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JOINT STANDING COMMITTEE ON TREATIES

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JOINT COMMITTEE ON TREATIES

Wednesday, 14 March 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: Senators Cooney, Ludwig and Mason and Mr Bartlett, Mrs De-Anne Kelly and Mr Andrew Thomson

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 11.21 a.m.

THOMPSON, Mr Gregory Fredrick, Manager, Advocacy Network, World Vision Australia

WELLS, Ms Alison Susan Mary, Policy and Campaigns Officer, Advocacy Network, World Vision Australia

CHAIR—I declare open this public hearing of the Joint Standing Committee on Treaties inquiring into the statute for an International Criminal Court. I welcome the representatives of World Vision Australia. I have to advise you that these are legal proceedings of parliament and they warrant the same respect as if they were taking place in the House of Representatives or the Senate, and hence the giving of any misleading evidence is a serious matter. We have 40 minutes until lunch so there is plenty of time. Please start with some remarks generally speaking to your submission, and then we will talk about it by way of cross-examination.

Mr Thompson—Thanks, Mr Chairman and members of the committee. On behalf of World Vision Australia, I thank the committee for this opportunity to present our submission in this hearing. Just to give a bit of background to World Vision Australia, World Vision is Australia's largest international development relief NGO. We form part of an international partnership of World Vision entities reaching out to work in relief and development programs in more than 4,000 projects around the world in almost 100 countries. Our work is in response to emergencies and disasters as well as in ongoing community development programs. In the process of dealing with emergencies and disasters in many contexts, as well as responding immediately to the needs of people impacted by those disasters, we seek to engage increasingly in efforts to build peace, to ensure reconciliation between communities who have been in conflict and to work with others to set in context a process of conflict prevention as well as resolution.

It is in that context that we have welcomed the Australian government's role to this point in giving leadership to the process of the development of the Rome statute for the International Criminal Court, recognising Australia's significant role in that process. Through our submission we urge the government to ratify that statute and therefore become a party to the development of the International Criminal Court. We do this because of the recognition of the need for establishment of a rule of law internationally where in many places this does not exist at the moment. We have seen this in our experience in the former Yugoslavia, in the Balkans, as well as in Africa, in Sierra Leone and other places, where children, women and citizens have been impacted by the inappropriate use and abuse of power through the crimes against humanity that have been committed by rulers setting themselves outside the rule of law in that national context and against the principles of international human rights law and international humanitarian law.

We believe that an International Criminal Court will ensure the establishment of a rule of law and will be an appropriate institution to put in place that law. This would help to ensure the prevention of conflict in the future, to ensure that those who have been guilty of crimes against humanity might find themselves held to account for those acts and, therefore, in the longer term setting in place a context in which such conflicts in the future might be prevented. It is in that context that we make our submission and urge this committee to recommend to the Australian

government the ratification of the statute. I now invite Alison Wells to continue with these opening remarks.

Ms Wells—As Greg said, perhaps the greatest reason for Australia ratifying the statute to establish the court is the fact that over the past history, particularly in the last century, there has been no means of bringing war criminals to justice. The fact that they have had immunity from prosecution for their crimes has been perhaps the greatest reason why such great violations of human rights have continued. The fact that there has been only two ad hoc tribunals set up to deal with abuses in the former Yugoslavia and in Rwanda but not in other cases of similar gross violations of human rights shows that, if the International Criminal Court were established, it could provide some consistency in dealing with such crimes and would act as a deterrent to any would-be perpetrators if they know that they could be brought to justice through the existence of the court rather than getting away with the crimes they have committed.

CHAIR—Any further remarks or do you want to go to questions?

Ms Wells—We can go to questions.

Mr BARTLETT—I have a real dilemma with this treaty. On the one hand, I can see the need for us to do whatever we can as an international community to prevent the atrocities of war crimes, crimes against humanity and so on. Yet I have two problems. First, I am not convinced—I am open to being convinced but I am not convinced yet—that the ICC would achieve that. Secondly, I have serious questions about whether the ratification of this treaty by Australia would in any way compromise our national sovereignty. I have not heard from any of our witnesses to date an unequivocal guarantee that this cannot undermine Australia's sovereignty. I am talking about the fact that, if we are seen by the International Criminal Court to not be willing or not be able—but presumably not be willing—to prosecute a particular case that they see ought to be prosecuted, an Australian citizen could be hauled before this International Criminal Court. Can you give us a guarantee that that could not happen? Could you rule out any possibility that an Australian citizen, acting in his or her role as a member of the Australian government for instance, could not be taken before the International Criminal Court when the Australian legal system has said they do not have a case to answer?

Ms Wells—I think you should firstly look at article 17 on the principle of complementarity, which says that, in order for Australia to ratify the statute, all the provisions of the statute would be incorporated into Australian domestic law, so that under Australian domestic criminal law any person who is found to commit a crime against humanity or a war crime or genocide could be tried in Australian courts first.

Mr BARTLETT—But that still does not really answer the question, does it? Certainly we could have legislation enacted to say that crimes against humanity, however they might be defined—I have some problems with that as well—ought to be prosecuted in the Australian courts. But if our legal system still agreed that there was not a case to answer for a particular person in a particular situation, they could still then be forced to appear before the International Criminal Court, could they not?

Ms Wells—There would still have to be proof of evidence of those crimes. If the Australian courts found that there was not enough proof of evidence to convict those people, then I guess

the prosecutor of the International Criminal Court would have the same understanding. While Australia would be in the process of considering the crimes of that person in a trial, they would have to be reporting to the International Criminal Court at the same time, giving a full account of the process of the court and their findings. It would then be for the prosecutor of the International Criminal Court to decide whether there was still a case, whether they disagreed with the consensus of the Australian courts and would still like to proceed with a trial at the International Criminal Court for that particular criminal.

Mr BARTLETT—But this is the essential issue, is it not, that the prosecutor in the International Criminal Court can still then decide that Australia should have acted and that they will act then if we have not acted? With respect, you said that I guess they would operate under the same standards, and that is one of our problems. We cannot be totally sure that those operating in the International Criminal Court would apply the same standards that we in Australia consider to be acceptable—probably and most likely yes, but we cannot be sure.

Mr Thompson—If we look at the case where Australia does not ratify, in that circumstance, not being party to the development of the court, we are standing aside to allow a court to evolve without our input, and then perhaps citizens may be more vulnerable in those circumstances.

Mr BARTLETT—Could you perhaps elaborate on how that might be the case?

Mr Thompson—Should the International Criminal Court find in some particular case that an Australian member of a peacekeeping force or some other citizen engaged in a particular act of conflict in which there may have been a crime against humanity committed, then to the extent that that person could be subject to the jurisdiction of the court, that could be pursued anyway without Australia having any assurance—I am not a lawyer so I can only express my feeling and sense of the intention of those countries, including Australia, that have developed the statute to this point. I believe the intention is to establish an institution that is credible, that respects the sovereignty of its member states and respects the rule of law as it is developed in the member states of the court. I guess there is a risk that is involved, but it is better to be part of the court than not to be part of the court in terms of ensuring the establishment of an international court that does fulfil the wish of the international community to protect and enhance the establishment of a rule of law as expressed in those international statutes.

Mr BARTLETT—This is the problem that I have. I agree with the objective of establishing a rule of law to do whatever we can to prevent war crimes recurring but I am not convinced that this statute does it without compromising Australia's sovereignty. I would like somehow to have a guarantee in there that it could not happen but the nature of the beast is, as I see it, that we cannot have that sort of guarantee.

Senator MASON—Mr Bartlett put the issue very well. I have two questions, one based on assumptions and the other based on principle. I think you have said, Ms Wells, in your oral submissions, and indeed you implied in your written submission, that the ICC will be a deterrent to any would-be mass murderers or international criminals. I used to lecture in criminology and I have discovered that all the research is that crime, courts and heavy penalties can deter criminals if they are rational actors. So white-collar criminals may be deterred more easily, for example, than someone who is operating in a crime of passion. The death penalty does not deter murderers, for example, particularly in crimes of passion.

I am not convinced that Hitler or Pol Pot would be deterred by an International Criminal Court. However, what concerns me and I think other members of the committee is that it could deter or compromise the capacity of Australia—or indeed the United States and other of our allies—to effectively prosecute their foreign policy. That is precisely the point that many former US secretaries of state as well as a former US national security adviser have made. They have said that, because politicians and public servants are subject to the ICC, what may be compromised is the effective prosecution of US foreign policy—and indeed that would apply to Australia. So I am just not convinced at all, I will be honest, that the ICC is a deterrent to the Pol Pots, the Hitlers and the Milosevics, et cetera. What do you say about that?

Ms Wells—Surely if any democratically elected government is operating purely under international law then it would be adhering to the Geneva conventions and other treaties under international law. There should be no fear of being brought before the International Criminal Court if all its foreign policy is adhering to those standards. It should not have a fear of that. My argument with regard to Hitlers or Pol Pots would be that any action the international community can take to try to deter would-be criminals is extremely valuable. As an international community, we should be doing all within our power to try to stop these abuses of human rights happening.

Senator MASON—Do you think the International Criminal Court would have deterred Adolf Hitler?

Ms Wells—I am not saying that it would deter Adolf Hitler. We cannot say, because we cannot go back to the late 1930s and early 1940s and replay that situation with an International Criminal Court. But, obviously, the world community's outrage at what happened during the Second World War led to some of the first tribunals to try war criminals. Following that, other tribunals that have happened over the last 50 years—of which there are not many—have led to a popular belief that we do need to have something permanently there to provide consistency in dealing with these perpetrators.

Senator MASON—Ms Wells, we could enter into debate here, and it is not the time for that. My concern in a sentence is that this statute could operate as a fetter against generally rational, liberal democratic countries but not as a fetter on the madmen of history. And that is the problem in a sentence.

Mr Thompson—But after the event of the perpetration of such crimes against humanity in particular contexts, the citizens of that state—if we look at a country like East Timor, for example, in terms of rebuilding the society or building the society from scratch—need to have some assurance that those who have been guilty of the crimes against the people of that state will be brought to justice. It gives confidence in the development of the rule of law in that particular place. So there is not just the deterrence argument but in terms of ensuring appropriate peace building and reconciliation in particular states.

Senator MASON—Sure, I understand. So you would say that the institution of the ICC is valuable irrespective of the deterrent—just the fact that it is there and is more useful, for example, than ad hoc tribunals set up by the Security Council?

Mr Thompson—That is right, yes.

Senator MASON—I understand; I accept that. I have one last point on principle that was raised by Mr Bartlett before. Mr Bartlett, and indeed many prominent people in the United States, have argued that the ICC could affect or impinge on our sovereignty. That is one way of looking at it. In other words, the ICC may, by operation of law, for example, feel that Australian courts were either unwilling or unable to prosecute certain people at certain times. The flip side of that, Ms Wells—I would like your comment on this—is that, while the ICC is constituted by learned judges and so forth, all judges are subject to political and diplomatic pressures, as we all are.

Let me paint a scenario very quickly for you. An alleged crime has been committed in the People's Republic of China, and the courts of the People's Republic of China have been asked to try that particular person. Australia is a signatory to this organisation, the ICC, but we see the trial as a total and utter sham. There are some standards in there. My concern is that the court would be very reluctant—this is the flip side of what Mr Bartlett said—to say that the Chinese judicial system was not up to it because, in effect, what the ICC has to do under its own statute is say that a particular country's judicial system is not up to it. Do you think any court—the ICC or any other—would say, for example, that the People's Republic of China's judicial system was not up to it?

Ms Wells—I think it would have to. If somebody brought that case to the prosecutor and asked the prosecutor to investigate it, then they would be obliged to do that. If China were found to be unable to deal with that case appropriately, if it had not provided the necessary evidence that it was dealing with that case appropriately, then that would allow the ICC to step in in that situation.

Senator MASON—You are more confident than I am, and then Mr Bartlett's equation steps in that in fact it impinges on sovereignty.

Senator COONEY—I am going to continue with the theme that has already been set because I think it is our problem. If you look at the proposition for an international court, you would say, 'We must agree with this. It is a great concept that you are going to have an impartial tribunal deciding in an impartial, efficient and correct way who has committed crimes in the context of war,' and you must give that the big tick if that is the situation. But then when you try to work it through, as has been happening along the table, you become a bit concerned. You say, 'This tribunal will be good.' A democratic country might put a person on trial and a result will occur. Then the international court can come in over that and say, 'That really was not a proper trial,' and the same sort of thing could occur with the Chinese and what have you. You then start to worry and say, 'Is it possible that this concept can be given the power, can be given the culture and can be given, if you like, the ethic which would allow it to be independent and take on everybody?'

Then looking at the national interest analysis, what is talked about is the horrific events that occurred in the former Yugoslavia and Rwanda. In your own submission you talk about Kosovo and Slobodan Milosevic. But there is never any mention of what might have happened in Northern Ireland, in the Middle East or in Sri Lanka. Dresden is never used as an example of what might have been inappropriate. I was almost going to bring down some magazines that Yugoslavia has produced about the results of the NATO bombing, which looked tremendous—that is never mentioned in this context.

All the examples seem to go one way. The people who come along and give evidence cite examples that all seem to go one way. What you have here is a court that will take on the losers or the less powerful. Am I too cynical in saying that this court is not going to be effective against China, against the United States or against the big powers of Europe or the United Kingdom? That is the first thing: can you possibly make it fair? If it is going to be able to move against the smaller nations, where does Australia line up? It lines up amongst the smaller nations. I think that is what is a bit of a concern here. Would you like to comment on that rather rambling dissertation? Why don't you use the example of Northern Ireland or of the NATO bombing or—

Mr Thompson—In the circumstances of our submission, we were speaking immediately from World Vision's experience. We do have experience in those particular countries, so we have not extrapolated to other particular contexts. I did mention East Timor before as a further example beyond those contained in our submission. There are calls for the establishment of an appropriate tribunal at the moment in East Timor. Increasingly, I think, in the context of globalisation and internationalisation, then other circumstances may emerge where such an institution might have a role to play.

The basis of our submission is that Australia has in the past been party to the development of the statute and seen the value in it. By ratifying the treaty, we continue to be part of the shaping of it. If we are not involved and the International Criminal Court emerges, then it will be the lesser because Australia has not made its contribution, reflecting those standards that we have in Australia in the international jurisdiction. Basically a substantial part of our argument is that Australia needs to be party to this to contribute the standards of law making that we have in Australia to the prosecution of law in the international community. Increasingly we recognise in World Vision's experience that, while respecting national sovereignty, we at times need something beyond national institutions to ensure an appropriate rule of law internationally.

Senator COONEY—I suppose you might say that even though many escape it is a good thing that at least some people are brought to order.

Ms Wells—I think there is an advantage as well in having a permanent body rather than ad hoc tribunals. Ad hoc tribunals, as you rightly pointed out, are very selective insofar as there have been tribunals set up only for the former Yugoslavia and Rwanda, where there was the political will for that to happen, but tribunals have not been set up for other instances of gross violations of human rights where there has not been the political will. Perhaps the media has played some part. Violations that have appeared on the TV screen perhaps raise more popular support and thus greater political will to have the criminals brought to justice, whereas other violations have gone unpunished.

