved by current resolutions of both houses of parliament before they are signed or ratified or, alternatively, that treaties must be approved by a 75 per cent majority of the Senate before they are signed or ratified. Our concerns with this particular exercise, the Statute for an International Criminal Court, are severalfold. The first is the way in which it erodes national sovereignty, particularly through the notion of universal jurisdiction; the second is the notion of complementarity where, if Australia does not mirror the statute in its legislation—a task which would be very hard because of the vague and general language used—it will be found to be unable or unwilling to act. If it does mirror it, it will open a can of worms for the extension of these crimes at some time in the future in ways that were never envisaged; and the third is the matter of prosecutorial abuse. We argue that a prosecutor should be totally impartial and free from political influence. Here we have a possibility where gratis personnel—those who are supplied to the court and paid for by others—could at some time in the future be used to push their own barrow. That is positively frightening.

In conclusion, we would again argue that this constant joining in with other nations in a wide range of treaties covering almost every aspect of our lives, particularly the social aspect of our lives, is gradually leading to our sovereignty being continually chipped away. The people who are then overviewing the way in which we comply with these treaties are often from nations that have cultures, practices and behaviours which are far less than we would aspire to. We think Australia has a huge amount of moral credit built up over many years in its performance in the international arena in standing up for human rights. It is time that Australia stood up again and said, 'We do not want to be part of these kinds of treaties unless they do not affect our sovereignty.' That is where we stand.

ACTING CHAIR—Thank you for those opening remarks. I would like to acknowledge the attendance of the Hon. Bruce Baird, the member for Cook, who has joined the committee this morning. Before I open to questions from colleagues and allow them to discover a little more

from your opening remarks, I remind you that the scrutiny of the parliament is through this committee. Since mid-1996, the revised process of investigating treaties before ratification is that they are referred to the parliament by the executive for attendance by this committee to invite public submissions, comment, et cetera. The committee is in the process of producing its 40th report, which essentially has handled everything.

We have resisted the occasional submission from the bureaucracy that procedural things do not need to pass the committee's gaze. I do not think it is wrong for me, as the acting chairman of this committee hearing, to say that the committee is determined not to allow one little chink in our determination to develop by saying that there is no such thing as a procedural matter. There may be template treaties that come, but we want to test the relevance of each of them. I think this committee is above the party political nature of the cut and thrust of parliament and has proved itself to be quite determined to get to the bottom of the question of what is in it for Australia.

Having said that, I also acknowledge that under our Constitution, for 100 years or otherwise, there is the requirement that it is the executive of the nation that signs these treaties. So our recommendations are exactly that. I am not absolutely forcing the hand of the executive one way or the other—although, while we have not seen all the reports back on our comments on every treaty matter, the executive has paid close attention to what we have put forward. Having said all that, you are prescribing in one part that this committee should look at the prospects of recommending a change to our Constitution to make it a requirement that it is no longer the executive that binds Australia into treaties but rather that the matter is fully debated in parliament and voted on accordingly.

Mr Whitely—That is our view. We would argue, too, that it was not until certain High Court decisions were made that this executive power extended to such treaties as the ones we are dealing with here. They were more of the diplomatic, ambassadorial type tasks that were envisaged, I believe, by the framers of the Constitution. With the Tasmanian dams case, the first chink in the armour occurred, and it has gradually been extended. Over time, changes take place in thinking, the environment, social norms and so forth. Any of these treaties are then seen as a way by some people to change—it is a matter of social engineering, really. We do applaud the work of JSCOT, and we have made several submissions to it. We are very pleased that you readvertised this particular one, because it almost escaped our attention.

ACTING CHAIR—Before I yield to other colleagues, I want to ask you about what we should be attempting to demand of our bureaucracy. They are the ones who are out there doing the nuts and bolts, the close work, the bolt tightening work on these things, negotiating them and coming back with a submission. They are operating in an environment where there are pressures placed upon them to be party to what looks like a really good international submission that is attempting to put one size across all the various systems of democracy or otherwise that exist in the world. Are we leaving the door open too wide and not explaining, or do you think perhaps our bureaucracy do not fully understand how our Constitution works and that the impact that some of these things they are bringing to us and signing for us can be manipulated through our Constitution?

Mr Whitely—That is a really puzzling question. I will put my view, and then the chairman and the deputy chairman may wish to add to that. One often wonders why, but if you look at

what is happening in the world, if you look across Europe—with the development of the European Community—the United Nations and Australia—and the bureaucrats in Australia play a very essential role, as they do in all Western democracies—you see in Europe that the bureaucratic process of the European Community is gathering force and you see the bureaucrats of the United Nations. It is sort of becoming a situation where governments come and go, politicians come and go and soon nations will come and go, but the bureaucrats go on forever.

ACTING CHAIR—That was in *Yes, Minister*, episode 4 of series 3, I think! I think the quote was, 'Politicians come and go, but public servants go on forever.'

Mr Whitely—If, in Australia, we are going to allow this to happen, then we must have a final sanction before people get convinced by well-meaning bureaucrats—and I do not argue at all about that—of the need for these things and what will be the effect on Australia's sovereignty. That is where we are coming from. This chipping away at and gradual erosion of our sovereignty sooner or later has the effect—and it is happening already—that the states will not be able to make domestic laws without having regard for these things, even though the domestic laws are perfectly reasonable, legitimate and for the aspirations of all Australians. Unless the parliament itself is going to be involved in this process along the way, it has to have a final sanction. This is necessary if it is to be left to others to put forward the argument and do the work. It is a common practice for officers to do the work and for politicians then to put their seal of approval on it in ministerial meetings and, ultimately, in cabinet. That is how I believe CNI Western Australia sees it. I don't know whether Ken or Phil have something to add.

Major Gen. Taylor—The problem with bureaucrats is that they are developing their position from a very narrow base. They are specialists in agriculture or quarantine or whatever it is. As experts within that field they develop an argument for accepting a United Nations treaty or not, with all good cause and thought. But nobody brings to bear upon their argument a wider understanding of the effects on the community or the nation's economy or the nation's defence or whatever. That is the job of government. This is why the work of the specialists must then go before general examination or general audit by the politicians or the governments, who will say, 'But have you thought about this? Have you thought about that?' Of course they have not and they do not, and nor should they. It is not their business but it is your business: it is the business of government. They are the servants of the people and they must continue to be that. They cannot become the governors of the people.

Mr BAIRD—Apologies for being late. I came from Sydney this morning, and you have to get an early start. I find your discussions interesting. I have heard other people's views on this before. I notice we have a major general and a rear admiral here, who have obviously been in theatres of war. I would have thought that you guys would take a particular interest in being able to take to court those international criminal figures who have been guilty of significant wartime atrocities. Given that the countries they come from are often in a parlous state in terms of their own democracy, don't you believe that there is a need for a court where you can actually take these people? A country such as Australia is at no real risk. The general standards that we have in this country at this point in time are such that we bear no risk of our sovereignty being impugned. Given your backgrounds, don't you feel that there is a need for such an institution, where war criminals can be taken and tried justly? It is not as if, for the most part, you are taking them out of countries like Australia. You are taking them from countries that have been

ravaged by war and that have very fragile democracies, at best, when they come out of the conflict situation.

Major Gen. Taylor—I could not agree with you more, except in one sense. I probably have more passion about this than you, with respect, for bringing these terrible people—

Mr BAIRD—I am, hopefully, an objective member of the Treaties Committee.

Major Gen. Taylor—We have seen at first hand the consequences of it so we feel it more deeply than others.

Mr BAIRD—I see. To that point you are right?

Major Gen. Taylor—There is no question that there is a need to bring the war criminals to justice.

Mr BAIRD—Isn't that what this is all about? If this is what the objective is and you agree with the objective, how do we develop a court that meets your requirements? From where I see it, the concept of it, I am sure you and I would agree, is very worth while. What particular elements concern you the most that you can point to, which we could address in our report, because we agree that the overall aim is worth while so let us concentrate on the areas where you believe it should be changed in order to make it not a concern in terms of Australia's sovereignty or whatever?

Major Gen. Taylor—Where you and I separate I think is that you—

Mr BAIRD—I am just a member of the committee. Try to form my opinions.

Major Gen. Taylor—The words used were, 'Let's have a court to do this,' and I think that is where you and I separate. I am with you in that we must have them brought to justice. It is the means that is wrong here. My objection to this thing is the way it is put forward.

Mr BAIRD—If you do not have an international criminal court, how do you bring them to justice?

Major Gen. Taylor—Okay. Here you are. In the Attorney-General's paper called the national interest analysis, under costs it referred to the international criminal tribunals for former Yugoslavia and Rwanda. Without this court they are doing it. There is no spelling out in here of the pluses and minuses and the gains and losses.

Mr BAIRD—Think of all the problems they had to get the leader, in terms of their own country, whereas if there was a treaty in place—and who knows? Somewhere in the future, this is what Australia's situation could be. Hopefully, we will have institutions that will make that very unlikely. The whole process has gone on and on, as the leader has escaped being brought to trial and he has still not got there yet. As you know, it looks as if he is on his way and it is a complicated and difficult process. It seemed to be achieved only with the Americans leaning on them suggesting about the aid requirements. It is not necessarily one that you can point to and

say, 'It works now; we don't need anything else.' It was only with American aid money being dangled above them, whereas if they were signatories to an international convention, it should happen automatically. I am just being a devil's advocate as we seek to think this through.