In having the International Criminal Court, you set up that court only once. You do not have to go through the lengthy process of setting up individual tribunals every time. Also, because it is an independent body, hopefully it would rise above the issue of victor's justice, which you mentioned, where certain issues have been brought to tribunals and certain other situations have not. With an International Criminal Court being an independent body, any situation can be brought to trial, not just those with victor's justice where victor's justice is an issue.

Mrs DE-ANNE KELLY—First, could I say that World Vision is held in great regard and we know the good work that you do particularly with regard to children and their treatment around the world. Having said that, I can certainly see that your submission is really put from a very compassionate point of view in attempting to alleviate the situation that so many people find themselves in around the world.

I notice that article 90 of the statute refers to states that are not party to the statute. That is on page 7, the third paragraph down. Where a requesting state—this is to request extradition to the criminal court—is not a party to the statute and is under no international obligation, it basically comes down to the respondent state deciding whether to give priority to the court's request or the requesting state's request. In other words, it is really up to them whether they surrender somebody or not.

Taking that into account and the fact that there are so many nations that have indicated they will not ratify—most particularly if one suspects that some of those nations might have to surrender a few political or defence figures—it seems to me that what will be left, generally, will be those nations that do have a sound judicial system, that are generally seen as good global citizens. Isn't it then going to be something of a kangaroo court? It is going to take away the opportunity for far more effective means—trade sanctions and so forth—of bringing perpetrators of genocide and so on to heel. While trade sanctions are clumsy—and I recognise that sometimes it is the innocent who suffer in a country with a sanction against it—if this is set up and is ineffective, won't the argument always be, 'We've got the International Criminal Court that looks after all of that.' I am concerned that your worthy aims are, in fact, not going to be achieved but that we are going to see a significant loss of sovereignty to those good global citizens that do ratify. What is your response to that?

Ms Wells—One hundred and thirty nine nations around the world have already signed.

Mrs DE-ANNE KELLY—But signing is not ratifying.

Ms Wells—It is not ratifying, but it is declaring an intention that it may well ratify in the future.

Mrs DE-ANNE KELLY—No, with respect, it is not. I am sorry, I have to stop you there. We have already established that signing bears no obligation whatever. The committee has done that on a range of other treaties.

Ms Wells—There is no formal obligation, but it indicates its willingness—as you are doing here—to conduct full inquiries into the process and to actually consider the full implications of ratifying. So at least that is taking it a step further. It is also saying that it would give some support to the existence of the court. If a country did not want to give any support whatsoever to the existence of a court, it would not have signed the treaty in the first place.

Mrs DE-ANNE KELLY—Yes, but it is still not a party to the statute, is it?

Ms Wells—It is still not a party to the statute, but that means that those countries can still—

Mrs DE-ANNE KELLY—And there is no financial obligation?

Ms Wells—influence at the moment the workings of the preparatory commission in terms of seeing how the court will be shaped in the future. Obviously, the statute is not perfect, as we have seen from the arguments that have been raised this morning, but it is a good starting point. I think that when it is established it will be the most concrete institution the international community will have seen so far in the history of the world. It therefore gives us, if not a perfect final outcome, the first step in the process of developing something which is workable, and the more countries that ratify it, obviously, the more universal it will become. Even if you say that it is only the democratically elected governments with strong judicial systems domestically who are signing, hopefully over time, through political influence over other nations, the number of people ratifying will increase.

Mrs DE-ANNE KELLY—But you have no guarantee of that.

Ms Wells—There is no guarantee, but already 29 countries have ratified. It is likely that probably in the next year the number 60 will be reached and it would be—

Mrs DE-ANNE KELLY—With respect, please may I stop you there? Of that number that have ratified, some of them are the old Soviet Union nations. Let us face it, big countries that generally have very good human rights records, like the United States, have signed but have indicated that they will not ratify. The message to us is that if some of our democratic allies see a problem with the court, and see it is an inefficient and ineffective way to proceed, why should Australia rush forward? We are pretty much the juniors in the internationals here, aren't we? Why should we rush forward?

Ms Wells—New Zealand ratified last September, France has already ratified and the UK will probably ratify fairly soon. There are other countries that—

Mrs DE-ANNE KELLY—You are not answering my question. Let us be quite frank: New Zealand is not exactly on a par with the US; I have not noticed New Zealand as being a superpower in the Pacific yet—and I mean no disrespect to our kiwi cousins.

Ms Wells—Sure, but France has ratified, it is on the Security Council; and the UK is likely to ratify soon. They are two crucial allies, so I do not think that argument holds for all countries, for all superpowers around the world.

Senator LUDWIG—I do not know whether you have turned your mind to it, but how would the International Criminal Court being able to call people to account fit with the current position of existing extradition rights? For argument's sake, some countries do not extradite nationals and others, such as Australia, appear to in the common law tradition, whereas the International Criminal Court will establish itself and those that ratify it will then be subject to being called before that court.

The interesting question that arises—which has been subject to some scrutiny here this morning, of course—is that those countries that are likely to ratify may very well fall into two groups: those that have a tradition of allowing their nationals to be extradited and those that do not normally allow their nationals to be extradited. They may not sign it. If you do not already wish to comment on some of that, the question then is: where have we advanced to? In a sense, we have simply split the group up along the lines that they already generally line up on anyway.

The International Criminal Court would be effective only with those countries that would be effective in any event, with those countries that would say, 'We are happy to set up a tribunal, we are happy to allow these sorts of things to happen because we all have that view of trying to ensure that there is some justice and that there are some human rights advances,' whereas we know those countries that do not sign it and that also do not sign extradition treaties or have reciprocity are not keen on those areas.

Ms Wells—I am not really in a position to answer the legal aspects of that. I do not really know enough about extradition law.

Senator LUDWIG—Unfortunately, neither do I. Those sorts of problems seem to arise where the International Criminal Court will cut across those existing areas.

Ms Wells—I would reiterate what I said before, in that we do not have a perfect situation here but it is the most workable solution that the international community has come up with so far. For that reason, I think it deserves Australia's full support. Through ratifying, Australia has the opportunity to continue to influence how the court is developed. It would not have that opportunity if it did not ratify. It could only observe what was going on. I think, for that reason, it is important for Australia to ratify, to be part of the continuing process of development of the court. Hopefully, as international consensus is gathered and gains strength through the court and as the court develops over time, more and more countries will decide to ratify and those that have already ratified will be able to exert their own influence over those nations.

CHAIR—Just finally, some of the ambiguity in the definition of the crimes is what has people really worried—that is, how wide the jurisdiction is. In your view, if this had been ratified and the legislation passed in, say, 1996, would the Maritime Union of Australia have indicted and prosecuted Peter Reith by reading this as a crime against humanity—that is, Mr Reith, according to the charges laid against him under article 7K, having inflicted inhumane acts intentionally causing great suffering to the mental health of the members of the union on, say, political grounds? Likewise, if it were on foot, would Mrs Pauline Hanson have called for the ABC and the Fairfax newspapers to be similarly investigated and charged for causing her great suffering and mental harm on the basis of political grounds? What would have stopped such vexatious prosecutions, if I might characterise them that way, taking place? The words are pretty plain.

Ms Wells—I think she would have to approach the prosecutor of the International Criminal Court to say whether she had a case. The prosecutor could then consider the evidence and decide whether there was beyond reasonable doubt the proof to—

CHAIR—No. If you go to the draft rules of procedure and evidence, I cannot see anything that says that an investigation has to pass some standard of proof before that. The point is not so much whether these individuals would succeed in initiating prosecution but whether the court would have jurisdiction over matters that had happened within Australia. Is there anything in the statute to say that they cannot deal with crimes against humanity that take place within the borders of Australia—this is what the two gentlemen here are asking you—or the borders of Iraq, Kosovo or whatever? Is there any difference between Australia and these other countries? Do you reckon Reithy is a goner and Pauline will get the prosecution up? If you want to make a supplementary submission and consider these things, by all means do so.

Ms Wells—Sure.

Proceedings suspended from 12.01 p.m. to 1.04 p.m.

CARLTON, the Hon. James Joseph, Former Secretary General, Australian Red Cross

McCORMACK, Professor Timothy, Vice President, Australian Red Cross, and Chair, National Advisory Committee on International Humanitarian Law, Australian Red Cross

TATE, Reverend Professor Michael AO, Member, National Advisory Committee on International Humanitarian Law, Australian Red Cross

CHAIR—I welcome three more witnesses from the Australian Red Cross. Would you like to make an opening statement, Jim, or each of you and then we will go to questions?

Mr Carlton—If I could just say a few words and then ask Professor Tate to talk about certain aspects of sovereignty, which I understand are of great interest, and then Professor McCormack will be available to cover certain legal issues. Thanks for the opportunity to appear. My seven-year term as Secretary General of the Red Cross has now concluded, and the new secretary general, Martine Letts, has been kind enough to ask me to come along because I have had a deep interest in this subject area.

The Australian Red Cross has put in a submission to the committee as well as one from Professor McCormack on behalf of the International Humanitarian Law Committee of the Red Cross. A lot of water has gone under the bridge since those submissions were put in. So I thought it would be useful for me to deal with what I see as some of the major political issues that have arisen in the mean time.

The first point is that the International Criminal Court proposal is not a fringe proposal. It is not something dreamt up by some fringe group of well-meaning busybodies, as I have seen in some of the commentaries that have been made, nor is it anything to do with groups who might have demonstrated in Melbourne, Seattle or whatever—it is essentially a mainstream issue. It is a mainstream issue for the International Committee of the Red Cross. The first Geneva Convention was signed in 1864, the Red Cross was started in 1863 and, since about 1870, it has been a serious concern of the International Committee of the Red Cross that international humanitarian law has had no provision for prosecutions, no provision to try anybody for infringements of international humanitarian law.

International humanitarian law preceded the founding of the Red Cross. If one goes right back into history, there are certain Shakespearian plays where it is quite clear that the wording reflects the desire of both sides of a conflict to respect certain rules in order to have, if it is possible, a more civilised conflict. The Red Cross has had as its mission the amelioration of suffering in war. Obviously, the Red Cross would love to have an outbreak of universal peace but, being realistic, it has always worked to try to relieve the suffering of those affected by war and to try to regulate the way in which wars are conducted. As far as the Red Cross is concerned, that begins with the first Geneva Convention of 1864.

The concern of the international committee, which is based in Geneva as you know, has been expressed year after year that it is possible for people to carry out the most horrible crimes against innocent civilians and against opponents in war with total impunity—except for unusual

cases such as the Nuremberg trials, the Tokyo trials and, more recently, the tribunals in The Hague dealing with the former Yugoslavia and Rwanda. I am not going to sketch all that history; I merely want to point out that this has been a core concern of the international committee since about 1870. It has been a very strong lobbying point by them behind the scenes—the Red Cross lobbies governments in private—certainly since the Nuremberg and Tokyo trials and it has certainly been stepped up since the formation of The Hague tribunals.

Australia's role in this is not, as I have seen said in certain quarters, 'a frolic of public servants'. It has been a determined action of government. It has had full involvement of ministers. The two ministers publicly involved have been the Attorney-General and the Minister for Foreign Affairs. But behind the scenes the Minister for Defence and the ADF itself have been heavily involved in all the negotiations that have led up to the Rome conference where the treaty was signed. Defence representatives have been on all the preparatory committees with the full authority of the Chief of the Defence Force and the minister. So this is not, as I have seen in some submissions, some kind of fringe activity putting pressure in ways that are not in the centre of public debate.

Australia has certainly taken a leading role in the approach to the treaty—not, as has been suggested, to pander to certain interest groups and so on but to try to guide the process so that the outcome will be acceptable to Australian interests—so that the rules of conduct of the actual court itself will be sensible and will be the kind of rules that we as a country would like. That has been the issue as far as the Australian government is concerned, and I know that that has been the very strong concern of the two ministers publicly associated with that process.

The United States, although it has signed the treaty, has indicated that it is unlikely to ratify. I want to deal with that issue because it is quite important. The United States is a very complicated society. It plays a major role in the democratic world, doing all sorts of really important things, and it has been a major ally of Australia for a very long time. It does, however, play very hard ball on treaty issues. The negotiators of the United States government really go right to the wire on anything which has to go through the Senate to be approved for ratification, because there is a strong isolationist streak within the United States polity. It is very hard indeed to get anything ratified by the Senate which, even in a minor way, infringes on US sovereignty. Every international treaty that one signs certainly is a giving away of some sovereignty in the hope that there will be some countermanding benefit. The United States plays very hard ball on these things.

I chaired the humanitarian action sections of the drafting commission of the International Red Cross and Red Crescent Conference in 1995. I do not know whether you are aware, but every four years the International Conference of Red Cross and Red Crescent involves all the states party to the Geneva conventions, and the resolutions of that conference are treated by the states party virtually as if they were treaty obligations. So all the states that are interested send very large delegations to the conference. The United States sent 16 members of its State Department and associated departments to that conference. I was in the hot seat chairing the drafting commission which dealt with such very complicated issues as economic sanctions, for example. I had to try to get an agreement on wording between the United States, Iraq and Cuba—to mention one particular difficulty I had—and the United States played very hard, in fact, with Pakistan and India, who are manic on sovereignty issues. The United States is the same because their negotiators are always looking over their shoulders at Jesse Helms in the Senate. It is a

very tough business. I managed, in that case, to get an outcome with the United States which is a fairly standard way of operating: they argued very hard right down to the wire, but, when we got to the end, they did not deny me a consensus on what had been sort of agreed, because they did not want to be seen to be opposed to the general movement in a humanitarian direction, which was the aim of that Red Cross conference.

In other words, the United States is basically there with the goodies, but the way they play it within their political system is rather different. I will give you an outstanding example of that: the United States still has not ratified the 1977 protocols of the Geneva conventions of 1949. The 1977 protocols of those Geneva conventions are the absolutely essential additions to the 1949 Geneva conventions which introduce international humanitarian law into internal conflict. The International Committee of the Red Cross is currently engaged in over 60 actual war zones around the world. The licence it has to be there is actually under the additional protocols of the Geneva conventions which have not been ratified by the United States. But the Congress—not the Administration, the Congress—provides about 20 per cent of the funding to the International Committee of the Red Cross to operate under those 1977 protocols. So one of the most effective supporters in the world of the 1977 protocols is the country that has not ratified them. And it tried to prevent Australia from ratifying them right up until 1991. It argued between 1977 and 1991 that we should not ratify them, their lobbyists from the military argued with our military, we kept delaying and, eventually, we did ratify. One has to say that frogs have not rained from the sky, or whatever, since that happened. The ADF has worked very happily within those protocols. In fact, the International Committee of the Red Cross would be severely handicapped in the internal conflicts—which are most conflicts these days—if those protocols were not actively supported by the United States.