Major Gen. Taylor—The problem is the signatories. Its jurisdiction is limited. I do not think you were present when I questioned whether the authors seriously believed that this court would have any significant effect in China, Iran, Iraq, Bangladesh and so on. Its deterrent value is near zero. It compares unfavourably with many other forms of international political and financial pressure. Its jurisdiction is quite limited. The good guys who will not commit these awful crimes, like us, will ratify the statute but all the bad guys who do commit the crimes will not commit to the statute and will not become state parties. If they are not state parties, we cannot get them.

Mr BAIRD—There are already a number of countries that have signed up.

Major Gen. Taylor—Yes, all the good guys. Where are the bad guys? Where is Idi Amin? Where is Saddam Hussein? Where is Prince Sihanouk?

Mr BAIRD—Should there not be a start? There is international pressure. These people are very much in the minority and they want various concessions so there is a bargaining point. If the objective is, as you say, to bring them to justice, don't you think you have to look seriously at how such a court can be achieved? Why try to point out the arguments as to why this does not work? You have agreed right up front that you think it is a worthwhile activity bringing these people to justice. Saddam Hussein is a prime example. How do we do it?

Major Gen. Taylor—Well, you do not do it through this mechanism.

Mr BAIRD—Which mechanism do we do it through?

Major Gen. Taylor—Why not use the ones that are quoted under the costs section, the international criminal tribunals, which are sitting for Yugoslavia and Rwanda right now. What is wrong with that system? Why do we have to go to this?

Mr BAIRD—It has not worked particularly effectively with the Saddam Husseins of the world.

Major Gen. Taylor—Do you reckon this one is going to do any better?

Rear Adm. Kennedy—Can I interrupt for a moment: I think this paper was rather dismissive to suit the purposes of the author of the paper.

Mr BAIRD—So you believe this is the approach? Are you aware of the success to date of that particular organisation?

Rear Adm. Kennedy—You said yourself a few minutes ago that justice has been slow to catch up but it is indeed catching up with Milosevic.

Mr BAIRD—Thanks, Mr Chair.

Mr WILKIE—My question was very similar. Major General Taylor made the comment that it is a good idea gone horribly wrong. How do we deal with coming up with a good idea and actually putting it into place so it is effective? Obviously these tribunals are not as effective as we would like. Do you have any suggestions about which way we should go?

Major Gen. Taylor—It is a bit like stopping murder. Murder is a horrible crime. How do we prevent murder? Do we set up a court of criminal justice to try people for murder and hope that this will stop murder? It does not happen. The problem is that you cannot get past human nature in international politics and international affairs. We thought when we set up the United Nations in the 1950s that we would see an end to conflict and all this sort of thing. World peace was with us. We had just had two world wars with enormous consequence and horror. Despite all our good intentions, we set up the United Nations, and we have had 50 wars since then and they are ongoing. This is the nature of man. This is the nature of international economics and politics. You cannot get away from that. All you can do is say that it is inevitable that conflict and atrocities are going to occur, and they are going to increase in Africa. With the world population increasing, you are going to see more and more pressures on food and water and you are going to see more and more conflict. So, in the process of that conflict, how do you then, in a sense, manage the limits of conflict and limit the number of atrocities that occur? You can do that through the United Nations, through the many agencies that are doing it at the moment. But, if the atrocities do occur, how then do you punish them?

Rear Adm. Kennedy—Could I offer a general comment? As to Mr Baird's question about our solution, it cannot be done today or in a month or in many months. It is a very complex subject. But some of our answers in shorthand are in this paper, which you may not have had a chance to read.

Mr BAIRD—One of the advantages of a five-hour flight is that you do get time to read.

Rear Adm. Kennedy—May I indulge in a reminiscence of an international school for military generals and others, with 23 countries being involved, in London—the Royal College of Defence Studies—at the time the US embassy in Teheran was in circles. The only country that went to help the United States was Britain, which provided ships into the gulf. I can remember saying to this international body with a plea, 'Aren't any of you Europeans'—particularly the Germans who had quite a sizeable navy and who were dependent on Middle East oil in the way that the Brits were not, because they have got North Sea oil—'prepared to surrender a tittle or a jot of your sovereignty in the international common cause?' That is what we object to here. We do not object to the concept, to use Mr Baird's word for it, of an international court at all. But far too much of Australia's proper sovereignty—proper in my lexicon anyway, and the general's and Mr Whitely's—is surrendered. I believe it is true to say that some sovereignty must be surrendered to get an international body, but it has to be fireproofed against changes of perception and fireproofed against changes of people. I submit a scenario: I know Indonesia very well, as I have been there many times with the top people in Indonesia, and the generals become grey-suited chaps who look like lawyers or diplomats who turn up in committees in the United Nations, together with similar people from ABRI and, before you know it, you have General Cosgrove being subpoenaed to your International Criminal Court.

Mr BAIRD—With due respect, if you look at the European Court of Human Rights that I had the good fortune of visiting about nine months ago, they have a whole panel of people who look at those people whose names are nominated by individual countries as to who should be chosen. So the chances of your getting the odd member of Saddam Hussein's bodyguard group to sit on the tribunal is absolutely zero in terms of the European Court of Human Rights. So, while it sounds good in just throwing it out as a good line, the reality of how these international courts operate is something the same.

To take up your point in relation to a murder being committed, and using the same logic, are you saying that this court is not a deterrent? If there was a possibility for a Milosevich to know that, if his government were to fall, he would go straight to an international court, don't you think that would have some deterrent effect on the excess of war crimes?

Rear Adm. Kennedy—No.

Major Gen. Taylor—No effect whatsoever; and if it did, it would be so small in comparison to the other options that are available for deterrence.

Rear Adm. Kennedy—It is the nature of men like Milosevich, as the general has said.

Mr WILKIE—Aren't the ad hoc committees limited in their coverage by the very nature of the UN Security Council, whereas the International Criminal Court would have far wider options for legal actions against criminality under the statute?

Mr Whitely—Extremely wide options—that is one of the problems with this statute. It originally set out to deal with war crimes.

Mr WILKIE—How do you believe that this will go beyond war related atrocities?

Mr Whitely—Because of the vague definition of the crimes, the sweeping type of language, like 'other inhumane acts'. How are they going to be defined today, how they going to be defined in 25 years time?

Major Gen. Taylor—Things like genocide causing serious mental harm.

Mr WILKIE—But if we have got questions about the vagueness of some of the definitions or the crimes themselves, surely they can be defined in the process. They are only draft guidelines at the moment; they are not fixed in concrete.

Major Gen. Taylor—Then we should not be looking at them until they have done their homework.

Mr WILKIE—What they are saying is that once you have signed it you can then negotiate the definitions. You believe that is not the case, but I asked the previous speaker a similar question.

ACTING CHAIR—As a point clarification, we have signed up to this so that we are in the negotiating room; the ratification is the next step. So Mr Wilkie is quite correct to say that signing up is an important step because at least you are part of the process of trying to a tidy this thing up and get the definitions correct.

Mr WILKIE—Going on from that—and some people may disagree with this—I am a bit of a realist in that I can see that Australia is probably going to ratify this, irrespective of what the committee suggests, because it is a long way down the track. We can make recommendations as to how we should approach that, which I think is very important. So we can put forward the suggestion that it might not be ratified or that it should be; but at the end of the day, if it is, the question is: what needs to change in order to make it better than it currently is? A lot of people are saying we should throw it out; some people are saying we should ratify it. But what I want are some suggestions on how, if it is going to go through, we can make it better than it is.

Major Gen. Taylor—To go back a step, the arguments that this committee could put forward are in fact the preliminary steps that should have been made before the one that you have just made—in other words, to advance arguments as to why the government should take a deep breath and say, 'Whoa, whoa!' The initial idea of this was condemning war criminals and all the rest of it—marvellous—and everybody has gone along with this. And Australia has been the leader of the push. But now we are coming to the reality and practicality of it: how do we go through this mechanism of establishing these tribunals, or whatever they going to be, and how we punish these people? It is at this point that the government has failed; and it has failed because the thing has been so narrowly based. We have got some rabid enthusiast, some terribly passionate, well-meaning person, probably a senior man in Foreign Affairs, a human rights advocate, and he is saying, 'We should do this,' and everybody agrees with him. But all those who have gone along with him until now have all been within the narrow legal enclave.

Senator LUDWIG—This includes many countries; it is not one bureaucrat in Australia. I think you should reflect on what you are saying.

Major Gen. Taylor—But they are still the legal people. This is about a legal system, and it is only the lawyers who have been involved.

Mr BAIRD—Could you flesh out what you meant when you talked about the narrowness of it? I thought the problem you saw was the width of what it might encompass in terms of the definition of a war criminal.

Major Gen. Taylor—The narrowness of its development and formation—in other words, this has come from within a narrow community of people. The reality check has not been applied to what the lawyers have said. This is a system by lawyers for lawyers. All those who have been involved—whether they are international, national, state or whatever—have all been in the system, saying, 'How can we make a better court system?' But nobody has said, 'Hey, what about the rest of the world?'