So I want to put that question of the United States in some sort of context, because it is not awfully clear and it is easy to say, 'Well, the United States won't ratify this, so why on earth should Australia do so?' There are very particular domestic reasons why the United States is unlikely to ratify the International Criminal Court; but, equally, it is quite possible that the United States will provide a substantial part of the money. They also, as a matter of record, played a very constructive approach in the preparatory conferences to the Rome conference. They were exceptionally helpful throughout that whole series. They were arguing hard, as they normally do, but they played a very constructive role and, in the end, they signed it. I think that is important.

There is one further political issue that I would like to raise. It has actually been raised very strongly by a former colleague of mine. It is somebody whom I have had a number of dealings with and, in fact, on a lot of economic issues I have been very much on side with, and that is Mr John Stone. He and I very happily shared a position in shadow cabinet for some time, and I have known him for many years. But I have to take issue with a general point he makes about treaties. In his submission, where he attached a speech he had given to the Samuel Griffith Society, he referred to a group of treaties as 'moral vanity treaties'. These were any treaties that related to any kind of human rights.

As I understand it, the argument—I hope I am not misquoting him, but I do not think I am—is that since these great violations of human rights do not occur in Australia—and basically they do not because Australia is one of the most free and wonderful countries in the world—why on earth should we be signing treaties which merely inflate the moral vanity of those pressing these

highfalutin issues? In other words, in Australia you do not have crimes against humanity and you do not have mass rape by soldiers and all that sort of thing, so why is it in Australia's interest to sign these treaties? The argument is that that is moral vanity on the part of well-meaning people who really are trying to press others to follow a view and be goody-goodies around the rest of the world. What is the use of that? You should have a very practical view about what you sign and only sign it if there is an immediate practical benefit to Australia.

Since I am not now Secretary General of the Red Cross, I am not so confined in making political remarks, but even coming from the same side of politics as Mr Stone, he and I just do not agree on this at all. I believe that countries like Australia, which has an outstanding record in human rights, should be prepared to speak up in a general sense to support better behaviour around the world, and one way of doing that is to have treaties which encourage better behaviour. I think it is incumbent upon us to support those actions, even though in some cases you know that you are beating your head against a brick wall. In the case of the Taliban, for example, you do not get very far. I have negotiated with the Taliban. I have been in Afghanistan during the war. I had people in Kabul while it was being shelled and I was there with them, so I know these people. I have a very strong view that we in Australia—comfortably sitting in Melbourne, Sydney, Cairns or wherever—simply cannot say that we will not have any particular interest in these matters or join with other nations who feel the same way as we do in trying to improve the lot of human kind. I believe strongly that we should do that.

And the Australian people feel that way. In the Rwanda conflict, when people saw on CNN the dreadful things that were happening in Rwanda—and this was broadcast through our commercial and ABC television—they put forward over $30 million of their own money for relief. People went over there. One of my colleagues, Senator John Herron, went there as a doctor because there was this great outpouring of concern about that. What about East Timor? When people saw things on television that were happening in East Timor, their hearts poured out.

One could ask: what does an international treaty—a so-called moral vanity treaty, as my friend John Stone calls it—do? I merely quote what one of the prosecutors in Nuremberg said when somebody asked, 'What is the use of international humanitarian law? It is only a set of prescriptions.' In fact, they were saying it did not have any sanctions, although they had a few sanctions in Nuremberg. One of the American prosecutors said, 'Look. If it weren't for international humanitarian law, military hospitals would be bombed all of the time instead of some of the time.' In other words, what we are doing here is always at the margin. We are always trying to move in the direction of making the world a better place. If Australia does not take part in that actively and generously, I do not think we are doing what we should do internationally in a political sense.

The International Criminal Court goes to the heart of this question of impunity for war crimes. War crimes, over history, have been some of the very worst that we have seen. I have a particular personal feeling about this based on visiting these places. For the last seven years I have been sending young Australians—and not all of them were young—to war zones to work with the International Committee of the Red Cross. I visited those people in those places, such as Rwanda. We have a big surgical hospital up in north Kenya dealing with the wounded out of Sudan, and we have always had about six or eight people working in Sudan and in north Kenya. I have been to the Bosnian war, going down into the middle of Bosnia during that war. I was in

Kosovo just a day or so after the Serbs had left and KFOR were just starting to come in. I have seen the devastation; I have seen the effects on people. The fact is that people over the centuries have been able to get away with all that, to flout international humanitarian law—because the rules are there and they are very clear—and there has not been any mechanism to try and put pressure on this whole process, as there is in domestic law. But I have a particular personal concern added to the concern of the International Committee of the Red Cross and of the Red Cross movement generally.

That is my submission, Mr Chairman. It has a measure of personal emotion in it. The point I would really like to leave with you is that this is simply not a fringe issue; this is not some group of ratbags on the fringe trying to press for something that is going to be mortally offensive to everybody. The court itself, when it is set up, will only remain in position if countries with advanced legal systems and the rule of law—which are the countries with the money—choose to continue to support it. If a court were to be produced with a whole lot of ratbag judges from funny places that were not themselves subject to the rule of law, there is simply no way the thing would get off the ground or continue. It could only continue if supported by what these days we would call First World countries, who have the resources to support it and whose legal systems are the ones that will inform the rules. Also, to go back to what I said about Australian involvement, the Australian involvement in New York in the preparatory work and in the post Rome conference work on the rules of the court has been quite critical to ensuring that the rules are as good as you can get them, given that you have to have international agreement on that.

With your permission, Mr Chairman, I will ask Professor Tate to address that question of sovereignty, unless you would like to address questions to me first.

CHAIR—No, do the statements first and then we will go to questions. Please go ahead, Professor Tate.

Prof. Tate—Mr Chairman and members, thank you very much for the opportunity to address you. I think it is very important that the Australian parliament asserts the primacy of its national criminal jurisdiction in respect to this whole matter. Reflecting on this, I could not help but note how the mode envisaged for the operation of this international treaty is so very different to the operation of the War Crimes Tribunal in The Hague—I was the ambassador to the Netherlands at the time it was being set up.

The first case there involved a chap called Tadic, who was silly enough to try to lose himself in the mob of refugees from Yugoslavia in a German town. He was identified and seized by the German authorities, who had the capacity to try him: they had the laws and the prosecutorial and investigative expertise. But he was seized by the War Crimes Tribunal and taken to The Hague—they came over the top of the German authorities. The Rome treaty proceeds on a completely different basis. It proceeds on the basis that this is not to be allowed, that the national criminal jurisdiction of a state whose national it is alleged has committed one of these infringements of international humanitarian law should have the primacy of jurisdiction: the opportunity to investigate, prosecute and try that offence.

In thinking about this I had a look at the War Crimes Amendment Act 1988, which I shepherded through the Senate back then—12 years ago now. Operating under a lot of pressure

from Senator Robert Hill, we actually specified very precisely in that act the theatre of war, the area of conflict, which would be subject to the jurisdiction of the Australian courts in this case. We said 'war' means a war insofar as it occurred in Europe in the period beginning on 1 September 1939 and ending on 8 May 1945; 'occupation'—I remember Senator Hill moving this and I accepted it—refers to Latvia, Lithuania, Estonia between certain dates, and so on.

It strikes me that the parliament in its legislation supporting the ratification of this treaty—if you are so minded as to suggest that it should—should have some sort of provision in it taking advantage of article 1 of the statute and say in respect of any peacekeeping, or peace enforcing, or combat operations involving Australian personnel, ADF personnel, then Australian courts will exercise the national criminal jurisdiction. Then the act should set out the crimes that are covered by the treaty and provide for a mode of prosecution and trial—possibly in the Federal Court, I suppose. Or it could be done by way of regulation. In other words, you pass an act enabling the prosecution of all these crimes but saying that it will become operative only if the parliament is presented with a regulation specifying certain theatres of conflict, certain dates, particular peacekeeping, peace enforcing or combat operations in which the ADF is involved.

Whichever sort of method you use, we have the experience already on our statute books, endorsed by our parliament, of a way in which the Australian parliament says in relation to certain alleged crimes overseas that our Australian courts will be seized of the matter and prosecutions should be carried out and can be carried out in Australia. I think it is very important that that national criminal jurisdiction, the primacy of which is asserted right throughout this treaty but particularly in preamble paragraph 10 and article 1—that is the way it operates—should be taken advantage of and we should make it very clear to the International Criminal Court that we in Australia, having a well functioning criminal justice system which no-one can say is incapable of trying these sorts of crimes and which no-one can say is involved in sham operations designed to protect an alleged breach of international humanitarian law, can assert our primacy in this matter, and I am quite confident that our assertion of the primacy of our jurisdiction would be respected by the International Criminal Court.

As Mr Carlton has said, if it were the case that the International Criminal Court tried to come over the top then the whole thing would collapse. France and Germany, two much more powerful states than Australia with well functioning legal systems themselves, have ratified—not only signed—this treaty, and there is no way in which they could possibly tolerate the International Criminal Court coming in over the top of a nation state similar to theirs in sophistication of judicial processes. I think that if something like that is done, and done very expressly and very explicitly, taking advantage of article 1 of the treaty, then our parliament will have properly exercised its responsibility to ensure that particularly ADF personnel overseas are subject only to the jurisdiction of Australian courts.

There may be instances where the Australian government and parliament think that if an Australian citizen gets caught up in operations in a civil war overseas—perhaps drawn back by love of the former homeland or of his parents or something like that—and it is alleged that he committed a war crime or crime against humanity, then rather than try him in Australia, if it is alleged that he has committed one of these barbaric acts, then perhaps the ICC might be the tribunal where that person is tried. You are all politicians. You know that during the Yugoslav conflict how remarkable Australian society was in that you could have the Serbs outside the

Victorian parliament demonstrating one day and the Croats the next, but there was no great murderous violence one against the other.

Perhaps if a Serb, a Croat or a Muslim had been put on trial in Australia, that might have exacerbated tensions between the parties. It might well be that the Australian people, parliament and government would say that in those sorts of situations perhaps the person should be tried by the ICC. But there I have another suggestion—once again based on the War Crimes Amendment Act 1988. If there is to be a surrender to the ICC of an Australian citizen, resident or some person taking cover as a refugee coming in from East Timor—let us say a militiaman came in under the cover of a boatload of refugees—the extradition and surrender request must be supported by prima facie evidence. In other words, we should assert our own common law heritage in this respect. I think it was Senator Robert Hill—my memory is a little vague—certainly in the War Crimes Amendment Act, even though I had taken through changes to the extradition law to allow us to operate with civil law jurisdictions. I have to confess, Mr Chairman—

CHAIR—Government policy, not your own.

Prof. Tate—Nevertheless, under section 22 of the War Crimes Amendment Act, we put in a provision that, if there were to be an extradition overseas for these sorts of crimes, a person is not eligible for surrender unless the magistrate is satisfied that there has been established a prima facie case that the person committed the offence against this act; in other words, that there is evidence that, if uncontroverted, would provide sufficient grounds to put the person on trial. We already have in our Australian parliamentary statute books that particular provision. I think the ICC and the assembly of states parties under this treaty would accept that that is the way the Australian parliament looks at these particular requirements. It would pass muster under the various provisions of the treaty.

I am drawing on a little bit of experience in The Hague and in parliament to suggest that there are ways in which a lot of the proper concerns of the community can be met. The major thing to emphasise is that the Tadic snatch out of Germany—the German authorities acquiesced because they had to—is not the way in which this tribunal can operate. It is deliberately structured on different principles. That is the only reason that countries like France and Germany could possibly ratify it. Thank you, Mr Chairman.

Prof. McCormack—I will try to be brief, because we are anxious to answer your questions. I hope you are keen to ask some of us. I wanted to make my submission focus on some of the common and reiterated legal objections that appeared in some of the written submissions and in the press coverage in relation to this issue of the Rome statute. There are three key arguments that I want to make. The first argument is a response to allegations that the Rome statute creates new law and is therefore inconsistent with international law, and there are two points on that which I would like to return to. The second argument is about an alleged lack of clarity of subject matter jurisdiction in the Rome statute, particularly on the definition of crimes against humanity and the definition of war crimes. I would like to return to both of those briefly. The third argument is that the statute is inconsistent with existing international legal principles, including a key provision of the United Nations Charter. I will deal with each of those in turn as concisely as I can.

First, in relation to the alleged argument that the statute creates new law, I said there were two key issues. One of them is a question of forced pregnancy, which appears in the enumerated list of crimes against humanity in article 7, paragraph 1, subparagraph (g) of the statute, and then reappears in article 8(2)(b)(xxii) as a war crime. The allegation is that enforced pregnancy is made a crime for the first time in this statute. Further, the possibility exists, as a result of making forced pregnancy a crime, that a state policy prohibiting abortion can constitute a crime against humanity because it is forcing women to remain pregnant. I want to respond to that allegation because I think it is entirely fallacious. That argument is based on article 7(2)(f) of the statute, which gives the clarification to the meaning of the term 'forced pregnancy' found in 7(1)(g). Article 7(2)(f) says:

'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.

In the Rome negotiations for the statute—and I was part of the Australian government delegation as an expert international legal adviser to the delegation; I negotiated article 7, 'Crimes against humanity' on behalf of the Australian government—there was a very intense dispute about the inclusion of forced pregnancy in the list of explicit sexual offences, both as crimes against humanity and as war crimes. The dispute was primarily led on one side by Bosnia-Herzegovina, which in my view, understandably, and I think in the view of almost every delegation participating in Rome, had a very serious case to argue because of the policy practised by Serb militia and Serb government forces of forcibly impregnating Muslim women and keeping them in custody either until their babies were born or at least until the term of their pregnancies went so far that abortion was impossible, in order to change the ethnic composition of the child. It would no longer be Muslim, it would Serb because the father determines the ethnic identity of the child. This is a reprehensible practice in war by anybody's standards and, in my view, ought to be included explicitly as a crime—both as a war crime and as a crime against humanity—if the threshold requirements for the quantitative nature of crimes against humanity are met.

On the other side of the dispute—Bosnia-Herzegovina was leading the charge on this view—the Holy See and the Irish government were very concerned about, in particular, the Irish government's constitutionally enshrined power to hold a female ward of the state in custody if she was pregnant to ensure that she does not go elsewhere outside the Republic of Ireland to have an abortion. The Irish government did not want that government policy to be interpreted as a crime against humanity, and that is exactly the reason for the compromise clarification in article 7(2)(f). So I am very disappointed to see the misinformation in allegations in written submissions that forced pregnancy is a new crime and that this court will be able to go out and get governments who support a prohibition on abortion.

The second argument about the statute creating new law is that in this statute—this is the allegation, not my view—even non-states parties can be bound by the statute. This has never happened before in international law, at least not since the Treaty of Westphalia in 1648. That, in fact, is entirely incorrect, and it is wrong for several reasons. First of all, it is not non-states parties that will be bound but the nationals of non-states parties. Even leaving that aside, the reality is that the concept of universal jurisdiction that one state can try non-nationals—nationals of another state—for acts committed outside its own geographic territory and perpetrated against non-nationals of the state has existed at least since the Geneva conventions

of 1949. That concept of universal jurisdiction appears in the torture convention and in the hostage taking convention. In each case in Australian domestic legislation in respect of those treaties—our Geneva Conventions Act, our Crimes (Torture) Act, our Crimes (Hostages) Act, and, indeed, the War Crimes Amendment Act that Professor Tate referred to—our courts in Australia possess jurisdictional competence to try non-Australians for acts committed outside of Australian territory perpetrated against non-Australians. The principle is well established in domestic law and in international law. It is an inaccuracy to argue that this statute creates new international law by potentially binding non-states parties.

What the Rome statute does is acknowledge the existing international law reality and incorporate it into the statute. I think the critical question in response to that is: why then, if the legal regime already exists under domestic law, is the International Criminal Court necessary at all? The answer to that, in my view, is that exclusive reliance on national court enforcement of international law has been shown to be—what I would describe as—pathetically inadequate, ad hoc, inconsistent and unsystematic. Our own experience in Australia of trying alleged Nazi war criminals is illustrative of that.

What I think the International Criminal Court will do, apart from actually increasing the rate of prosecutions of those alleged to have committed war crimes and crimes against humanity, is actually act as a catalyst to encourage states to take more seriously their international obligations in respect of enforcement, and I think we are already seeing that. I think the Pinochet proceedings in the UK are an example of it, and I think the proceedings in Canada in response to Canadian defence force troops torturing to death a Somali national—a major board of inquiry, a court martial and, in the end, the disbandment of the whole air regiment that was associated with that atrocity—is a good example of developments in international law influencing national jurisdictions to take more seriously enforcement of international criminal law.

I would like to make a couple of comments now about the allegations of a lack of clarity of subject matter jurisdiction. In respect of crimes against humanity, the argument seems to be that crimes against humanity do not need to be committed in war. The Rome statute removes the nexus with an armed conflict for the commission of a crime against humanity so that it can be committed in peacetime. In a couple of the written submissions that you have already received some people say that that is outrageous because that means that citizens can be tried for going about their daily business if, in the view of some out-of-control judges in the International Criminal Court, they decide that particular practices in one society are unacceptable to them.

This, in my view, completely misunderstands what really happened in the negotiation for the definition of the crimes against humanity provision in Rome. The crime against humanity requires threshold quantitative and qualitative elements. We are talking about a multiple series of acts—and the list of acts is listed—and they have to be committed in a deliberate attack on part of a civilian population in either a widespread or a systematic way. We are not just talking about the capacity for a judge or a group of judges to decide that a particular practice in a particularly society is unacceptable and a crime against humanity.

There was incredibly protracted negotiation of each of these provisions in article 7—and I think it is also important to point out that these provisions must be read in conjunction with the elements of the crimes. A subsequent document, negotiated at preparatory commission meetings

after Rome in New York over an 18-month period, puts the specific detail required for a prosecutor to prove a particular crime in respect of each of the offences. The suggestion that somehow or other crimes against humanity is just an amorphous or loose concept and is dangerous as a consequence of that lack of clarity, is a misrepresentation of the truth.

In relation to war crimes, the allegation is apparently that extending the category of war crimes to non-international armed conflict is a terrible development because, if an armed conflict occurred in Australia, we could all be tried as troublemakers. Mr Carlton referred to the reality of non-international armed conflict. The ICRC overwhelmingly is dealing with non-international armed conflict in terms of its involvement in conflicts going on around the world. This is the way wars are now fought. Even the US delegation was extremely helpful and constructive in the Rome negotiations to ensure that the definition of war crimes extended to non-international armed conflict.

My own view is that the US is very happy not to participate in the court because it cannot control the proceedings of the court but will be very happy, also, to use the Security Council, because of its permanent member status, to refer situations to the court and so support it in that way. As long as the US can be sure that the court is working with conflicts that it is happy for it to work with it will be very supportive of the court's actions.

Finally, I mentioned the reference to the United Nations Charter and article 2(7). That has been referred to in a number of submissions that have been received and in some of the media discussion about the statute. Unfortunately, all the references to article 2(7) have stopped at the end of the first limb of article 2(7), which is the provision that protects the domestic jurisdiction of any member state of the UN from UN interference. But the provision has a very important qualification. The second limb of that provision says:

... this principle—

that is, the principle of non-interference by the UN in the internal affairs of a state—

shall not prejudice the application of enforcement measures under Chapter VII.

Chapter VII is the provision that allows the Security Council to intervene in whatever way it deems fit internationally because it recognises that a threat to international peace and security or a breach of international peace and security has occurred. I think that qualification is very important to understand because, when the UN Charter was negotiated in San Francisco, including by the Australian delegation, it was always accepted that the Security Council must have the constitutional authority to respond to threats to or to breaches of international peace and security.

In establishing the International Criminal Court—and I would refer here to the submission by Professor Tate—it is absolutely fundamental that we understand that the intention of all states parties, not just some of them but all of them including the Australian delegation, was that this court must be complementary only to national criminal jurisdictions; that it must not model the two ad hoc tribunals for the former Yugoslavia and Rwanda, both of which have primacy over the domestic jurisdictions of the countries they are dealing with. All states parties, I would

argue, were entirely in agreement on that principle as well as on the principle of non-retrospective application of the statute. I think I should finish. Let us have some interaction.

Senator LUDWIG—Thank you, gentlemen, for a very articulate presentation. While I strongly endorse the objectives of the establishment of the ICC and the need for Australia to take a leadership role in this, I am still not totally convinced that Australia's sovereignty is completely protected. I understand what you are saying, that the whole basis of this is the primacy of the national jurisdiction, but is it not possible, even given the principle of complementarity, that there could be a situation where the judges forming the ICC would be of the opinion that the Australian government is not genuinely willing to prosecute a case that they think ought to be prosecuted? Is it not at least possible that the ICC could come in over the top of the Australian jurisdiction and try an Australian citizen even when the Australian jurisdiction has decided that prosecution is not appropriate?

Mr Carlton—I think that is what I would call the sort of nuclear trigger, if the court began to behave in that way. As far as the Rome statute is concerned, of course you are correct: ultimately, they do have that power; there is no question about that. But if they capriciously used that power and if it were seen to be used against countries whose rule of law was virtually impeccable, as ours is, there is simply no way that the main supporters of the court and the main funders of the court would continue to support it. If an Australian government had become so extraordinary that it was regarded in that way by its peers, maybe that would be possible theoretically.

Senator BARTLETT—That might be the case, as Reverend Tate said, with France or Germany. But, as a smaller player, can Australia be sure that its interests will be protected in that situation?

Mr Carlton—It is a question of whether they see that as a threat to their interests, and of course they would. If a court were going to behave like that towards a country like Australia, then they are all threatened by it. We know in life that nothing is always 100 per cent possible. The International Committee of the Red Cross itself—not in any way a fringe organisation; it is the principal succour to hundreds of thousands of people around the world, prisoners of war, our own prisoners of war and so on—has been arguing for a set of rules to try to end the impunity of war criminals since about 1870. What has come out of here is a very much modified proposal compared with what some of the more gung-ho people were looking for. It is way down the line from The Hague tribunals, for example. You have to have that balance. Your question is spot on; I think it is the key question.

Mr BARTLETT—It is the one we are grappling with.

Mr Carlton—Yes. It is the one I dealt with in my introduction. It is hard in a country like this to picture the unbelievable horror of all this, to picture the horrible things we are talking about. Tim McCormack mentioned what happened in Bosnia—and I have people from Bosnia working in my office and I visited Bosnia during the war. Kosovo is not quite the same, but there were terrible things happening there. And there was the slaughter in Rwanda. These things are just way beyond people's ordinary understanding of horror. We in this country become terribly distressed when we see something happen within our own community—when a particular crime

is committed on an individual, a child is mistreated and so on. This is going on on a massive scale year after year after year. That is really the balance.

You—correctly and, I am pleased to say, under the new arrangement for handling treaties; they are no longer dealt with in the cupboard, which was the bad old way—have to face up to what I believe is the critical issue. That is the big issue. All the others are relatively minor. Most of the things that we have looked at are just wrong. I have read a whole lot of submissions from people, seen stuff in the press and seen things in letters written by former generals that are quite wrong. But you obviously can see through all that, and parliamentary committees have the expertise to do that. Kerry, you are spot on; that is the key question.

Mr BARTLETT—I will follow that up with one other question. Jim, you just mentioned comments that have been made, including letters to the press and letters from former generals, are wrong. A letter from retired senior Australian military personnel said in the *Australian Financial Review* earlier this week:

> So wide will the ICC jurisdiction be that Australian servicemen would not be protected against charges which could not be sustained under the provisions of the Australian Defence Force Discipline Act.

Can you comment on that?

Prof. McCormack—If it is okay for me to answer it, I would love to do that. I think that is not entirely inaccurate. That statement is true because at the moment the Australian Defence Force Discipline Act basically allows for the transport of the criminal law of the ACT with ADF deployment wherever it goes in the world. Under our existing criminal law, the subject matter jurisdiction of the International Criminal Court is not comprehensively covered. If we do ratify the statute and if we as a nation want to benefit from the complementarity formula as it is written into the statute, then we need to make sure that we have comprehensive legislation so that the Australian Defence Force Discipline Act would cover any act that is covered in the subject matter jurisdiction of the court, because then the Australian government can choose to exercise its primary jurisdictional right. Without that legislation—and the gaps really are in relation to the Geneva Conventions Act only covering international armed conflict and not non-international armed conflict; and the ADF has been involved in a number of internal armed conflict deployments—there is no provision for crimes against humanity in Australian domestic law.

Mr BARTLETT—But even if our legislation were written to cover those provisions, the ICC could still presumably come in over the top?

Prof. McCormack—I am sorry, that is where I disagree with that statement. In relation to the scope of the Australian Defence Force Discipline Act, I think that is accurate. If the Australian Defence Force Discipline Act was comprehensive, I think that is then a misunderstanding of the way the formula is written. Jim and I from the Australian Red Cross cohosted an intergovernmental conference with the Department of Foreign Affairs and Trade and the International Committee of the Red Cross Delegation for the Pacific Region. It was a closed working conference with representatives from 22 regional states from South-East Asia and the South Pacific on the International Criminal Court held in May 1998, a month before the diplomatic conference commenced in June.

The prosecutor of the International Criminal Tribunal for the former Yugoslavia at the time and now a justice of the Supreme Court of Canada, Louise Arbour, came to speak to the conference to talk about the workings of the tribunal as a forerunner to the International Criminal Court. She actually claimed that, in her view, the complementarity formula was too weak and she wanted it to be stronger. The reason why she wanted it to be stronger is that it is okay perhaps for the court to say in a situation like Somalia or East Timor that the criminal law has broken down. This state is genuinely unable to try these people—maybe it is questionable about what the law is, because there is certainly no court process, or it is unwilling because a state decides that they are not going to try a person.

There are some situations where it is uncontroversial for the court to exercise its jurisdiction because the state of nationality, one way or another, is unable to do it. But Louise Abour then said that if the state of nationality tries an individual, it will be an intensely political thing for the court to decide that this state is still genuinely unable or unwilling to try this person. That is, to actually come out with a statement saying, 'This judicial system is not up to it and we are going to override it'. She said, 'I cannot imagine that happening. I cannot believe that a prosecutor would act that way and judges would act that way.' If they did, I do not think it matters which state it would be against—whether it was Australia, Western Samoa or Tuvalu—it would not matter how small it was. France, Germany and the UK when they ratify would all say, 'That is it. There is no way if the court is going to act that way and abuse the formulation that we put in place in Rome to guarantee our own sovereignty.' I mean, sovereignty was alive and well in the Rome diplomatic conference—

CHAIR—I am sorry, I will have to stop you. We have limited time and all the members need to have an equal chance to ask some questions.

Prof. McCormack—I am sorry; I became excited.

Senator MASON—I have a couple of quick questions. Professor McCormack, you raise an interesting issue that we have addressed earlier today, which is the flip side of Mr Bartlett's question that in a sense addresses the key issue. That is, not only would this court potentially impinge on Australian legal sovereignty but also Australia's capacity to prosecute its foreign policy. Mr Carlton, that is perhaps the principal argument that the United States raises, partly that potentially the Bill of Rights does not apply and so forth but also the Americans argue that this court will compromise their capacity to prosecute American foreign policy and perhaps acts of aggression and terrorism against the United States fully. That is their argument. So it is a mixture of law and foreign policy.

But the flip side of Mr Bartlett's question would be—Professor McCormack touched on this, and it is something I am still grappling with—what if, for example, the People's Republic of China prosecutes one of its citizens and we think it is a sham prosecution. That worries me. Professor Tate raised the same problems about the whole show falling apart. Australia, for example, by signing up to this treaty surely at one level is at least a stop from saying that the whole process is a sham. What do you think of that; is that a possibility?

Prof. McCormack—I think it is. In that case, I would say that because the People's Republic of China is a permanent member of the security council then the court still would not act. I am an international lawyer but I am acknowledging the reality of international politics.

Senator MASON—That is the first time we have had that answer. That is absolutely—

Prof. McCormack—I would draw a distinction between Serbia and the People's Republic of China. I think if the International Criminal Court had existed prior to the Balkans conflict and Serbia prosecuted a Serbian general but did it in a way that was clearly a waste of space, just trying to make it look good, I think the International Criminal Court might have been prepared to say, 'That is a sham, and we are going to issue an indictment against that person.' They have the capacity to do it.

Senator MASON—But would they do it in the case of the People's Republic of China?

Prof. McCormack—No, I do not think they would—or the US, or France or the UK.

Senator MASON—At long last. I asked that because that is the flip side of the point that Mr Bartlett has been arguing: firstly, it is an impingement on our foreign policy and our legal system; and, secondly, it is whether the ICC would in fact have the capacity, diplomatic and political, to overrule and to say—as you said in your words—that the judicial system of let us say the People's Republic of China is not up to it. Are you still arguing that we should go down this route because it is better than nothing? Is that your argument?

Prof. McCormack—Absolutely. That is the position.

Mr Carlton—We in the Red Cross are facing reality day by day. For seven years I was worrying about whether one of my people was going to be killed the next day. We are facing what you can actually move along incrementally. International humanitarian law in its history has always lagged behind reality. Until the 1949 conventions it was not possible to protect civilians under the Geneva conventions. We caught up in mid-1949 because of terrible atrocities during World War II. Then it was not until 1977 that we realised that we had no jurisdiction over internal conflict. So it is always a question of following up. Going back and reading the history of the Red Cross, all these things have been argued year after year after year. The proposal to cover civilians was made in the Tokyo conference back in about 1935 or so—I cannot remember the exact date

Prof. McCormack—It took until 1949.

Mr Carlton—But it was not accepted. By 1949 there was a complete sea change in what the world powers were prepared to do.

Senator MASON—If I can just jump in, because we are pressed for time, and ask one very specific question: Professor McCormack, on the issue of the principle of non-retrospectivity, you argue that because this tribunal will not operate retrospectively then our actions in Vietnam and policies which led to the stolen generation of indigenous children would not be scrutinised by the court. Are you suggesting that if there was not a principle of non-retrospectivity that these sorts of issues could be brought before the ICC?