Rear Adm. Kennedy—The impingement on the legal systems of a great variety of states.

Major Gen. Taylor—Let me go back a step. The military has always had terribly—

Senator LUDWIG—Let us take up that point and the Defence Force Discipline Act. You do not say that it excludes the civil law, the criminal law or, for argument's sake, the criminal code of Queensland, do you?

Major Gen. Taylor—No.

Senator LUDWIG—You would say it works in complement with it.

Major Gen. Taylor—Yes.

Senator LUDWIG—Given that you understand how the Defence Force Disciplinary Act works, how can you say that the International Criminal Court will not work any differently in the sense that, if international crime is committed, it would be handled in the fair and even-handed way that an exclusive or international jurisdiction would look after war crimes? Do you understand the analogy I am drawing? If there are matters to be dealt with by the military they deal with them under the Defence Force Discipline Act. If the matter is one which could come within their jurisdiction but is best handled by the criminal court, then it is handed over and dealt with accordingly. Nobody argues about that because they recognise that, if there is a murder committed, it is no longer appropriate for the Defence Force to deal with it. You understand that analogy. How can you then say that the International Criminal Court would not work any differently, in the sense that it would work hand-in-hand with a civil law jurisdiction or, in our instance, a common law jurisdiction?

Major Gen. Taylor—I will just go back a step. One of the greatest difficulties that the military has had with law concerns the riot act. If you go back to the riots in India and 'shoot the ringleader' and all that stuff, it is an extraordinarily difficult thing for the military to act in that environment. The rights and responsibilities are very well defined: there has to be a magistrate, the riot act has to be read and so on. It is a terribly complex and terribly difficult thing for the military to execute. We had it with the Hilton bombing when CHOGM was on and the military were called out illegally. The military has been arguing for 10 to 20 years to try and get governments to sort out aid to the civil power again, so this is a very complex issue for us. You still see both courts martial and civil cases about murder in Northern Ireland and, again, it is aid to the civil power—this is all part of that. Many of the things that the military will be doing in future years as part of United Nations activities will be under aid to the civil power, as we have been doing in so many places around the world in the last 10 years where we have gone to help in other nations' instabilities. The problem is: what do you say to the corporal or the sergeant or the young lieutenant? What are your responsibilities to maintain security, to kill people in defence, in rioting or whatever it is? So the law, as it is applied by soldiers in moments of extreme stress, in moments of great isolation and in moments of great fear and sometimes great anger, is very difficult to apply. He must have certainty. He must know clearly what the rules of his authorities are, what the rules of engagement are and all the rest of it, and if you have this vague legislation as it stands at the moment, none of your defence forces will be able to operate with comfort or certainty, in which case they become ineffective.

Senator LUDWIG—That is not right. Surely you are not really subscribing to that proposition. You are not saying in argument to this that the common soldier will be given the text and told, 'This is the law that you have to abide by'?

Major Gen. Taylor—Yes, I do say just that. He must know what his rules of engagement are.

Mr WILKIE—But surely the soldiers must also be able to negotiate those rules of engagement so that they have an input into it. It is my understanding that this still is a draft and, once finalised, the elements need to be adopted by two-thirds majority of an assembly of state parties before they come into force. So there is certainly an opportunity there to negotiate many of the definitions and areas that you have been discussing but, after that negotiation, two-thirds have to agree to that before it comes into force anyway. So I think there is scope for narrowing down the definitions.

Major Gen. Taylor—But that is after ratification, isn't it?

Mr WILKIE—Well, it is the parties. It would be after application, but it still then has to have a two-thirds majority of the assembled states.

Major Gen. Taylor—It is too late then.

Mr WILKIE—They cannot be enforced until they have been ratified and then actually passed by a two-thirds majority—otherwise they are not going to have it in place.

Mr Whitely—Mr Acting Chair, in relation to that issue, you should be aware that, since the statute was signed, there has been a preparatory commission working for two years which has basically decided on all of these issues: the elements of the crimes, the manual for the operation of it and so forth. This is one of our concerns. We were asked, 'Why won't the international court and Australia's law work together?' The manual for the ratification and implementation of the statute asserts that, to comply with complementarity, modifications must be made to a state's code of criminal law and human rights legislation and, further, should there be conflict between the ICC and existing state legislation, international law established under the statute takes precedence. So it is being argued that the International Criminal Court law will take supremacy over a state's law.

Mr WILKIE—In those areas.

Mr Whitely—In relation to criminal conduct which is defined in those vague terms of 'genocide', 'inhumane acts', 'persecution' and so on. This is our concern. All right, it is a good idea to have a criminal court of some kind—whether it be a permanent body or an ad hoc body. We would tend to favour a mechanism where some ad hoc body could be quickly established. Otherwise, you may have a group of judges sitting in The Hague with nothing to do and costing states a lot of money. If there were a mechanism to establish a tribunal or criminal court or some other body—and it may emanate from the Security Council or something like that—which could quickly address such issues and if, in quickly addressing war crimes or atrocities, it did not impinge on the national law—in other words, our sovereignty and the ability of our parliaments to make laws—then that would be fine. But, as the procedures are being developed by the preparatory commission and as the manual sets out how it is to be adopted and agreed to and approved in due course, it is going to be very difficult to change what has already been agreed to, after two years of negotiation and discussion by the various representative parties.

It clearly states that our laws must be changed to mirror those laws. The fact that the statute enables the court to act where a state is found unwilling or unable to means that complementarity is no longer effective, because, if our laws do not mirror these vaguely worded crimes, we will be found unwilling or unable to act in terms of those crimes at some time in the future when somebody says, 'Hey, this is a breach of the International Criminal Court statute.' So, to answer the question which you raised, Mr Baird, and I think Senator Ludwig raised it too, complementarity does not really work because of the way the rules have evolved and developed and been agreed upon by the preparatory commission, and they will most likely be very hard to change when they go to the assembly to be adopted.

ACTING CHAIR—One would imagine then that at the heart of any judicial process there must be a set of values. Societal values, one would hope, are reflected in the judiciary: the expectations of society are reflected in the way they judge and then offer some sort of sanction to those who do the wrong thing. I think the judiciary let a lot of people down on too many occasions. I do not want to be in contempt of every court, but I suspect that there is probably a lot of frustration in this society with a fairly broad but albeit common set of values in this nation.

The question then perhaps becomes, 'How does one impose a value that is important to you, in an international process, when some of the countries believe that you can chop off somebody's hand if they steal something or when some of the countries believe that an 11-year-old child should be able to legally engage in sexual activity?' Is it really a question of values that are underpinning this?

Mr Whitely—If you read the statute, as no doubt I am sure you have, and read the language of the crimes which are described in there, one can only come to the conclusion that it opens the way for people with vested interests and certain values to argue, through the vagueness and generality of those crimes, that certain things are illegal. For example, the crime of forced pregnancy is now narrowly defined. Initially, when that crime was inserted, it was argued that there is a crime of forced pregnancy because if a woman became pregnant and wished to have an abortion, but that country's laws—such as those in Ireland—prevented that, then she was being forced to be pregnant and, therefore, the nation would be guilty of a crime. That is a wide and wild example, and a lot of the things that I am saying could be argued to be at the extremity of the interpretation, but I am saying simply that what is clear today, and said in goodwill tomorrow, presents a very different kettle of fish.

ACTING CHAIR—Why is that? Is it because of the values of the people involved in the judiciary process at the ICC?

Mr Whitely—I do not know that it relates to the values of the people involved, but if you are looking at the use of gratis personnel, there are lots of NGOs—non-government organisations—around the world which are very well funded and which have a particular philosophy. If they can offer to do work for the court and have it paid for, then it does not take too much imagination to see what can happen. Getting back to the values of the judiciary, I think that the values of a nation are really the values formed in the homes and families of the people; the people elect a parliament which will reflect those values, and the parliament then will pass laws which will pass those values into the courts. I think it is a role of the parliament to be reflecting the values of the nation.

ACTING CHAIR—But what is the step to the ICC from those particular basic tenets you have just outlined? Is there a link? Is there a way that a nation can actually get its value system up on the international stage to ensure what is acceptable here? I think you talked before about Australia having a lot of moral capital. Do you think Australia's moral capital is sufficiently strong enough to carry the day in international fora with regard to what values are imposed in the process of an ICC?

Mr Whitely—I think in respect of Australia's moral capital—and by moral capital I mean the way Australia has behaved over decades in its performance in theatres of war and standing up for human rights et cetera in various places—that Australia's standing by comparison with a vast number of nations in the world is such that if it said, 'I do not want to go on with this because it is too vague and it takes away too much of the decision making power of Australia and we support the total idea of punishing these war criminals, but let's get back to taws and find a way to do it'—it is probably beyond me to say how you do it, but I could say how you do not do it.

ACTING CHAIR—Mr Wilkie was rightly putting to you the proposition that, essentially, to use the vernacular, it is better to be on the inside of the tent looking out than on the outside of the tent trying to look in.

Mr Whitely—I suppose it is, but in this case it seems to me, from my readings, that the large amount of the definitions and the preparation of the manuals for procedures et cetera have already been made by the preparatory commission, and they will almost go en bloc and be approved in toto. That would be the logical course of action. You do not set up a commission and then take it to the court on the first day and say, 'No, we won't agree to it.'