Prof. McCormack—I just make the point that that is the argument that is being made—that the court could look back at past events. But no delegation in Rome would accept that.

Senator MASON—Yes, that is not the question I am asking.

Prof. McCormack—You had better just try it again. It is a double hypothetical.

Senator MASON—It was, and I apologise for it. But let me ask this specifically: in relation to the stolen generation and to Australia's prosecution of the Vietnam War, in either of those instances would it be likely that Australian citizens could be taken before the International Criminal Court?

Prof. Tate—It just cannot happen because the treaty is written in a way which does not allow that to happen.

Prof. McCormack—That is not what he is asking.

Prof. Tate—I know.

Senator MASON—If it were retrospective. It is a hypothetical—

Mr Carlton—You are asking a question for us to make a value judgment, a legal judgment or a judicial view about whether or not something was a crime, and that is not a fair question.

Senator MASON—Let me explain my thought and then we will move on. Some wars are more popular than others are, and I would hate to see any sense that, just because the Vietnam War may not have been popular in certain people's eyes, therefore that gives a licence for a court—potentially politicised—like the ICC to prosecute. That is the problem.

Mr Carlton—Your real question is—it is not for me to phrase the question for somebody on the committee because I am no longer on committees—in the future, is it a real worry that some wars will receive more attention than others? Of course it is. It is the same kind of question as, 'Would the court be more likely to prosecute former Yugoslavia or Serbia than China?' It is the same sort of question. But, in the world of politics, in the world of reality and in the world of human conflict, these are the kinds of issues that we have to deal with every day.

Senator MASON—Thank you very much for that refreshing evidence.

Senator COONEY—Can I follow on from what I thought was excellent questioning by Senator Mason and consider this issue of how flawed can we accept this court as being—clearly it is flawed because it is not going to be able to act with the same force against the United States, China and the European Union as it is against other countries. Nevertheless, it has to be conceded that, no matter what court you are looking at, it is better to have some crime punished rather than no crime at all. I accept all that. But then a system can become so flawed that you have to worry a bit about it.

The answer to the questions about what would happen if Australia was unfairly treated was, 'Places like France and Germany would step in and withdraw the resources available to the court.' I think to myself that, during the last century, Germany had a few fairly heavy priors and so, I would have thought, had other nations. There was trouble in Northern Ireland and there

still is trouble in the Middle East, and so on. If justice is meant to be blindfolded—and according to the statue above us at the Supreme Court here it is—and if justice is meant to be applied without fear or favour, how much inadequacy can we allow in this court before it just becomes the instrument of a victor or a big person?

Mr Carlton—It will depend a lot on the ratifications. Mind you, the number of signatories is quite impressive. The number of ratifications so far is also the case. I think we are up to 29 so far which, given the relatively slow process of ratification we sensibly now go through—which we used not to—is fairly impressive. It will depend on the kind of confidence that is shown in the court by the number of signatories that ratify and the amount of money that is put into it. It will either build up in strength and be respected or it will not. What the Red Cross has been saying is that it is time to try it out; it is time to take this step. It is a modest step. There are a whole lot of things that the Red Cross was arguing for which are not there. But the countries that were negotiating very hard and in great detail decided, in their wisdom, this is as far as they should go. We have just got to see. Every justice system has its problems. I am about nine-tenths Irish—

Senator COONEY—I always thought there was some style about you.

Mr Carlton—and what has been happening in the United Kingdom legal system over the last 20 years in relation to my forebears bears a certain amount of scrutiny, if I may say so.

Senator COONEY—It sticks in the craw a bit, I suppose, to call it the International Criminal Court. Shouldn't we be calling it the Slavic and African Criminal Court, because that is really who we are going to direct it against?

Prof. McCormack—I do not think so. Do you want a response to that?

Senator COONEY—Yes, I want your response. Remember Henry V: he justified his advance to France and then cut the throats of the French noblemen outside Agincourt. We praise that; we sit there saying, 'That's really good,' because he was the goodie. If it is done by somebody else, the baddie, that is not so good. As far as this criminal court is concerned, what you say is probably right: we have got to start off from a lowly base and try to move into more elevated plains. But it worries me that the basis on which we would start is so low that it just might be tainted hereafter.

Prof. Tate—The hereafter—that is my cue.

Senator COONEY—Everybody has been calling you Professor Tate; I would like to hear what Father Tate has to say about this.

Prof. Tate—I am not entirely disagreeing with my colleagues, but I would ask: if the powerful were not threatened by this creation of an International Criminal Court, why is the United States so concerned? It is the only super power. The fact is that it is concerned that, if one of its nationals is allegedly involved in a breach of international humanitarian law in the territory of a state party, that national might be brought before the court or sought to be brought before the court. The only thing that could stop that would be a resolution of the UN Security Council requesting a deferral. You have only got to have one veto of that by a permanent

member and the area cannot protect its national. That is why it is concerned. It is not entirely true that power gives you some sort of guarantee that your nationals will not be subject to this court's jurisdiction. But I would also say that we are in early days; it is a step. There was a huge gap after the Nuremberg and Tokyo trials. We started with The Hague tribunal, extended to Rwanda. We are now taking another step but I think we should take it.

Senator COONEY—Yes, that is one interpretation as to why the United States is concerned. Another interpretation might be that, as we sit here analysing movements of war and the horror that I would have thought goes on in any war, people judging might not understand the pressures of the heat of battle and the madness that comes upon people when they are at war—which we seem to be blessing in some ways in taking this approach; we are taking the approach that there are good wars and bad wars—and might not understand an individual's situation and, therefore, a United States soldier might be subject, even in his or her absence, to scrutiny which is not necessarily fair. Simply because you have got judges does not mean to say they are going to be fair or competent.

Mr Carlton—I think that goes back to that political issue that was raised by Senator Mason. Just to go back to the example I gave when I was chairing that drafting committee and being hounded by United States negotiators against the Cubans and Iraqis. Basically the United States officials with their eyes on the Senate took the view that they were a very powerful country that acted honourably all the time and for them to be constrained by a Red Cross resolution on the humanitarian aspects of sanctions was unacceptable. They wanted to be able to impose sanctions as a major power whenever they felt like it without let or hindrance, and the implication was that they would always do it honourably and sensibly.

I am able to make political comment now, having left the Red Cross. Just have a look at the effect of the sanctions on the populace of Iraq—and I have people working in Iraq so I have direct evidence—and ask whether those sanctions work or not. The United States is the main protagonist of those sanctions and they are being looked at again by the new administration. But that is the basic reason why the United States does not like to be bound by any treaty at all really, except mechanical treaties like postal unions, because it likes to be politically absolutely the great power.

Senator COONEY—But isn't that the problem? We say, 'It is good to put sanctions on Iraq, because they are sort of not quite as human as everybody else and Saddam Hussein is an evil man. Therefore, that will be blessed.' But if you had a different personality there, it might not be blessed.

Mr Carlton—It is harder. During my life time—and you are a bit younger than I am I think, but not all that much—the general pressure of opinion and the immediacy of media coverage make it harder and harder for any government, particularly democratic governments, to behave in a bad way. In the United States there is such terror of getting into a situation like Vietnam again that perhaps quite sensible government actions have been avoided. So there is that constant pressure of scrutiny which certainly when I was a boy just simply was not there. Half the time you did not hear about these slaughters. Had there been CNN back in the Armenian slaughter of 1917—

Prof. Tate—And bad countries do not have marginal seats, so to speak.

CHAIR—We had better move along a bit.

Mr Carlton—As a former state secretary of my party, I am very much aware of the plight of marginal seat members.

Prof. McCormack—If William Calley had been tried by the International Criminal Court instead of being court-martialled in the US, I would hope he would have got more than three months house arrest. So far the ADF has had a relatively extremely good record in terms of discipline of troops—and I hope that continues; I am proud of that record so far—but, if one of them actually commits an atrocity anything like the My Lai massacre, then the Australian public in my view would rightfully demand that that person be prosecuted, and I hope the Australian government would prosecute him.

Senator COONEY—We as a nation depend on our armed forces for our security. We sent them to Vietnam in my view wrongly. We said, 'We are going to send you up there'—conscripted perhaps—'but if you step out of line in any way, we will come upon you. And, if we do not come upon you, we will let the International Criminal Court come upon you.' Whereas, if you are putting a plea in, you would say this conduct is rough, but the country that is not going to be prosecuted has created the situation in which that person moves.

Prof. McCormack—Our troops are taught what is acceptable and what is not acceptable. When they go out there, so far, they have been able to conduct themselves worthy of admiration.

Mr Carlton—We have been working with the ADF closely on training in international humanitarian law. The Australian Defence Force has been the best in the world—I believe by a long stretch—in terms of its training in these areas.

Senator LUDWIG—In your submission, you also talk about education seminars that you have been conducting, but I would like to take this opportunity to read you this article from the *Australian Financial Review*. Part of the way through, it says:

> The more or less random mix of judges from many different legal systems presages a bench skirting the edge of chaos. The judges, moreover, are to be elected by delegates from the participating nations. To believe there would be no political and factional deals is to deny human nature.

It goes on to say:

> The erosion of national sovereignty would be epic were a High Court to decline to hear argument on a case. The International Criminal Court might take it over, becoming our even higher court.

Two issues arise from that. I would like to give you the opportunity to, firstly, shed some light on some of the darkness where those comments might have come from and, secondly, in terms of the education seminars that you have had, are those the sorts of messages that you have been getting back?

Mr Carlton—It is fair to say that the people that have come along to all our kinds of things are not basically the people that are writing like that. One has to say that. Generally speaking, the Australian Red Cross spends something like $800,000 a year and employs quite a few

people in the dissemination of international humanitarian law to the general public, and it also has a strong collaboration with the ADF. It is treated very seriously by us. The Australian Red Cross employs a full-time manager, of the very highest intellectual capacity, to run this program.

Senator LUDWIG—She has not gone to have the baby, has she?

Mr Carlton—Yes, she is about to have a baby, so I think she has had to retire a bit earlier. For the kinds of seminars we hold, the kind of people that come to them are generally not the people who use that kind of emotive language. So I do not think we collected in those seminars a lot of the people that are reflected in some of the submissions you have seen, which have what I regard as the more outlandish statements in them. In other words, they are people who are probably inclined towards the Red Cross, inclined towards being concerned about these kinds of issues.

Senator LUDWIG—Yes, I was interested in the breadth of the education seminars you conducted. I thought at first it might be that you were preaching, in effect, to the converted.

Mr Carlton—People who do not know much about it—

Senator LUDWIG—I do not mean that in a negative way.

Mr Carlton—Most of them do not know much about these things before they come along, but they are sympathetically inclined. They are quite different from the public hearings on Defence, for example.

Prof. Tate—I want to speak about another part of that. It is a bit mischievous about the High Court. The High Court's role is not to decide whether a prosecution should occur within the Australian judicial system or the ICC should take the matter. It is a matter for the parliament to set out very clearly the primacy of Australia's national criminal jurisdiction. The High Court's role is to ensure that any legislation that goes through the parliament purporting to implement this treaty or to provide for that jurisdiction is within our constitutional powers, and there is no question of that being displaced. The High Court will always have the task, as it did with the War Crimes Act, of determining its constitutional validity. That is its role. Then the Australian judicial system, if that is what is invoked, to prosecute and try an allegation of a breach of these sorts of flaws will just roll along. I am sure it will do it very expertly.

Somebody raised the question of the war crimes prosecutions. They work so well within our system in a way with the juries and so on and so forth that people were acquitted, or it became evident that juries were not going to convict elderly pensioners. So our system worked.

Senator COONEY—Where are we going to get the person with the wisdom and the grace of the member of the Senate who put that legislation through the Senate?

Prof. Tate—If you are retiring at the next round, Senator, I am sure a proper appointment will be made.

Mr Carlton—There is a point about judges and so on. The other night I discussed this matter once again with Sir Ninian Stephen, who joined the Asia-Pacific grouping, the private meeting we had with representatives of about 22 governments; the Attorney-General; the Minister for Foreign Affairs; and Louise Arbour, the Chief Prosecutor. Sir Ninian was there the whole time. He has been intimately involved in all this and, of course, he has been a judge in The Hague. I had a further chat with him last Friday night about this whole issue. He expressed some alarm at a lot of the really wild accusations and suggestions being made about what is proposed, that it is way off the beam. With all his experience and wisdom, Sir Ninian was quite comfortable acting as a judge in The Hague. The selection of judges for The Hague turned out to be quite reasonable but, as you all correctly say, we cannot be absolutely certain what judges are going to be appointed. We have had certain appointments to our top court that I have had concern about.

CHAIR—Perhaps we will move on from there. To sum up, in the evidence given today, very little has been mentioned about the prosecutors who will hold office in those branches. That has given rise to a lot of members having misgivings about vexatious investigations being brought that, in a sense, have the effect of interfering in the sovereignty of a country like ours by looking over the shoulders of people who hold either political office or military office. We have not heard any evidence that tends to reduce those fears that the prosecutory strata of this outfit would not be infected with the same sorts of things that have troubled the UN human rights committees in Geneva. Indeed, the draft agreement between the UN and the ICC specifically provides for information to flow between organs of the UN and the ICC—and, fair enough, organs of the UN could be peacekeeping forces; that is obvious—and, furthermore, for such information to be confidential. For example, the United Nations will provide documents or information to the prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such information shall not be disclosed to third parties without the consent of the UN. That paints a pretty obvious scenario for people who are sceptical of it to think that here you have these committees in Geneva providing evidence or information to the prosecutor, who has proprio motu power to initiate investigations before they get to this pre-trial chamber, before they get to any of these thresholds you are talking about, and, in a sense, to inflict this thing on us in a political way. That is the trouble we have with it.

Prof. Tate—I have a couple of answers. One would be that, nevertheless, the pre-trial chamber is important from Australia's point of view, because there would be no request for the surrender of somebody from Australia without the prosecutor having to satisfy three judges that there was reasonable evidence, et cetera. As to your other matter, I suppose what you have to bear in mind is that, as in the former Yugoslavia, and as we saw in the *Weekend Australian* with regard to East Timor, evidence was gathered about the multiple rape of women as an instrument of terror—not just the lust of young soldiers but a way of trying to affect the future ethnic composition of a particular village or in order to facilitate ethnic cleansing because, of course, whole villages flee if they are facing that prospect. In that situation, evidence could be taken by a special rapporteur of the United Nations to protect the identity of the women who were making the complaints and so on. There are those confidentiality provisions. I think that is what it is meant to cover. I do not think it is meant to do anything but protect the potential witnesses from being subject to perhaps elimination by those who are accused.

CHAIR—I agree. In the cases of serious crimes, when we think about crimes in an ordinary sense of the word, these are perfectly reasonable sort of provisions. The misgivings people have

are the loose wording of the elements of the crimes plus some of these mechanisms for the prosecutor to get under way.

Prof. Tate—Can I just make another point. You are reinforcing, Mr Chairman, a reason for a country like Australia to be involved. When I was Ambassador to The Hague, I took great pride in not only Sir Ninian Stephen being on the bench but also Graeme Blewitt was a prosecutor and Grant Niemann, I think, was a deputy prosecutor. These are fellows who have carried the whole burden—prosecutors come and go but the deputy prosecutor has carried the whole burden of marshalling the admissible evidence and compiling the indictments, et cetera. It has been a fantastic operation by a very fair minded, decent Australian.

But, more than that, when I went to a graduation ceremony involving New South Wales policemen back in 1995, I was able to tell them—this was at a time when their morale was very low—that undoubtedly the best investigators and assemblers of evidence available to the War Crimes Tribunal in the Hague were New South Wales homicide squad officers. That was well recognised. They were far and away in front of the others because of their professional expertise and the fact that they had had some experience on our own war crimes work and you had to put it all in context. It is important that Australia be there in the ICC to ensure that those standards are maintained.

Mr Carlton—If I could make another point from a Red Cross point of view, because the International Committee of the Red Cross has a major stake in the potential success of this court, it had a very serious worry that its own field workers might be required to give evidence. Of course, if that were the case it would destroy the Red Cross because we would never be allowed into another field of war. We have to have that immunity.

If there is any funny business going on within the prosecutorial aspect of this court, then it is not just government representatives from countries like ours who are going to be working in there that will smell it in five seconds flat, but the International Committee of the Red Cross will be watching it like hawks and making representations privately—as they always do—to governments. The same kinds of issues apply. The kind of worries you have expressed are perfectly valid but they are the same worries as other members of the committee have expressed about judges, about the whole method and approach of the court and about how it is going to work. At each level one has concerns about entering into a new venture like this with a whole lot of other countries.

The countries that have carefully negotiated the treaty have been worrying about all these things in considerable detail—Professor McCormack has given that very detailed example of the forced pregnancy and I have experienced this when chairing drafting committees of these kinds with governments involved—and the amount of detail and concern about each individual tiny clause is enormous. That investment having been made, if there is any sort of fringe funny business or the kind of things that people have observed in committees of the United Nations which do not have anything like the standing, if that sort of thing starts to go on, then there will be big trouble.

We are hopeful and everybody would be working hard to ensure that that does not happen. There is no question that the fears that it might happen are justified; one has to fear and worry about those things. But within the terms of the treaty an enormous amount of work has been

done since Rome in getting the rules of procedure of the court done. There has been our own involvement in that directly—not just Australian government involvement but also Professor McCormack has been involved. We are hopeful that any diversion from true judicial process will be instantly observed and dealt with. We cannot say any more than that, because it is in the future and we do not know.

CHAIR—Thank you. One thing that arose out of Professor Tate's evidence is the very interesting piece of advice that, if an enabling act comes to the Australian parliament and we consider it as legislators, there might be some amendments we can make to it. Perhaps, Professor McCormack, you can come back to us on this with a written opinion. If the Australian parliament varies the enabling act so it is different from the treaty, how will the court regard our act? Can you explain later on what the legal position is? If we amend the enabling act to satisfy certain concerns we have, and yet still pass some sort of enabling act, how will these blokes regard that? Do you see what I mean?

Prof. McCormack—Yes.

Mr BARTLETT—I was going to ask a similar question. Could you take on notice to suggest other ways, if that one does not satisfy our concerns, that we could still ratify the treaty but address the concerns we have? Perhaps it could be by a declaratory statement as part of our ratification, if it is possible to do that. That would be very helpful.

Mr Carlton—You already have an addendum to the original submission from Professor McCormack—his paper on the need for Australian legislation.

Prof. McCormack—There is a note at the bottom of the submission about two published articles. I sent a hard copy of those, but I did not have them in electronic copy for the website. So the committee should have those available. The second of those articles, which is on the topic of complementarity, is an overview of existing Australian legislation in relation to the subject matter jurisdiction of the court, and attempts to expose where we are covered and where we are not covered at the moment.

CHAIR—Thanks very kindly.

[2.34 p.m.]

RICHES, Mr Graham, Vice Chairman, Coordinating Council, Legacy

CHAIR—Welcome. Are there any comments you wish to make about the capacity in which you appear?

Mr Riches—To the extent that we have some thousands of members in our movement throughout Australia, the council is a small coordinating unit that is called upon to speak on behalf of the Legacy movement of Australia. That does not mean to say that everyone necessarily agrees with the views that I may be expressing here today.

CHAIR—That is your problem, in a sense. We are happy to have evidence from you.

Mr Riches—Thank you, Mr Chairman, and members of the committee for the opportunity to make this oral submission further to Legacy's brief written submission on this important topic of the proposed International Criminal Court. For the record, by way of background, I would like to speak briefly about Legacy so that people understand what we are about, because not everyone will necessarily understand where we are coming from.

Legacy was founded by men who served in World War I. They believed it was their responsibility to see to the welfare of the wives and children of their comrades who died in the war and afterwards. Legacy began in 1923 and now has clubs in all capital cities, many country towns and in London. Members of Legacy give their time and effort voluntarily to assist widows and children in their care. With more than 130,000 widows and children of ex-servicepersons throughout Australia, Legacy's task is formidable and, with Australia's increasing role in peacekeeping, the task will continue. The children for whom Legacy accepts responsibility are known within the Legacy family as junior legatees. They enjoy many outdoor activities, educational programs, counselling, tutoring and guidance to ensure that as far as possible the opportunities denied them by the loss of a father are made up by Legacy. Equally, Legacy is committed to its many thousands of widows and provides care and understanding to newly bereaved widows, gives practical assistance, fosters friendships, encourages participation in the many activities and provides recreational outings through the many Legacy widows clubs now operating in Australia. It will be many years before Legacy's task is completed. Legacy will continue its caring task for as long as there is a need. Administratively, Legacy consists of some 50 autonomous clubs with over 5,000 members adhering to a common code and charter and with the Legacy Coordinating Council representing the movement at a national level.

Although Legacy is primarily an ex-servicemen's organisation, its role is to represent the widows and dependents of service men and women who died in active service or subsequently but not—and I stress not—the ex-service men and women themselves. That is a role primarily adopted by our friends in the RSL.

CHAIR—Could you now move to the ICC?

Mr Riches—Okay. Given Legacy's role, our interest is therefore more directed at the widows and families of non-combatants rather than at the combatants themselves.

Turning to Australia's involvement with the Statute of the International Criminal Court itself, we note the following. It appears to us that the statute is the culmination of developments in international law that began some centuries ago with international understandings between European countries concerning the discovery and acquisition of the new worlds, piracy and, later, slavery. Major advance occurred with the founding of the International Red Cross in the 1860s. After the Great War, international treaties founding the League of Nations and the permanent International Court of Justice, the abandoning of gas and chemical warfare, dealing with prisoners of war, et cetera, further promoted international law, and I cite this as a lead-in to the concerns we have.

The horrors of the Second World War resulted in further advances such as the Nuremberg and Tokyo war crimes tribunals with all their imperfections. It is interesting to note that, when Goering was served with his papers—indictments by a young British major who had himself been a prisoner of war—he made a comment to the effect that there seemed to be a court of the victors dealing with the vanquished, and in light of some of the previous comments that is rather an interesting observation. However, since then we have advanced a long way in these matters and the European community has established its own human rights tribunal as well the current Bosnian-Rwandan tribunals. I was interested that there has been very little mention so far—just previously in the short evidence that I heard by the Red Cross representatives—with regard to that body.

Throughout this history, whilst international law has primarily involved nation states, there has been the golden thread of concern for individual human rights, which has grown much stronger in the last 50 years. It is those individuals and their families—who are not combatants—that Legacy is concerned about, not the nation states and the actual combatants.

Hence the following comments on the actual statute. As a preliminary, we note the dangers in allowing the unfettered international interference with Australia's own legal processes for dealing with international crimes and have reservations about some of the statute's definitions and clauses, and definitions of the crimes in particular. However, given the statute's overriding principle of complementarity in relation to the jurisdiction of the tribunal relative to our own national jurisdiction and the distinguished record of Australia's defence forces, for example in East Timor—and I might add that I served in Vietnam as a legal officer, after having trained as an infantry officer, so I have first-hand experience of that—we currently do not see jurisdictional issues as an obstacle to Australia's ratifying the treaty. If such became apparent, we note that there are provisions allowing amendments to the treaty or withdrawal.

Now for our actual concerns. Firstly, access to the court for individuals—and I am expanding on the points that were raised briefly in our letter. In the light of the history of the development of international law and the rise of human rights, a mechanism should be devised whereby individuals should have direct access to the court to enable them to seek the trial of their alleged aggressors and oppressors. Examples of this include actions by the IRA prisoners against the UK government in the European Court of Human Rights in 1988, court proceedings recently in the United Kingdom and Spain against General Pinochet, and the recent unsuccessful actions by comfort women against their World War II Japanese oppressors. These are all individuals; they are not nation states; they are not combatants.

The type of mechanism could be that used in the recently restructured European Court of Human Rights. This would not give automatic access to the court but rather require applicants to, in effect, seek leave to apply in a way somewhat analogous to Australia's High Court procedures. The victims of atrocities and their families could thereby seek justice on their own behalf and on behalf of their deceased loved ones directly, without the wrangling of international relations and nation states, provided they could satisfy the requirements to obtain leave to appear. Given the sufferings of Australians in the Sandakan death march, the Burma railway, the murder of Australian nurses in the Dutch East Indies, Australia's more recent peacekeeping activities in Cambodia following the genocide of the Pol Pot regime and now our own actions in East Timor, we believe that Australia has a direct interest in giving individuals the right of access to the court.

Turning now to the matter of retrospectivity which has already been discussed, whilst Legacy recognises the difficulty in practical terms of enforcing retrospectivity, given that the legal notions underpinning many of the crimes have long been recognised in international law—for example, the 1864 Geneva convention on wounded and sick of the armed forces, the 1948 convention against genocide and the four 1949 Geneva conventions regarding sick and wounded military personnel, prisoners of war and protection of civilians—why should perpetrators of genocide, mass murder, systematic rape and wanton destruction escape justice nowadays simply because the formal structure of administering justice in the shape of the International Crimes Tribunal is only now being created when those crimes have long been accepted as such?

Regarding enforcement, Legacy believes that there is not much point in theoretically being able to bring transgressors to trial and conviction if, for example, those transgressors are protected by nations that hold sham trials—and that point was discussed previously—under the guise of complementarity or to refuse to properly carry out the court's sentences. It seems to us that at this stage the enforcement provisions of part 10, and in particular article 109 of the statute, lack teeth and that it would be more helpful if it spelled out the type of sanctions—perhaps of a cultural, economic and ultimately military nature. Finally, notwithstanding the above points, Legacy supports the creation of the International Criminal Court and the Australian government's involvement in the process but suggests that this be reviewed in light of experience, in say three years. Thank you.

Senator LUDWIG—Thank you for your submission. What I was particularly curious about was that you said you supported the establishment of the International Criminal Court. You then go on to say that there are more than three reasons—but we will use three as an example—why the proposed establishment of the International Criminal Court will fail to meet its objectives. You note, firstly, that obviously there is no direct mechanism for the victims and their legal representatives in the court; secondly, that there is no retrospectivity; and, thirdly, that there seems to be, in your view, a lack of means of enforcement of the court's decisions against recalcitrant states. Those are not in the proposed treaty and nor are they on the horizon. Do you raise those as a matter of complaint about the International Criminal Court and its establishment, in the sense that you would see it more holistically and as a greater court if it had those, or do you say that we should, in our deliberations, say, 'The International Criminal Court should not be established unless those three matters are satisfied'?

There would be many places where you could raise your concerns about the International Criminal Court, but we are past the point of those three issues. Although they are certainly weighty matters, of course they do not come up for discussion in the true sense of the word unless you then say that they are good reasons for not ratifying the treaty and that we should then say, 'Don't ratify the treaty until and unless those concerns are met.'

Mr Riches—Our view is that the treaty is not perfect at the present time but that there is a need to start somewhere in regard to this treaty, and that it is necessary to acknowledge what we see as the deficiencies. At the same time we take a more holistic approach to this, I think those were your words, and move forward with what we have and at an appropriate time in the future—because there is provision, as I read it, in the statute for amendments—we put those amendments forward. But the fact that it is not necessarily perfect at this stage only goes to show that it is typical of most legislation and many treaties, otherwise there would be no need for lawyers and courts and heaven knows what.

Senator COONEY—Thanks very much for that, Mr Riches. I am very clear on what you are saying, so thank you.

CHAIR—The definition of crimes against humanity is what troubles people who have expressed misgivings about it in evidence before us up until now. How do you feel about the scope of this definition, which includes the grounds listed under the heading of persecution including, for example, political persecution? How does Legacy feel about the breadth of all this?

Mr Riches—Obviously there are certain aspects of it that would concern us, and I will just cite several of them. Article 8, point 2(b)(ii) of the statute says:

Intentionally directing attacks against civilian objects, that is, objects which are not military objectives.

That is one that I think brings into play a lot of political aspects. Clausewitz—I think it was—said that war is international relations carried on by other means. That does not say much for international relations.

The bombing of civilian targets during the Second World War was seen as part of the overall structure of the carrying out of the war, and that was done by both sides. Yet, at the end of the war, it was seen that only one side—if you like, the vanquished—was brought to account with regard to this. One could argue that this is at least a step forward; we are at least signalling this problem. But the fact of the matter is that in this day and age major wars involve civilian populations, and they are as much part of the war machine as anything else. If what has been euphemistically described as collateral damage takes place, then it is hard to say what is the dividing line between an international crime and the legitimate conduct of war. Another point in article 8—2(b)(vi)—says:

Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion.

I would have an obvious problem with that. Let us say one is out on patrol with a group of four or five in hostile enemy territory. What happens if you come across a hostile combatant—if I can put it that way—or even a non-hostile one, who can threaten not only a mission but the lives

of your fellow soldiers? It is a serious dilemma, and I am not talking about Mei Lai—that was outrageous murder. Colonel Hackworth, the United States most heavily decorated officer in that war, condemned Calley's lenient treatment and his pardon by Nixon at the time. The standard of the Australian troops I think stands beyond reproach and, on the rare occasion that it did not, I can assure you that we used to bring the appropriate requirements of military law to apply, and proper trials were conducted over there with regard to that. I will not go into that now, but I have personal experience of that. That is one definition that causes me concern. Another one is article 8, point 2(b)(xii):

Declaring that no quarter will be given.

Again, you could argue over what that means—'declaring that no quarter will be given'. It can mean, in my view, deliberate slaughtering of the opposition or it can mean that you will go in with the full strength at your command. But these sorts of definitional problems are problems that are faced all the time by courts and judges around the world. There is nothing new with regard to that. So I cite those as some of the reasons.

CHAIR—I appreciate that. It is interesting that someone who has served in hostile situations has given evidence. We take that very seriously.