Mr WILKIE—We were talking before about the ad hoc tribunals in Rwanda and Yugoslavia. Currently, they are applying basically similar definitions of crimes to those that are included in the statute. They do not seem to be having a problem with that, so why could there be a problem if you had an international criminal court applying the same standards?

Major Gen. Taylor—Because they are applying it from a very narrow base. They are applying it specifically to the atrocity part. But what this is on about goes way beyond atrocity.

Mr WILKIE—Could it not be defined?

Major Gen. Taylor—Serious mental harm.

Senator LUDWIG—Are you saying that a tribunal would then be limited to atrocities?

Major Gen. Taylor—I think that is where you have got to start.

Senator LUDWIG—We have already started with that; we have had a number of them. Are you saying that we should not go any further?

Major Gen. Taylor—We should not go as far afield as this argument.

Senator LUDWIG—I am trying to identify the nub of your problem. You say that we should have tribunals, you say that it is permissible to have ad hoc tribunals, and you complain about the language of this particular proposed treaty and the draft text, yet the ad hoc tribunals enforce customary international law as understood, so that it is not unnatural law that is being applied in these ad hoc tribunals and it is not unnatural law that is being proposed in the treaty for the establishment of the International Criminal Court. Although you say—and these are my words—that you are upset with the language of the text, I detect a discordant note where, on the other hand, you say that the establishment of a tribunal enforcing these rules is okay—those are my words again.

I am trying to work out exactly where you stand on some of these issues. You complain about the words, but the words are 'international customary law'. Do you complain about international customary law as being wrong and about the general definition? Do you not understand that the finalised draft text—and you went to it yourself—will flesh out some of these issues; that is, in terms of the elements of crime? You understand that—I know you do; you have already mentioned it. Is the nub of your problem that we are giving up some sovereignty or a perceived sovereignty issue?

Mr Whitely—There are a number of issues. One is the giving up of sovereignty. Secondly, if you say that the language of the ad hoc tribunals is the same as this, then the ad hoc tribunal is operating today in a precise set of circumstances. This is an ongoing body which seeks to be there for evermore. We are arguing that, if that is the case, the language is so vague that at some point down the track—maybe 10 or 15 years out—other interpretations will be placed on that language.

Senator LUDWIG—That is not that unusual, is it? The Criminal Code was introduced in 1904. It was magnificently drafted, but it has developed over time to keep pace with social change and it has been expanded and narrowed as the case may be, and we as a society have accepted that, by and large. You understand that, do you not? Do you agree with that? You do not take issue with the way the Criminal Code has been expanded or contracted over time, so that is not your complaint, is it?

Mr Whitely—There is quite a difference here, in that in 1904 the Criminal Code would have been drafted in very precise terms and it has now been expanded to take account of changes. This is drafted in very vague terms and it will not need to be changed.

Senator LUDWIG—You should have a look at the Criminal Code to see exactly how it is drafted.

Mr Whitely—Parliament demands precision in the drafting of these kinds of codes.

Mr BAIRD—Is the principal nub of your concern what it could mean to our defence forces? I am not sure of your background—you are probably a lawyer, is that right?

Mr Whitely—No, my background is in finance and commerce.

Mr BAIRD—Given your defence background, is your predominant concern what it would mean for members of the defence forces and their vulnerability in the heat of battle—that is,

that you can see them possibly coming under the definitions required under the ICC and then being brought before an international court over which you will lose your sovereignty? Is that the nub of it?

Mr Whitely—Yes.

Mr BAIRD—I understand.

Mr Whitely—That is the nub of one aspect of it.

Mr BAIRD—I think that has validity. It is the same as when the ICAC was introduced in New South Wales. There were a lot of public servants who would not move because they were all so terrified of transgressing the requirements of ICAC—an unintended consequence with somebody who is a little close to that particular issue. In relation to the other aspects that you are concerned about, what did you say is the key aspect for you two?

Mr Whitely—It is the gradual erosion of sovereignty. It is the notion of universal jurisdiction: complementarity, which sounds good at this point in time, in effect will mean that Australia will be bound by it irrespective. Either it will have to comply and make its laws compatible or, alternatively, it will be called unable or unwilling, and so the court will still have jurisdiction. Third, there is the possibility in the longer term of prosecutorial abuse where gratis personnel are used. And fourth, I suppose, is the treaty making process. Please let us have a treaty making process which gives you, the parliament, real power to decide on these treaties. We think since the 1996 changes that you do a wonderful job, but those changes really do not go far enough. You are the people; you are the voice of the people. We can elect you or not elect you and you should have the say on whether or not a treaty is binding on Australia.

Major Gen. Taylor—I have three points I wish to add. The first is that this is a poor solution to the problem. It is not a good solution to the problem of bringing about justice, which must come forward.

Mr BAIRD—I kept on waiting for your solution to it, however, and I did not hear it from you today. That is what we are interested in. You spelled out quite well the issues and the problems that we are looking at now, but I still did not hear of your solutions—what you would do if you were put in charge of developing some way of bringing international criminals to justice. So let me just throw that one back to you. I am happy for you to write back to us as a committee with your thought-out views on that.

Major Gen. Taylor—Thank you for that invitation. My second point is that it is too narrow a development base; this is done by lawyers for lawyers. My third point goes to the unreality of this and its lack of effectiveness. They are my major concerns.

ACTING CHAIR—I appreciate the dot point summaries of the nubs of your concerns. I think that is a good place to finish. I also appreciate the acknowledgment of the committee's work from the Council for the National Interest. Thank you for appearing today.

[11.05 a.m.]

SHERLOCK, Mr Rupert Francis, (Private capacity)

ACTING CHAIR—Welcome. Could you please advise the committee of the capacity in which you are appearing before it.

Mr Sherlock—I am appearing on my own behalf. I am involved in certain things of a political nature, but I do not present my submission connected in any way with my political activities.

ACTING CHAIR—Although the committee does not require you to give evidence under oath, I advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House or the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as contempt of parliament. Do you want to make a couple of opening remarks before we briefly question you today.

Mr Sherlock—I should perhaps outline where I am coming from. I have been a farmer all my life. As such I have worked very hard, often in very inclement weather. I have had a fairly tough life. One of the many things that have affected me is the very poor terms of trade that farmers suffer under. The contribution that I have made to the industry of farming would probably in other industries have reaped two, three or four times the return that I got. I have been concerned about the rights of people. That is what I am on about.

In the submission I put forward first the nub of my concern is that I do not believe the government of Australia has a moral right or even a legal right to enter into this sort of treaty. As has been mentioned by the previous people, it does involve a loss of sovereignty of the Australian government. I am concerned that that loss of sovereignty may, and very likely would at a later date, impinge upon the government's ability to legislate for the rights of ordinary people. The rights of ordinary people, myself being a very ordinary person, are my great concern.

As I have set out in the first submission, I believe the exercise of sovereignty is a sacred trust. It was given by consent of the states. That consent did not extend to the right to give it or trade it away. Under the circumstances, in the light of the foregoing it would be a gross act of treachery to the Australian people for the government to enter into an agreement of the nature proposed in the International Criminal Court without having first obtained the consent of the people by referendum. Having listened and heard a good deal of argument put forward by other people, it would seem to me that there is a kind of acceptance of the proposition that the government has the right to do this. A personal and very strongly held opinion is that it does not have the right to do this without obtaining the specific consent of the people. That is really the gist of my first submission. If I may go a little further. The supplementary submission states:

The essence of that submission—

that is the first submission—

is that Ratification by Australia of the Statute of the International Criminal Court amounts to a further ceding of Australian sovereignty to an outside body, which action the Australian Government has no mandate for.

ACTING CHAIR—Mr Sherlock, please do not read your submission into the record. We have your submission here in front of us so there is no need for you to do that.

Mr Sherlock—I put forward an example there, and I would just comment that it is very possible that that situation could arise. It is not an airy-fairy sort of proposition; it could very well happen. The second part to my supplementary submission states:

Further, I submit Ratification of the Statute of the International Criminal Court at the present time would be an act of folly by the Australian Government, because several vital questions concerning its efficiency are still not addressed or answered in the Statute. I name

1) Enforcement: Should an act of offence under Articles 6 or 7 be committed by a sovereign nation, and found to be such by the Court, what means would it have of imposing any form of punishment on that Nation?

2) United Nations Agreement: Article 2 provides for some form of an Agreement to be concluded with the United Nations.

Until this is completed it will not be known if the United Nations would be called on to execute sanctions determined by the Court in a case as '1' above.

That, in my view, is a major shortcoming in the proposal. Even if it is finally decided that the government has the right to go ahead and ratify it without further consent from the people, I still feel that the proposal for the International Criminal Court, as supplied, falls far short of what would be needed. My supplementary submission goes on to state:

3) U.N. domestic problems: Irrefutable records of actions of United Nations 'peacekeeping' forces, reported in the attached document, show they have been guilty of horrendous crimes whilst on duty in some other parts of the World.

What measures are to be used against the Secretary General of the United Nations if he allows his forces to commit these crimes again?

There is no provision for these things in this statute as presently printed. I understand that suggestions for amending or altering the matter have been frowned upon, that it is considered that enough work has been done in the preparation of this at this stage to warrant ratification. I would contend that, even if it is held that the government has the right to decide to ratify it, it is a very inadequate provision in that the original objective of the thing is not fully covered.

ACTING CHAIR—I do not want to cut you off midstream but there are a couple of questions from the committee. It is important that we take those. Mindful that we have a scheduled witness now with us, we want to give you the opportunity to answer any questions.

Mr WILKIE—I have a comment and a question. Part of your submission says that we should put treaties to the people by way of referendum. Your closing comment says that even if the people decided to ratify this treaty we should not approve it. Are you suggesting that we go against what you have been recommending?

Mr Sherlock—I do not quite follow you. What is the point?

Mr WILKIE—You are saying people need to ratify a treaty by referendum but, if they ratified this treaty by referendum, it would be unwise for us to ratify it anyway.

Mr Sherlock—The people can only give their consent. The government still has the responsibility to see that the proposal is adequate for what is required. That is the responsibility of the government. The average man in the street has no power to decide the legal aspects of these things—that is the responsibility of the government. I believe the government should not act on the matter until and unless they get an approval from the people and that could only be had by a referendum or something similar—some type of a plebiscite perhaps. It would have to be only after the full portent of the document is explained to the people. That is absolutely essential. That is where I stand on the matter. I am absolutely against any movement in that matter.

I might also comment that the suggestion put up this morning for an ad hoc committee to handle these sorts of international problems would be much better than a permanent organisation. As it has been pointed out, values change over years, say 10 or 20 years and so on. Furthermore, values in many other countries vary greatly from our body of values, which arises from our English common law. You cannot expect them to accept our values without a great deal of opposition. An ad hoc committee could accommodate different levels of values according to the nation in which the matter they are dealing with occurs. For instance, if an ad hoc committee were set up to deal with a problem in Africa, it need not in any way concern China or Canada. In dealing with the matter of an offence committed on African soil, a different set of values from ours should be accommodated.

Mr WILKIE—I see there is an attachment here from a Mr Jack Sheehan. How much credence do you place in the information contained within Mr Sheehan's submission?

Mr Sherlock—The only thing I can say about that is that he gives the source. His letter is largely an assembly of previously printed information. He gives the sources of them fairly fully.

Mr WILKIE—Do you support his view of the United Nations, where he says:

So, be under no illusions that the United Nations will attack Australia if we refuse to live under a totalitarian, tyrannical One-World government.

Mr Sherlock—With regard to that, I have seen evidence put forward. For instance, words from Kofi Annan himself stated that the United Nations, in pursuit of its responsibilities, is not bound by national boundaries and is able to move wherever it wants to regardless of national boundaries. So you would have to allow for the fact that that could happen.

ACTING CHAIR—Thank you, Mr Sherlock. I do not have any questions to ask you either, but I appreciate the time you have taken to be here and I appreciate the opportunity to listen to your submission today.

Mr Sherlock—I appreciate the time you have taken to hear a few points.

ACTING CHAIR—That is what the parliamentary committee is attempting to do on behalf of the broad parliament. Thank you very much.

Mr Sherlock—Finally, I believe I have made the points fairly clearly in the submission and even if I was not able to present them personally, I think the submission is fairly solid, so thank you.

[11.21 a.m.]

CLARKE, Mr Benjamin Matthew (Private capacity)

ACTING CHAIR—Mr Clarke, welcome to the committee hearing today.

Mr Clarke—Although I am a member of the International Commission of Jurists and other organisations, I am actually appearing in a private capacity, but I will certainly be expressing sentiments and principles that the commission stands for.

ACTING CHAIR—Thank you. Mr Clarke, although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House or the Senate. The giving of false or misleading evidence is a serious matter and may in fact be regarded as a contempt of the parliament. Do you have any introductory remarks that you would like to make before we proceed to some questions?

Mr Clarke—Yes. I have prepared a written submission, which I will table. I have a copy here and I intend to read from it—not verbatim but from the headings.

ACTING CHAIR—Please go ahead, and we will move for the receipt of your submission once you have given us some opening remarks.

Mr Clarke—I thank the Joint Standing Committee on Treaties inquiry into the ratification of the Rome Statute for an International Criminal Court for the opportunity to make these submissions. I would like to present a number of arguments both for and against ratification before coming to my conclusions. The first heading I have is, 'Why ratify the statute?' It is hard to envisage any credible or humane argument against the aims of the statute which were expressed in its preamble, and without reciting them I will note the following one:

> Mindful that during this century millions of children, women and men had been victims of unimaginable atrocities that deeply shock the conscience of humanity.
>
> ... the most serious crimes of concern to the international community as a whole must not go unpunished—

Et cetera. In my view, substantive objections to ratification would need to be based upon technical procedural jurisdictional grounds and also perhaps on matters of national interest and state sovereignty, as we have already heard today, and I will address some of those objections here.

Before I do that, I would like to set out a couple of arguments in favour of ratification. The first heading is 'Strategic interests'. It might seem trite to express the sentiment that we are, per capita on a global basis, an extremely wealthy country. We enjoy a quality of life and freedoms from human rights violations of which many who visit our shores are extremely envious. From this privileged place that we have in the world, in my view much is expected of us in the promotion and protection of human rights. Although this often involves delicate diplomatic balancing acts in protecting our trade interests with neighbours who may have different approaches to human rights, in my view embracing and ratifying the statute gives us the

opportunity to join a global movement for the protection of human rights and makes this task a lot easier than doing so in our own right—merely one country speaking out against things that we find to be contrary to the international human rights principles in documents that we have already ratified. I note that it is of significance that the European Union, which is the largest trading bloc, places human rights at the centre of its legal and constitutional framework, and it is in our interests, as well as being our responsibility, to cooperate and assist in the work of the proposed International Criminal Court.

The next heading I have is 'East Timor'. You have probably already received numerous submissions on East Timor in the context of ratification of their statute. I note that it is clear in my view—from what I observed as a citizen watching the media, reading the papers and listening to the radio—that the aftermath of the elections in East Timor cast a spotlight on our national conscience and for the first time many generations of Australians felt the spectre of conflict only miles from our shores. We realised how precious we regard the fundamental freedoms and rights that I have referred to and we demand, and demanded, from our political leadership and institutions that those rights be protected. It is fair to say that most Australians are probably blissfully unaware of this statute or the work of this committee; however, they are clearly aware of what happened in East Timor. The reality of the atrocities that occurred there was brought into their living rooms on the evening news on a nightly basis for many weeks. It created a national anger that crimes against humanity displayed on our TV screens could be committed with impunity. The resounding cries in homes, if not in workplaces, around the country was: why aren't these people being arrested and brought to justice? We demanded that our government act and send troops to restore order and protect the human rights of our nearest neighbours. In fact, there was concern expressed that it took us a matter of weeks to do that, even though we set a world record in a UN recognised and endorsed operation to intervene to protect people. People may not be versed in the work of this committee, the statute or even the language of international law, but we knew that what was happening was wrong and that Australia needed to act. The public momentum preceded the government action, although the government was obviously keen to assist as quickly as it could.

So the diplomatic, humanitarian and public response to the plight of the East Timorese was one of the most unifying and defining moments of our national consciousness. It clearly demonstrated our fundamental belief in the primacy of the rule of law and the desire of Australians to help others receive a fair go. In my view, this is an implicit commitment to the very aims and objectives expressed in the Rome statute. If there were a national survey conducted setting out the purpose of the statute and Australia's opportunity to ratify the statute, I have no doubt that the overwhelming majority of Australians would be in favour of ratification, seeing this step as being in our national and global interests. If the decision were not made to ratify, I am equally confident that the resounding response would be why on earth not, particularly if all of that were put in the context of the reality that crimes of aggression and against humanity often go unpunished unless there is the will of the international community, through the auspices of the UN, to set up an ad hoc committee. That clearly does not occur in many instances where such abuses occur.

The next heading I have is the 'Sacrifice of war service men and women'. Obviously throughout the century there has been a significant sacrifice by Australian men and women who have served overseas in conflicts beyond our shores. With few exceptions the overwhelming sentiment of our country was that that service was to fight tyranny and oppression. We hoped

that the First World War would be a war to end all wars. Unfortunately it was not. It is my hope that a permanent International Criminal Court will, by its very existence, deter future crimes of aggression and so reduce, if not eliminate, the need for further service men and women to risk their lives in foreign wars—although it is conceded that they will need to put their lives on the line as Australia continues to assist in peacekeeping efforts.

For those Australians who have made the ultimate sacrifice in defending our country and protecting the human rights that we enjoy, we have an opportunity to pay a lasting tribute to those men and women in ratifying the statute. By its very existence it brings us the opportunity of pursuing the goal of universal justice and creating a world where there is less aggression, less warfare and fewer atrocities so that we will minimise the risk to more of our citizens serving abroad.