Senator MASON—I was not going to ask you a question, Mr Riches, but you have raised something that interests me—perhaps Dr Spry may also want to respond when he returns—and that is the complementarity principle that the International Criminal Court will take up jurisdiction only when a state is unwilling or unable. You mentioned President Nixon's pardoning of Lieutenant Calley. I was wondering how that would operate. In other words, what would happen if there were a proper tribunal—administered correctly; with an appropriate punishment, be it 10 years imprisonment or life imprisonment—and then President Nixon's or another executive clemency were invoked? According to the statute, I do not think the ICC would gain jurisdiction, because of the executive clemency. So you could circumvent the jurisdiction, couldn't you?

Mr Riches—Yes, and that is a problem we have with the enforcement provisions. In a sense, the tribunal ensures that a trial takes place and that it be done in accordance with proper procedures. How do you avoid the problem of the sham trial? The irony of the Nuremberg trials was that it was Stalin and Roosevelt who wanted the trials. Stalin wanted them for show purposes, and who did he have there but Vyshinsky?

Senator MASON—You are right. We have discussed the potential for sham prosecutions ad nauseam in this committee, but you are talking about more than that; you are actually talking about executive clemency after a bona fide trial.

Mr Riches—Yes, and there is no provision for that. It is not perfect, and this is why we have concerns with regard to enforcement. Calley is a classic example. Indeed, one could ask: how far up the chain should it go? General Mladic was but one cog, but a very important cog, in the Bosnian-Serb wheel. What about Karadzic? What about Milosevic? What is going to happen in Serbia if they run a trial there? What about the women who were raped? What about the families; what rights have they? Why was there not some sort of provision similar to the European human rights tribunal; why was that not put in? We say that, yes, this is a step in the

right direction but that it is not perfect. Certainly, the rights of our defence force must be protected. The best protection they can have is proper training and instruction—and we have heard already that that is of a world-class order—so that they do understand right from wrong and for our legal criminal system to be such that it can cope with these situations.

CHAIR—Thank you, Mr Riches, that is very interesting evidence. If you would like to add anything in the next few weeks or so by way of further written submissions, please do. We are quite happy to accept them, and the committee members will study them.

[3.00 p.m.]

SPRY, Dr Ian Charles Fowell, QC, Member, Council for the National Interest, and Editor, *National Observer*

CHAIR—Would you like to make some remarks and then we will have questions?

Dr Spry—Thank you, Mr Chairman. With regard to the capacity in which I am appearing, I would like to add that on these matters I also appear for the RSL—the Returned Services League of Australia.

First of all, I have some additional material for the committee. There is an index of the material, of which I have multiple copies. The material itself is quite bulky, and I am afraid I only have one copy here. I would ask your indulgence in having that copied at some stage and passed across to other members of the committee. The material which I have just handed across includes an address given late last year by Sir Harry Gibbs, the former Chief Justice of the High Court of Australia. Sir Harry has authorised me to say that he disagrees with the setting up of the court. Mr Justice Beach, of the Supreme Court of Victoria, has also authorised me to say that he disagrees with the setting up of the court.

The second document that I have handed up is a copy of a letter, which has been published in a number of Australian newspapers over the last few days, written by Major General Butler, Major General Digger James, Air Vice Marshal Jordan, Rear Admiral Philip Kennedy and Major General Ken Taylor. It is not a very long letter and, if it is convenient to the committee, it may be useful if I read it out now.

CHAIR—No, we have had it all day.

Dr Spry—You have seen that letter, have you?

CHAIR—Yes. We have been examining other witnesses on it.

Dr Spry—I see. The importance of that letter is, of course, that many members of the armed services cannot express views on these matters and retired members can, so they are able to speak freely. The third document I have handed up is a paper I wrote recently which is to be published as an article in a journal—not the *National Observer* but some other journal. The paper sets out what the Americans are doing with regard to setting out to enact legislation in view of the possible taking effect of the International Criminal Court statute. I have summarised there the key provisions of that particular legislation, which has been introduced and is still before committees in the American Congress. It can be seen from that short article of mine that the Americans are taking the matter very seriously indeed and that they regard this proposed court as a very serious threat to American independence.

The next document, a copy of which I have handed up, is an article by Professor Richard Wilkins, from Brigham Young University in the United States, who is an expert on the International Criminal Court and the problems that it raises. I would commend the article to members of the committee. I will not go through it all now but, at page 10, after dealing with other aspects of the proposed jurisdiction, he deals with the question of the Women's Caucus for

Gender Justice and with attempts by certain bodies to use the International Criminal Court to enforce what he refers to as 'social agendas'. At page 11 he says:

> During the past decade, the United Nations system has negotiated numerous "platforms", "agendas" and "declarations" setting out aspirational goals for Member States in virtually every area of human life. The Women's Caucus for Gender Justice unquestionably intends to use the International Criminal Court to enforce these (previously) "soft law" norms. As the Caucus' March booklet explains, "the creation of the world's first permanent criminal court" provides "an opportunity to codify as international law ... many of the strategic objectives outlined and committed to by Governments in (such documents as the Beijing) Platform for Action.'

That platform deals with abortion and attempts to make abortion available in all countries. I commend Professor Wilkins's article as indicating some of the problems which may be expected to arise if this court goes ahead and attempts are made to use it in this particular way. Undoubtedly such attempts would be made, whether successful or not.

Then there are a series of articles from a number of gentlemen: Brett Schaefer, Lee Casey and David Rivkin from the Heritage Foundation; Michael Scharf from the American Society of International Law; and Gary Dempsey from the CATO Institute. There are also two addresses by the former US Ambassador, David Scheffer, from the United States Department of State, on these particular matters, and also a transcript of evidence of hearings before the United States Congress in regard to the International Criminal Court. I will not go into those matters now, unless the committee particularly wishes me to do so. I think it is sufficient if the documents are handed across and the committee can look at those documents at its leisure.

CHAIR—We would rather hear what you think.

Dr Spry—A submission was put in earlier by me to the committee with which the RSL agrees. The submission indicates that the proposed International Criminal Court would in fact involve an unjustifiable interference with Australian sovereignty, in two areas particularly. First of all, in war situations the Australian Defence Force would be under unreasonable threat of constraint and, secondly, in non-defence and armed force situations Australian politicians, Australian civil servant and Australians generally would be subject to the possible application of the statutes in regard to matters which might be claimed to be genocide or abuses of human rights and would be at risk of being extradited and tried before this tribunal.

A key point which we would emphasise is this matter which is sometimes referred to as 'complementarity'. Often it is attempted to justify the application of the statute in Australia by saying that the principle of complementarity applies and that therefore Australia would be left to deal with war crimes on its own terms—because we have a good legal system and so on—and that there would be no need for the International Criminal Court to interfere. We would submit that that proposition is naive and unduly optimistic. If one looks at article 17 of the treaty, which deals with the so-called principle of complementarity, we see that in actual fact the court is entitled to proceed if it decides that the state in question—Australia, in our case—is unwilling or unable generally to carry out the investigation or prosecution. The decision as to whether Australia has been unwilling or unable generally to carry out the investigation is entirely the decision of the International Criminal Court. We are unable to make any finding on that matter ourselves; that is a matter for the International Criminal Court. The International Criminal Court might, for example, take this view because under Australian law we will not admit hearsay evidence because of certain risks in accepting hearsay evidence, and we will also not admit insufficiently verified documents in Australia. Also, in Australia we require a jury.

It may well be that if the International Criminal Court took the view that our courts had reached a decision they did not like, the court would be able to say, 'Well, they haven't admitted non-hearsay evidence. They haven't admitted insufficiently verified documents which we say are sufficient. They've required a jury; the jury is of Australians and would not be as likely to give an unbiased view of the matter as the International Criminal Court, which does not comprise Australians.' And there are a large number of other ways in which an international criminal court might be able to espouse the contention that in Australia there had not been an adequate judicial process. If the International Criminal Court reached that conclusion then it would simply assume jurisdiction. We would not be able to prevent that, however much time and effort had been put into Australian hearings and however much care had been taken in order to ensure that a correct decision had been reached. The principle of complementarity which has been put forward as a justification for our ratifying simply does not provide an adequate safeguard.

There are two situations, as I say, where one could be particularly concerned about the possible application of the International Criminal Court statute. The first is where Australian Defence Force members might be engaged in armed combat or in peacekeeping operations abroad. In those circumstances, one notes that there is very considerable ambiguity and difficulty in applying the definitions of genocide, crimes against humanity and war crimes as set out in articles 6, 7 and 8. Let us take, first of all, genocide. Article 6 says that genocide includes:

... an intent to destroy, in whole or in part, a national, ethnical, racial or religious group—

such as by:

(b) Causing serious bodily or mental harm to members of the group.

We have had the situation recently where in certain United Nations forums it has been put forward by people that genocide has been committed with regard to Aboriginals, perhaps in regard to the so-called stolen generation, the misnamed stolen generation group, and those claims have been taken quite seriously by the United Nations agencies. That is not to say that the matter is finally resolved yet, but the point to note is that there have been claims which have been given credence that Australians have involved themselves in genocide. If that were accepted by an International Criminal Court it would follow that it would be possible to extradite Australians and deal with them in the International Criminal Court. Then we come to crimes against humanity, and the definition in article 7 is:

For the purposes of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread of systemic attack directed against any civilian population. with knowledge of the attack.

And paragraph (h) of article 7 includes:

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law ...

Exactly what does that mean? What does 'persecution' mean in this context? All sorts of discriminations which may have a perfectly valid basis might, if one took a bizarre view of the matter, be regarded as persecution and, on that basis, the matter might be brought by the ICC

under the heading of crimes against humanity. Then we come to war crimes as defined in article 8. Under point (b) war crimes include:

Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

And under article 8, point (b)(ii):

Intentionally directing attacks against civilian objects, that is, objects which are not military objectives.

What difficulties would be faced by a soldier in the field or an airman in an aeroplane required to attack some particular object where it might be a matter of considerable difficulty to know whether the object was or was not a military objective? Another category here, which raises the same problem, is paragraph (b)(iv) of article 8, which states:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the national environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

Take the position of an airman or a soldier in the field. How would he be confident that particular orders would or would not satisfy those particular criteria? One must bear in mind that there may be no defence of superior orders under this particular statute. If something is a war crime or some other offence, there may be no defence at all to say that there have been superior orders. Another category which requires consideration is destroying property unjustifiably. That is in (xiii), which states:

Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war ...

What is meant by 'imperatively demanded by the necessities of war'? These are very marvellous phrases but, when it comes to actually applying them in any particular case, there is room for very grave doubt and uncertainty. Finally, paragraph (xxi) states:

Committing outrages upon personal dignity, in particular humiliating and degrading treatment ...

What is an outrage upon personal dignity? If somebody is taken away and locked up because he is suspected of being a member of the enemy and he turns out not to be, is that an outrage upon personal dignity? These phrases are extremely troublesome. Whatever they may mean or be found to mean, it is quite clear that in many situations members of the Australian defence forces would not be able to be confident that they are acting lawfully. Of course, an officer will be liable and responsible for what is done by his men under the statute. A general or air vice marshal or somebody like that would also be in the position where he might be brought before an international tribunal because he had not taken sufficient steps to prevent the so-called war crimes taking place. It is very easy after the event to say whether sufficient steps were taken. At the time, when a decision has to be made in a military context, it may be extremely difficult for any officer all the time to be confident that he has taken all steps to ensure that improper acts are not taking place under his command.

CHAIR—Can I ask you pause in the evidence and we will go to questions.

Dr Spry—Yes.

CHAIR—We get the most out of cross-examination and so will you.

Senator LUDWIG—I put this question to an earlier group and they gave me an answer, but I was curious about your view. You referred to the retired military officers and their letter, but there was another article in the *Australian Financial Review* which stated:

> The more or less random mix of judges from many different legal systems presages a bench skirting the edge of chaos. The judges, moreover, are to be elected by delegates from the participating nations. To believe there would be no political and factional deals is to deny human nature. The erosion of national sovereignty would be epic were a High Court to decline to hear argument on a case. The International Criminal Court might take it over, becoming our even higher court.

Is that the position you are putting to us?

Dr Spry—Those are additional points, if I might say so. One has to go next to the actual mechanism within the court and the people who compose it. One would have a prosecutor, who will have very great powers. He exercises certain powers to be subject to the pre-trial chamber, and the majority of two judges out of three will be able to make certain decisions there.

As somebody who has been in the Australian legal system for many years, one has very great doubts about how any cases will turn out at any particular time. Bear in mind that in this context it is quite likely that in a war time situation or in a peacekeeping situation, where feelings are high, there will be false evidence which is put forward or, at the very least, a significant risk of false evidence. I think it would be very difficult to be confident that any decision made by the International Criminal Court would be a just decision in all of the circumstances.

Senator LUDWIG—What about the national sovereignty?

Dr Spry—It does involve a detraction from the national sovereignty, and that really brings me to what I might call a constitutional point. I do not know whether you want me to look at the position under the Constitution now or whether I should make a separate written submission.

CHAIR—Make a written submission about that. We have been talking about it, but we do not have much time to go into it today.

Dr Spry—I will make a written submission. Section 71 and 73 of the Constitution do raise serious questions about whether this would be valid under the Constitution and whether an amendment of the Constitution might not be needed, but that is something I could go into at a later stage.

Senator LUDWIG—Do you come to the conclusion that the International Criminal Court is not a good thing and that Australia should not ratify?

Dr Spry—Yes.

Senator LUDWIG—As a consequence, do you think the world should not do anything about the atrocities that we hear so much about?

Dr Spry—No, I do not.

Senator LUDWIG—That is the connection I have difficulty with.

Dr Spry—I understand what you are saying. It has been put forward strongly that it is not in Australia's national interest to become a party to the court, to ratify, but that does not mean that other mechanisms should not be followed through in regard to punishment for war crimes. Recently, there has been reliance on what one might call ad hoc tribunals, such as the Yugoslavian tribunal, to deal with these problems. As far as one can see, though, those tribunals have proceeded fairly well. Certainly, one could not say that an international criminal court would proceed any better. Until some better proposal comes up, one should stick to the present system. It may be that, at some later stage, some more carefully drafted and more generally approved version of an international criminal court will arise, in which case one should look afresh at that. But, until something can be produced that is a lot better than the present proposal and that is not as damaging to Australia's interest, we should adhere to the present system of ad hoc tribunals in the special cases where that is necessary.

Senator COONEY—Dr Spry, you have made the position clear. Could I just put this proposition forward, and I would very much like your reply to it. Say that, instead of Australians being the ones who were going to be accused pursuant to the provisions of this statute, they were in fact the victims—for example, if some country from the north bombed Darwin; or if, as happened during the fifties, sixties and seventies, there was great tension here that some force would come down and injure Australians. Say that one attack had been made to make it clear to Australia just what its position was and that, in effect, war crimes had been committed. If we had an international court, we might be able to do something about those sorts of situations. If we did not, what could we do about them?