The next general matter I want to raise in favour of ratification is 'Policing of multinational corporations'. We are all well aware of the economic power that multinational corporations can wield. We are aware that when corporations are not happy with taxation or environmental and occupational health and safety issues and other regulations that restrict their operations they are often more than happy to move to countries which provide more flexible and favourable arrangements to them. Implicit in such movements of transnational companies is the risk of the deterioration and abuse of human rights for persons living in countries willing to open the doors with very little or no regulation. My submission in relation to the statute in this context is that, in a world where multinational corporations are getting richer and able to move offshore, there is the spectre and reality of private armies and security forces being employed—often with the tacit consent of local governments—and for these armies and security forces to do the will of the corporations involved. This often involves bringing influence to bear on local communities and even, in some cases, of human rights abuses of dissenting minorities and communities.

If we were to ratify the statute, and sufficient other countries did the same, it would send a clear signal to such corporations that the committing of crimes against humanity and of other crimes specified in the statute is not tolerated and there would be the opportunity for greater respect for human rights in those countries. It should in fairness be said that arguments have been raised that human rights standards have been increased in various developing countries where multinationals exist. I accept that that is true, but in my submission, when you are dealing with companies that may not be prepared to respect human rights, a permanent International Criminal Court would serve the useful deterrent purpose in being able to investigate and prosecute conduct which breached the statute where the relevant state was a member of the court. Where it is not a member, then there is still scope for matters to be referred to the assembly of the state parties or to the Security Council where political and economic pressures could be brought to bear on those states which allow or tolerate human rights abuses to occur by virtue of activities of private companies.

The next matter I wish to raise in favour of ratification is 'Internal conflicts within states'. Obviously the traditional difficulty in this area has been that state sovereignty prevents the international community from protecting persons who are suffering human rights abuses within a national state. Where there is not an outflux of refugees across borders and into other countries, there has often been little power to intervene. In my submission, relevant examples include the Iraqi Kurds and the Montagnard peoples of Vietnam who sided with the Americans during the Vietnam War and who have suffered persecution since.

In instances where you do not have leakage outside national borders and where state sovereign rights prevent international intervention to protect these groups, there is a significant absence of protection. In my submission, the coming into force of the statute will bring greater pressure to bear on regimes which commit human rights violations against their own people. The court will be empowered to request member states to arrest and surrender persons alleged to have committed crimes against the statute. If those persons or citizens travel abroad, it will then be possible for them to be arrested in other member states. That in itself will have a significant deterrent effect. It will be a way in which we, although geographically isolated from such places, can play our part in protecting the human rights of our fellow citizens of the globe.

The next heading I wish to address is 'Prosecution of the well-heeled'. It is on page 6 of my submission. The great advantage of a permanent, international, impartial criminal court is that, by its very nature, it stands ready to deal with whoever is alleged to have committed crimes against the statute, be it the driver of a truck carrying people to a place where human rights abuses are committed, a president or a commander-in-chief of an army deliberately carrying out crimes against humanity or other international war crimes. If the statute is brought into force, when such crimes are committed by wealthy, influential persons who, in the absence of such a statute, might otherwise not be prosecuted, there will be less difficulty in terms of the need to set up ad hoc tribunals so as to prosecute persons or, alternatively, the need to wait for them to leave their country and to arrive at a point at which they may be arrested and brought before a court of law for crimes alleged to have been committed. So, in my view, the establishment of the court would certainly significantly increase the universality and perceived impartiality of the way in which war crimes are prosecuted, in such a way as to promote broader and more consistent prosecution of war crimes.

ACTING CHAIR—I think the committee would like the opportunity to inquire into some aspects of your submission, now that we have it before us. I also note that from page 8 onwards you have highlighted four points that have been brought forward in other submissions with regard to reasons to oppose ratification: we appreciate your providing that juxtaposition in your submission. Unless there are any other quick summary points you want to make, as opening remarks, we will move on to questions. Is there anything else you want to say?

Mr Clarke—Not at this point.

Resolved (on motion by **Mr Baird**):

That this submission be received as evidence to the committee's inquiry into a Statute for the International Criminal Court and authorised for publication.

ACTING CHAIR—Before I yield to my colleagues, I want to raise one thing. No matter how well intentioned we may be, coming from our very Western, democratic, pluralistic society and holding the values we do, there are nations around the world which are led by people who have little or no interest in what we are saying here in Perth today. These people have no interest in laws and rules and are themselves a law above everyone else. Why would the establishment of the International Criminal Court prove to be the big threat that, from our position, we hope that it would be?

Mr Clarke—Firstly, those countries are certainly very much in the minority. To address your question: in my view, the existence of the court in restricting the movement of people within those countries—because, by its very nature, it would be able to arrest people who left and went to member states—would be a significant deterrent to those people.

ACTING CHAIR—It would isolate them.

Mr Clarke—Yes, it would isolate them. Furthermore, it would be another mechanism which would bring pressure to bear on them and it may well be a factor which is significant in them deciding to end their ways. As we know, the statute will not be retrospective and they may take the view, 'We can now rejoin the international community, because we will not be prosecuted for things that have gone before.'

ACTING CHAIR—How serious is the prospect of isolation? Are you trying to tell me that an ICC would have had Christopher Skase locked up behind bars 10 years ago? That is a contemporary example. I do not want to hold you to an absolute opinion on this, but it strikes me that if you could convince me and a lot of other people in Australia that the ICC would have dealt with Christopher Skase in a far more timely manner than currently is the case then everyone will be signing up to it by 2 o'clock this afternoon. Does it deal with those sorts of matters?

Mr Clarke—We are still going to have to deal with state laws on extradition and so forth, but I would have thought that there would be much greater momentum and willingness among countries to assist each other.

ACTING CHAIR—That is an aspiration, not a guarantee, is it not?

Mr Clarke—No. We have to wait and see how it plays out, but I think that the machinery is certainly there.

ACTING CHAIR—We have had submissions from very well-intentioned people—some of them ex-military people—this morning here in Perth, for instance. These are people who you would think, certainly by their submissions, would have a great interest in ensuring the protection of Australian armed forces personnel. They are very strongly opposed to this—and you deal with it in your submission—because it undermines national sovereignty and they do not believe it is going to change anything anyway except that it is going impact heavily on Australia's own set of values underpinning the laws that we create through parliaments for the judiciary to hopefully judge fairly and deal with.

Mr Clarke—I would like to know how it is going to impinge upon our values.

ACTING CHAIR—It is going to impinge upon us, by their submissions, in that there is going to be international pressure placed upon us to change our laws to conform with international expectations, which may reflect other aspirations and what we believe is important. That is their submission.

Mr Clarke—I cannot think of any necessary change to our laws that would not be consistent with generally accepted human rights ideals, norms and standards that most Australians would accept. I am struggling to think of one.

ACTING CHAIR—That is your key point, isn't it: 'Yes, I can see that they have a fear about it, but we haven't really anything to hide in this country. Essentially, we're doing things pretty right'?

Mr Clarke—That is right, and I think that we live in an open country—as you have said—where, if we were doing things that were not right, we would want them remedied. The majority of Australians would want that to be disclosed and dealt with.

ACTING CHAIR—And any government that got human rights so glaringly wrong would not be the government for very long—they would be voted out.

Mr Clarke—Hopefully, but I guess it would depend on the economic imperatives of the day and other issues that came up.

ACTING CHAIR—But the point is that the opportunity to vote them out is there, which is not true in other countries.

Mr Clarke—That is right.

Senator LUDWIG—Could you disclose a little bit about the International Commission of Jurists as to what you do? It might be helpful to put it in context.

Mr Clarke—The International Commission of Jurists is an organisation made up of judges, lawyers and other jurists around the world. We aspire, essentially, to uphold the rule of law and to promote the rule of law. The fundamental objective is the promotion of the universal observance of human rights and fundamental freedoms by means of the rule of law. This includes upholding the independence of the judiciary, speaking out very strongly and lobbying governments and agencies when that independence of the judiciary is undermined, monitoring the conduct of court proceedings to ensure due process and the right to a fair trial, gathering evidence of alleged human rights violations on occasions and handing them over to the appropriate prosecuting authorities or other bodies; and bringing to the attention of the international community acts of governments, political leaders and perhaps even state sponsored militia which undermine the rule of law or involve human rights violations.

Senator LUDWIG—A previous organisation raised the issue of sovereignty being removed or challenged if the International Criminal Court is ratified by Australia—in other words, we would lose some sovereignty as a consequence. What would you say to people who say that? Do you have a view on that?

Mr Clarke—Technically, the answer is yes, but in reality the amount of sovereignty that would be ceded is so minimal that it need not concern rationally minded Australians.

Mr BAIRD—You did not hear the input from the Council for the National Interest, but they raised this spectre: if, instead of being a lawyer, you were in the defence forces waging a war

against Saddam Hussein and, in the heat of battle, certain events occurred and you were suddenly accused of an event which was regarded as a war crime, might that not be a situation where your rights as an Australian citizen suddenly became secondary when you had to appear before the International Criminal Court? The council are saying that the rules of engagement in war are often such that you cannot clearly define what is appropriate and what is right, et cetera. If you were a member of the armed forces, in the thick of battle would it be a problem as to what you should and should not do?

Mr Clarke—Those fears are real, and they have been addressed in the framework of the statute.

Mr WILKIE—In what way?

Mr Clarke—There is provision for defences in terms of acting in the course of a conflict and not, in fact, committing crimes against humanity. There are clear distinctions that can be drawn. If you are dealing with unarmed people and you commit abuses against them, obviously you can expect to be dealt with by the tribunal. If you are dealing with armed persons and they allege human rights abuses, crimes against humanity or other crimes in the statute, you will have the opportunity to have the matter impartially investigated. There are procedures whereby the prosecutor has to look at all the available evidence, including evidence which would support the suggestion that there has been a crime, as well as exonerating evidence.

In fact, the various provisions in relation to prosecution and the way in which the court functions are a set of procedures which defence lawyers, including me, having been a defence lawyer, would envy. Accused persons in the state of Western Australia do not enjoy the rights that are to be afforded to accused persons under this court, should it commence its operations. In particular, there are sanctions for persons who give false testimony, corruptly influence witnesses, obstruct or interfere with witnesses, impede or corruptly influence an official, or attempt to solicit or bribe an official of the court, and all those issues are set out in my submission. In my view, clearly, there will be defence personnel who will have concerns, and they will have to rely upon the integrity of those who investigate, prosecute and judicially determine crimes, and upon the calibre and ability of the presiding judges.

Mr BAIRD—You make some good points, but take, for example, the US Air Force incident that occurred only a week or so ago. Would it not depend on how the numbers went on the particular tribunal? For example, if there just happened to be someone from Iraq, someone from China, someone from Russia or from another Soviet state and someone from North Korea sitting on the panel, how confident would you feel?

Mr Clarke—The first thing you notice when you see photos of these ad hoc tribunals is the multitude of judges that sit. The second thing you notice is that there are appeal mechanisms. The third thing is, as I have said, you have an impartial prosecutor, you have hopefully got impartial judges—and I am sure that you do; they all have reputations to uphold—and you also have the ability to have counsel appointed by the court for your legal representation, which perhaps goes further than that which we enjoy in this country. In my view, taking into account all of those things, you could be well satisfied that you were going to get a fair hearing.

Also, we cannot close our minds to the reality that there may be Australian men and women who serve who may commit crimes whilst they are at war and may wish to raise these kinds of arguments in their own protection. I am not suggesting that it is prevalent or frequent, but it could occur. They would, in my view, perhaps raise the very arguments that you are raising, and there may be ex-service men and women who hold those very fears. They are not going to be affected by this statute, because if they or anyone they know have committed any crimes they cannot be dealt with under this statute. I think that is certainly something that should be considered.

Mr BAIRD—I am sorry, I have interrupted Senator Ludwig's questions.

ACTING CHAIR—I thought in your comments you opened up the door on the arguments that have been put forward by others of this becoming, as I termed it, a forum shoppers paradise in that there will be people with particular beefs about certain other activities other than the very hard to argue against noble intentions of the ICC that will seek redress through legal process. People this morning have described it as a document written by lawyers for lawyers. I know that you are not just a lawyer but also a lecturer on it. Therefore, it possibly confirms their judgment.

An example was given of the consent laws in the Netherlands, I think, where children who are 10, 11 and 12 are within the legal age of consent and Australia therefore may face the prospect of someone using this as a mechanism to try to drive our consent laws down—the paedophilia lobby. They also gave an example of the Nulyarimma v. Thompson case in the High Court in regard to certain ministers and a red-headed personality, who is no longer in the parliament thankfully, who were alleged to have been involved in some form of genocide against a particular tribe of Aborigines. In other words, there have been some matters put before us that suggest that the ICC's good intention is easily perverted, that it becomes a forum for other problems. I thought this morning that your concept of multinational corporations, pollution exporting and so forth perhaps opened the door on that. Do you have a few comments about that?

Mr BAIRD—Wouldn't that be the ILO? Why this court?

Mr Clarke—For work standards?

Mr BAIRD—Yes.

ACTING CHAIR—Possibly so. I guess what I am trying to drive at is that a lot of people are behind the ICC concept because they see it as a vehicle for the sort of change that they want to inspire. Do you see the ICC being abused by this? Is it going to run out of work?

Mr Clarke—I think the same sorts of objection would have been raised to civil rights legislation in the US in the 1950s. Really, in my view, this statute quite properly prohibits conduct that we would all find abhorrent and, if somebody wants to try to use this as a vehicle, they are going to have to come up with credible evidence to satisfy an impartial prosecutor. I am sure the prosecution are going to get a lot of what you might call extremist—

ACTING CHAIR—Vexatious.

Mr Clarke—Yes, vexatious gatherings of supposed evidence, and they are probably going to filter a lot of that out. But, given the way the provisions are set out and the mechanics, I think it is extremely unlikely that you are going to get anything that has not got substance to it brought before the court.

ACTING CHAIR—You have spoken of the reputation of the jurists involved, and I will use a good Australian example. It is unlikely that you are going to see somebody of the stature of Sir Ninian Stephen really wanting to preside over minor matters when there are major matters that should be before the court instead. Would you presume that?

Mr Clarke—Yes, that is certainly true. In terms of raising the spectre of Australians being dealt with for genocide against indigenous Australians, as I say, it is not retrospective, so anything that has happened in the past could not be dealt with by that statute. People are so familiar with the concept of genocide that I think anyone who did anything that remotely resembled genocide as it is defined under international law in Australia would be worthy of investigation, anyway.

Senator LUDWIG—Coming back to the issue of complementarity: do you think that the provisions of the statute itself adequately protect the Australian citizen from the prospect of double jeopardy being visited upon them?

Mr Clarke—Yes.

Senator LUDWIG—It is a matter that has been raised. I am not going through those issues obviously, but it having been raised I give you an opportunity to comment on it.

Mr Clarke—It is a fundamental principle of our criminal justice system anyway that you cannot be dealt with twice for the same crime. If someone were to be prosecuted by the international court and then brought before an Australian court, any judge mindful of his reputation would no doubt be alerted to that by the defence counsel, and in fairness the prosecutor should raise it too.

Senator LUDWIG—What about if they were dealt with by an Australian court such as the High Court which might find them innocent and then the International Criminal Court took up the issue and pursued them?

Mr Clarke—I must say I have not looked at the statute in that context and I have not identified whether there is a provision dealing with double jeopardy.

Senator LUDWIG—I am happy for you to take that on notice and give that further consideration.

Mr WILKIE—Following on from that, I suppose there could be a situation where Australian law does not cover a particular item and an individual deliberately targets that group via the international court's legislation to try and gain a conviction, or if the penalties were harsher under the International Criminal Court they might try and prosecute them under that rather than under Australian law.

Senator LUDWIG—So already we have a potential gap in relation to genocide.

Mr WILKIE—Yes.

Mr Clarke—Yes, that could occur. I think that article 17 1 (c) certainly affords the defence where it can be raised. It reads:

(c)The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3—

which I have not looked at.

Senator LUDWIG—That is all right. Just for the ply of the argument, if you did wish to comment further you could take that on notice.

Mr BAIRD—I am interested in going through some of the issues that were raised before. The concerns that are expressed are not unique to one group of people; there is widespread concern. I know you have partly answered this before: one of the common arguments put forward is that the countries who uphold the normal democratic processes and have good legal systems in place are the ones who are going to be the signatories, and all those countries that obviously we are interested in—Iraq, China, Vietnam, Cambodia, Rwanda or whatever—simply will never sign. So we are dealing with a less than complete scenario. If, as someone has claimed, the UN were to become involved in assisting, there would be the whole question of the veto rights of the Security Council, et cetera. I heard your comment before that if they try to flee then they can be prosecuted in the other countries, but how do you answer that central charge, which I think is quite a valid one?

Mr Clarke—I think there will always be people who do not want to come on board because they are concerned that it will affect their hold on power or their support base at home, or for whatever reason. That is certainly no reason not to ratify and to join in an international push to seek global justice. We have to accept that there are some countries that will not come on board, and perhaps the world is divided into the majority who are in favour of the protection of human rights and a small minority who are happy to allow them to be abused within their borders.

Mr BAIRD—If the countries you are really interested in where the prosecution should be made are those very countries that do not sign, is it not all a bit of a hollow exercise?

Mr Clarke—In answer to that, I think we can look at the nightly news last night where two Rwandan nuns were being dealt with in an international court, I think in the Netherlands, for crimes committed allegedly within Rwanda. That is an example of a situation where the scenario you have raised has been dealt with by an impartial tribunal. The benefit of having this international court is that it is permanent and available, and it can seize on opportunities to deal with people as they travel or as they may be surrendered.

Mr BAIRD—Using your example of the Rwandan situation last night, that was being dealt with by another forum, so why do we need to invent another one?

Mr Clarke—Because people are not always going to travel to countries where there are other forums and there may not be the international momentum to set up international tribunals in cases where you are dealing with a small country or a few people who have been subjected to horrific human rights violations but whose voices are not sufficient to warrant the attention of the Security Council. We are all aware of the fact that Australia was certainly leant on by the US to play a major role in East Timor and they were too busy in other areas of the world. But when you have a permanent court, it is seized of the ability to deal with things as they arise.

Mr BAIRD—I understand that. The question was raised of the complementary nature of the legislation, and the view was expressed that we in Australia would be constantly required to amend our legislation so that it conforms with the ICC. Those who argue on the basis of it offending our own sovereignty would argue that that would be the case.

Mr Clarke—Certainly it is going to require amendments to legislation from time to time, but anyone who is in favour of a substantial change would certainly have no problem with seeing the parliament conduct amendments as they are required. I do not think that is an argument against ratification that has any real substantive merit. The parliament is constantly having to amend legislation.

ACTING CHAIR—For new offences too, in some cases.

Mr Clarke—Yes, but I think that all the offences set out here are consistent with our concept of respect for human rights. Perhaps we have not used the language of some of these sections and some of them are different from other offences that we have on our statute books around Australia, but they are not a significant departure from the values and norms we have here.

ACTING CHAIR—You raised before the question of extradition problems, but you believe that an ICC would provide such international pressure that it would iron out those sorts of wrinkles in the process.

Mr Clarke—Yes. We saw with Pinochet, we have seen with Skase and with other examples that whether you have extradition arrangements or not there can be diplomatic and legal problems. My view is that, once the statute comes into force, there will be significant pressure to hand over persons who have been investigated by the international court and, where the international court has seen fit to prosecute and to lay charges, countries will be more forthcoming in terms of cooperation than they may otherwise have been.

ACTING CHAIR—If I can use East Timor as an advance proposition—but you could go back to the Rwanda circumstance—isn't there already sufficient international pressure following a conflict, when the UN or the Security Council decide to convene an ad hoc or specialist committee, to get countries to cooperate with the running down of the alleged bad guys?

Mr Clarke—I do not think so. We can count the number of small and large scale conflicts throughout the 20th century and we can count the number of ad hoc tribunals that were set up, and there is a great discrepancy between the two and a lot of unpunished human rights offenders who have avoided prosecution because there was not the international momentum.

ACTING CHAIR—So you are saying people have got away with genocide all round the world?

Mr Clarke—Or human rights abuses.

ACTING CHAIR—All sorts of things?

Mr Clarke—All sorts of things.

ACTING CHAIR—All the things that are set out in the ICC statute?

Mr Clarke—That is right. And you will have a permanent court ready and willing to investigate and pursue people, without the need to go through the rigmarole of Security Council resolutions to get the support.

ACTING CHAIR—Why couldn't Australia show a lead by legislating, in the same way we have with the child sex crimes bill, against some of the specific matters—actually they are not all that specific; some are and some are not—laid out in this statute?

Mr Clarke—Rather than ratifying?

ACTING CHAIR—Yes. In other words, we say to every Australian, 'If you get involved in a human rights abuse or are a party to it or part of a company involved, or something like that, and we hear about it, then we are going to prosecute you because our values here in Australia are that you should not be doing that, whether you are in Pakistan, Tibet, China or Washington DC.'

Mr Clarke—We have already started doing that. Other countries have already started doing that as well. I think we should do both—we should be able to pursue human rights offenders in both ways.

Senator LUDWIG—But the states look after criminal law. Are you saying the Commonwealth government should legislate over the states in respect of those crimes?

Mr Clarke—It has already occurred with the amendments to the Crimes Act for child sex tours.

Senator LUDWIG—Yes. Are you saying it should be extended to encompass genocide, war atrocities and the like, and that there be the International Criminal Court?

Mr Clarke—My view is that it is sufficiently dealt with within the Rome statute and it would be duplication for us to make those amendments and pass legislation through the Commonwealth parliament to achieve the same effect.

Senator LUDWIG—I thought that is what you were saying.

Mr Clarke—No. I am saying both would be fruitful, but in my view we should ratify and see how the mechanics of the court work. If it is sufficiently dealing with those kinds of matters and there is no need for us to pass our own domestic legislation outlawing the same conduct, then there is no need.

ACTING CHAIR—But would it not be a way to appease those who see sovereignty being sold out, by passing these laws deliberately to say to them, 'Everything in this statute is agreed to be an important matter on our books—not the international books, on our books'?

Mr Clarke—Yes, that is a very good idea, because it would be very hard to argue against the kinds of offences which are set out in this statute—I cannot think of one that I have read, but for the military aspect we have looked at in terms of perhaps crimes against humanity and possibly crimes of aggression or war crimes. When you go through them individually and read the offences that are set out there, some of which are not part of our domestic law, I do not think there is going to be any great difficulty in pursuing that path.

Mr WILKIE—How do you respond to the view that has been put forward—probably on three occasions today, and previously—that the laws under the statute are ill-defined and quite ambiguous and the definitions are vague and that we just do not want to have something so loose that is going to be binding on Australian citizens?

Mr Clarke—I have had a look at the way these offences have been drafted and in my view they are sufficient and adequate. As any judge would tell you, when you start confining things too tightly you are not able to effectively deal with a wide variety of issues that may arise. You would have to give me a specific example. There may be cases where, if you define certain things too narrowly, people who have committed war crimes could escape prosecution because there is not a sufficiently broad offence. The classic example is crimes against humanity. Prior to that offence, many people got away with offences which the international community considered abhorrent.

ACTING CHAIR—I guess the one other point that has been made as well, not necessarily today but in other submissions, is that we should wait and see who is in the 60 who ratify this to see who we are joining up with. A lot of former Eastern bloc nations are keen to be part of the world community and are signing anything post haste and ratifying everything post haste. We might be bunched in with a whole pile of countries that do not necessarily have the same human rights values that we have. Is there an argument for that?

Mr Clarke—I think, if a whole lot of eastern European countries that might have had a different sort of human rights background are prepared to ratify, that is fantastic. I also realise that there may be pressure on the government to follow in the slipstream of the US, which is obviously concerned about their personnel overseas, but I think we are looking at greater principles here than simply what is expedient in terms of a political and economic relationship. I do not think we are going to suffer huge economic consequences if we ratify, and I think that some of the objections raised by the US and other countries in relation to potential prosecutions of their personnel are exaggerated. Perhaps it is a good thing that there is a crime of aggression that is dealt with in an international court so that superpowers cannot simply send out a press release saying, 'We acted in self-defence; that is the end of the matter.' Perhaps there are times

when an impartial court should decide whether they did act in self-defence or whether it was a crime of aggression.

ACTING CHAIR—There are those who say, though, that normally at the end of a war the winner judges how the loser acted and has a bit of a look at how they acted themselves, but essentially the winner gets to form the tribunal that judges the actions of the other. This opens the door for the losers to take people the court. You said there is nothing retrospective about it, so we are not about to get the Rhineland people taking on the British for bombing them during the Second World War, I guess—although someone suggested to us that that could occur. Likewise, is there likely to be a United States Vietnam inquiry or might certain persons who may have treated US personnel wrong during the Vietnam War get caught up in this? In other words, are we going to see the loser being able to take on the winner after a conflict? I know it is very vile terminology, but those are the sorts of sentiments that are being expressed to us.

Mr Clarke—There is no reason why they could not. If they could present credible substantive evidence and the prosecution vetted it and decided there was a case, then why not?

ACTING CHAIR—So all is not fair in love and war if the ICC comes to pass, then.

Mr Clarke—I think that would be the answer. I think it is fair.

ACTING CHAIR—Or is it? A lot of people would argue the sentiment that, if you are fighting a war and the other side is doing certain things to you and you respond or whatever and then you win that war—this is a very difficult argument to put but it is the sort of thing that has been put to us—essentially that is the end of the matter and after the peace we have the reparations and life goes on. But under this sort of concept there may well be an opportunity for those who are aggrieved about the conduct of that war to take on even the winner of the conflict.

Mr Clarke—Under international law you have got a defence of self-defence and if you are responding to violent aggression then you have a good defence. Taking up the last aspect of what you said, where there may have been a response in self-defence and some personnel go too far and commit crimes, if there is evidence that they have committed crimes, if they are prosecuted, so be it.

ACTING CHAIR—There is one last thing I want to raise. I do not know if my colleagues have further questions. This morning, I was talking with other witnesses about the values which underpin what you called today ‘universal justice’. Are there values which underpin this universal justice that should be foreign to Australians? In other words, is this fear that is being created about this statute justifiable in the Australian value concept?

Mr Clarke—I am from a generation where there are international conventions that were ratified before I was born which underpin what is set out in this statute. There are 1966 conventions. The Nuremberg trials talked about crimes against humanity. There is nothing in this statute which is foreign to the conventions that we ratified in the sixties, seventies, eighties and nineties protecting human rights and which were not really expounded at Nuremberg. I do not think that many of the people who have these objections objected to the prosecution of war criminals at Nuremberg.

ACTING CHAIR—And the tweaking of our own laws is not going to be an offensive tweak—that there will be some changes? A lot of people are very focused on the 'ICC will tell us what laws to make' aspect of the complementarity matter.

Mr Clarke—The document itself says that there are not to be any amendments. It is clear what those offences are. In ratifying, we are accepting that those crimes which are set out in the statute are crimes that should be part of international law and we should be ensuring that they are prosecuted.

ACTING CHAIR—By tradition, Australia has normally had appropriate legislation in place at the ratification of a treaty anyway, hasn't it? It has normally had legislation on its books that conformed with the gist of what is being proposed.

Mr Clarke—That is right.

ACTING CHAIR—Thank you very much for your time.

Resolved (on motion by **Mr Wilkie**):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 12.17 p.m.