Dr Spry—This morning, in a different context, Senator Mason said that this was very much a balancing exercise. There are some circumstances where Australia might gain somewhat through the existence of an international criminal court, but we submit that those considerations are far outweighed by the other considerations that tend against it. To take the case that you raised where there is a bombing of Darwin, it is very unlikely, one would have thought, that that would be prevented by an international criminal court. From a practical viewpoint, one would think that it would be more appropriate to concentrate upon the building up of our armed forces and matters of that particular kind. But it is a balancing exercise.

Senator COONEY—I was not thinking so much about the preventive function of the court. You would be very much aware of victims' statements and the part that they have started to play in courts in the sense of giving people an outlet for the outrage they feel as to the way they have been treated.

CHAIR—In the pursuit of justice.

Senator COONEY—In the pursuit of justice, yes. If this court could in some way satisfy that dimension, would that be an argument in its favour?

Dr Spry—Yes, I think that would be an argument in its favour—but, again, subject to the general proposition that you have to balance everything and, in our submission, that would not

be a sufficiently important matter to counterbalance the very great disadvantages against our joining the court.

Senator MASON—Dr Spry, I want to thank you so much for your contribution to this debate. I have got your article here from the *National Observer*. I read it weeks ago. We have increasingly heard evidence—indeed, you might argue, concessions—from various witnesses regarding, firstly, sovereignty, with respect to how it impacts on our legal system; secondly, on how it impacts on our capacity to conduct our foreign affairs; and, thirdly, on a problem that I am perhaps slightly obsessed by, but I feel a lot happier about now, which is the flip side of the sovereignty issue. We always hear about sovereignty, which is a bit of an issue in this country and is a consistent concern in the United States, which is why President Bush will not even take the treaty to the Senate. The flip side of that issue is this: many of us on this committee were concerned that even if a matter was heard in, say, the People's Republic of China, which is a very powerful country, for the International Criminal Court to obtain jurisdiction over an alleged war criminal what it has to do, in effect, is pronounce that the judicial system of that country is not up to it, that it is unwilling or unable. In effect, it would be saying, 'You are not up to it.' Many of us on this committee have been sceptical of the capacity of the ICC to do so and, in doing so, whether the system would fall apart.

Dr Spry—With respect, I would agree with that. I would be very troubled by the composition of the International Criminal Court. That is something which the Americans also are worried about. They are concerned that you only have to get a few people who are hostile to the United States in particular positions at a particular time, and findings could be made which were very adverse to that country. I would add that it is not only the matter of sovereignty which is affecting the Americans; it is also the fact that they believe their military forces would be hampered severely and would not be able to operate in many situations.

Senator MASON—That is right. Their capacity to effectively prosecute their foreign affairs they think would be compromised.

Dr Spry—There is one other point I should have made before in my capacity representing the RSL. The RSL is opposing this very strongly. Nonetheless, they have felt obliged to say that if any amending legislation were introduced in Australia, the enabling legislation which would be in some way tied up with our ratifying the International Criminal Court if that ever happened—which one may hope will not happen—and if there were anything in that legislation which overcame these problems, then to the extent to which the problems were overcome they would not exist. That is said formally to this committee. And I say 'formally' because I cannot conceive that there is anything which could go into the enabling or collateral legislation being introduced into Australia which could overcome these problems, quite simply because the statute overrides any Australian legislation. So nothing which we could put in our statute in Australia could ameliorate the situation. The only effect of such statutes would be to worsen the situation by including in Australian domestic criminal law such terribly vague crimes as genocide and crimes against humanity.

Senator MASON—Despite all those problems—and let us concede there are issues of politics, foreign affairs and law with respect to this—can't you argue, to use Mr Carlton's words, that this treaty may well improve the lot of human kind? Couldn't you argue that at least

this is a way forward and we are getting somewhere, that the human community can move forward and that if we do not take this great opportunity we will lose it?

Dr Spry—I understand the question you are putting. I would call those considerations utopian. Obviously one wishes mankind to improve, but there are a number of comments to make. First of all, our position here is a primarily a position with regard to Australians: we are looking at the interests of Australians and protecting Australians. If, in fact, this particular statute is against the interests of Australia and Australians, as we would submit it is, then that is an end of the matter. This committee should, on that basis, recommend strongly against it. Secondly, it is impossible to believe that this is the only opportunity which is going to exist of this particular kind. We do have ad hoc tribunals now which are being set up to deal with particular cases. In our submission it is better that that particular system continue. There is no reason to suppose that in a number of years there will not be some better thought out alternative brought forward instead of this rather defective proposal which we are now facing.

Senator MASON—This is a specific question rather than a general issue of policy. In your submission—I think it is the fourth or fifth paragraph—you say:

> It hence appears that if by a rule of Australian law it were found by an Australian court that no offence had been committed, if the proposed I.C.C did not approve of that rule, it would be empowered to assume jurisdiction and override Australian law.

Can you give us an example?

Dr Spry—I think an example would be in some of the matters I mentioned before. Let us assume that on what I might call international political considerations the ICC did not like a decision which had been reached by an Australian court on due process here. It might well say, 'This tribunal has not taken account of extremely cogent hearsay evidence.' There have been many pretexts in which it could be—

Senator MASON—Absolutely, I understand.

Senator COONEY—I have an item for clarification. Are you saying that, until a better system is developed, Australia's only remedy for an attack made upon it is armed retaliation? Would you go that far?

Dr Spry—No, I would not say that. I think that this is a defence or foreign affairs question, really. One tries to enter into alliances. One arms one's own forces; one tries to prevent attacks, either by showing one can defend oneself or otherwise. One could, by all means, appeal to the United Nations and take up matters in that particular way. I think one could be very sceptical that, if a country wished to attack Australia, the existence of an international criminal court would be any safeguard whatsoever.

CHAIR—The questions that you heard from Senators Ludwig and Cooney to start with go to the other side of these misgivings about its effect on sovereignty. That is the case where, for example, young Australians—to be blunt, they could be our children—take part in some aid work in a foreign country. They are imprisoned. They basically are mistreated, not according to the more ambiguously drafted crimes but according to some of the basic ones, and are imprisoned without trial and things like that in another country. How do we deal with that

question? How do we get justice for our own citizens and try to protect their rights if they are mistreated in a foreign country without a tribunal such as this? If it were confined to, if you like, the old-fashioned view of international humanitarian law, not the modern one, and if it did not have this complementary euphemism that it uses to evade sovereignty but its jurisdiction was triggered by, for example, a reference from the Security Council or some such proper mechanism, could you accept it on those terms?

Dr Spry—My difficulty here really is dealing with hypothetical cases. What I am doing is making submissions in regard to the actual statute which we see and in which we see grave disadvantages. If, for example, there were some new scheme whereby matters had to issue under the authority of the Security Council and someone wanted to look very carefully at that on its own terms, it may be that it would be a good system or it may be that it would not be a good system.

CHAIR—Bear in mind that this committee, although it has the duty to recommend for or against ratification, can recommend ratification on conditions. So, in a sense, we can go about redrafting treaties, if we want, by way of recommendation.

Dr Spry—I understand that you have that power, but I do not think in this particular case that would be something which would be applicable, because we are dealing here not with the treaty between ourselves and one other country; we are dealing with a treaty which, if 60 ratified, will bind a very large number of countries and nothing that we could do by way of insisting upon conditions would be accepted.

CHAIR—True—in the sense that the terms are already on foot.

Dr Spry—They are already on foot, they are finalised and it is presented to us as take it or leave it, essentially.

CHAIR—Except if we passed the enabling legislation in a pretty much different form and made our ratification conditional, by reservation or whatever, that we did not accept certain terms of it but we did accept certain others.

Dr Spry—I think that would raise very difficult legal questions. Basically, the treaty itself, the statute, would override any internal legislation of that kind and there would then be a question of construction as to whether it might be possible in some way to limit the ratification. I would not like to express a legal view upon that without giving it a lot of thought.

CHAIR—Fair enough. Anyway, we must explore these things. Thanks very kindly for your evidence today.

[3.37 p.m.]

PERRY, Hon. Justice John William, Supreme Court of South Australia

CHAIR—Welcome. Are there any comments you would like to make about the capacity in which you appear?

Justice Perry—Perhaps it will assist the committee if I explain why I am here and where I am coming from. I have been a judge of the Supreme Court for about 13 years and I have been a legal practitioner for the last 40 years. In the last few years I have developed an interest in international law and I have published some papers to do with particularly the interaction of international law with domestic law. More recently, I took an interest in the proposals for the establishment of an international criminal court and I published a paper on that which I delivered in Italy, at Lake Como, in 1999. I made a short submission to this committee and I enclosed a copy of that paper. Judging from what I have been seeing, it may be that it is buried; I do not know whether it is before the committee. It is an informative paper and it obviously is not dealing with some of the issues that are probably attracting the attention of the committee, quite properly so.

CHAIR—I am sorry to interrupt but, before you go on, I should ask if any of the issues that may arise from enabling legislation that the parliament might pass would be justiciable in your court or would they be dealt with by a federal court?

Justice Perry—I cannot image that the sorts of issues you have been talking about would be judiciable in my court. I was taken to task by somebody called John Stone for having the temerity to have said something publicly about this court. I thought it was a rather unusual thing for a journalist to suggest that judges should be seen but not heard, when they might have something to offer.

CHAIR—I appreciate that. It is just that I do not want our committee to get embroiled in some fight, but if you are happy that it is okay—

Justice Perry—Yes, and I spoke to my Chief Justice before coming here. And, as I say, I have minor credentials in international law.

CHAIR—I appreciate that. It is just that this is the first time we have ever had a judge before us.

Justice Perry—So be it, but I am here and if I can help the committee I will certainly try. I have certainly examined the question whether it is proper to give evidence and to write articles and so on. Within the tolerances of judicial protocol it is certainly permissible, and, as I say, I have a leave pass from my Chief Justice.

Senator LUDWIG—Perhaps I can pass it back that you would encourage others to do the same?

Justice Perry—I certainly would. I think judges have a legitimate right to be heard. In a way, this transcends local politics, and judges have a part to play in public discussion on these matters in a discreet sort of way.

Senator COONEY—In fact, a very eminent judge from the Family Court has given evidence, not before this committee but before another committee.

Justice Perry—I am perfectly comfortable with giving evidence, so long as you will hear me. I do not want to say a lot by way of presentation. I rather feel it would be better for me to answer questions which are of concern to the committee because I think I will then quickly get to matters which you want to hear about from me. Could I, without imposing on the committee, make a short presentation on what seems to be a fairly critical issue that is emerging, and that is the question of whether or not, if we ratify this treaty, we would be surrendering any part of our national sovereignty. That seems to be a recurring theme. I took the trouble to sit here for a little while to hear the dialogue with Dr Spry and it is obvious that this is a matter of concern.

Let me say that I understand those concerns, but I really feel that some of the arguments offered in support of that view are indicative of the misconception as to how a statute would in fact work on the ground. Could I help you by indicating my position on that? In the first place the Australian legal system would be left completely intact if we ratify this statute. All our courts would still be there. They would still have the jurisdiction they have now and, despite what Frank Devine said in the *Australian*, which I heard quoted a moment ago, the High Court would still be our ultimate court of appeal. There could be absolutely no question of any case going from our High Court to the International Criminal Court. With great respect to Frank Devine, that is nonsense; it just does not work that way. The ability, furthermore, to initiate prosecutions in our courts would remain completely unaffected. So our legal system would remain intact. Our ability to prosecute domestically definded crimes—if you want to me to put it that way—committed in our own states and territories would remain unaffected.

If an act of genocide, a crime against humanity or a war crime, as they are defined in the statute, were to be committed in Australia, it would unquestionably incorporate a crime which was domestically punishable. Torture, assaults, genocide, rapes, et cetera are domestically punishable, and our ability to prosecute for them would be unaffected. If an act of genocide, a crime against humanity or a war crime, as defined in the statute, were to be committed by an Australian national abroad, it may be committed in circumstances in which Australian courts would exercise jurisdiction over that person, in which event our ability to do so would be completely unaffected by this statute. If on the other hand it was not justiciable in Australia—if an Australian national did something abroad—we have not lost any national sovereignty by countenancing a situation in which some other country, if it is committed on the soil of that country, might prosecute or if the International Criminal Court might. So there is no diminution in sovereignty in any of those situations.

If prosecution in Australia resulted in a conviction or an acquittal under article 17, the International Criminal Court would not have jurisdiction. I am sorry to have to join issue with something from Dr Spry. The International Criminal Court could not examine the authenticity of an acquittal or a conviction. It could only examine a situation in which there had been a failure to prosecute through an inability or unwillingness to prosecute. If we have convicted or acquitted somebody that is the end of it. The only situation in which the ICC could pick up

jurisdiction is if Australia were unwilling or unable genuinely to carry out the investigation or the prosecution. It has got to be understood that this statute has not just appeared; it has been through the mill of the sorts of discussion that I think you have been having in an international forum for many years. I myself, without wanting to be naïve about it, have no doubt that if Australia genuinely carried out an investigation or mounted a prosecution, I cannot think of circumstances in which from, a practical point of view, it is likely that the International Criminal Court could pick up that matter and have another go at it. I just think it so unlikely. I would think it is what we would say is de minimus. It is just not something that ought to stand in the path of ratifying the statute. After all, if the International Criminal Court is constituted as suggested, one would expect that it would be constituted by very eminent legal personalities.

Before coming here, I took the trouble to turn up the statute for the International Court of Justice, the ICJ as we call it, and the mechanism for the appointment of judges to that court is much the same—eminent people, qualified for service on superior courts of particular national states and appointed by a resolution of the United Nations General Assembly. I have never heard it seriously suggested in international circles that the International Court of Justice is other than a very eminent court. I have never heard serious suggestions as to the political motivation and bias and so on.

I cannot understand why it should be suggested that an international criminal court, given the mechanisms by which its members would be appointed and so on, should not achieve similar standing. I do not see any reason why not. If they were, the suggestion that an investigation of a crime in Australia might be regarded as not genuine would have to be considered in the context of very senior and very eminent legal people looking at it. I do not think that is an argument that ought to carry the day. Put shortly, although I have listened very carefully to these arguments and I have read as much as I can, for every article that you are given against this court, I think I could devil up two or three in favour of it. I really think that is not an argument that ought to persuade this country not to adopt this treaty.

That is what I say about surrendering a part of our national sovereignty. I do not know whether the committee wants to ask me anything about that. I have prepared some notes about the various arguments against the court that I have heard of—that the composition of it may affected by political considerations, that the prosecutions may be initiated for political reasons, that the crimes are too loosely defined and so on. I have tabulated those headings, and I can offer the committee a short digest of what I would want to say about them if we run out of time or if you would like it to be handed to you in that form.

CHAIR—We have time, so please proceed.

Justice Perry—Do you want me to hand them to you or to develop them?

CHAIR—Please speak to them.

Justice Perry—So far as the argument that the composition of the court may be affected by political considerations, I have already indicated the experience that we have had for very many years with the International Court of Justice. I would see the International Criminal Court as a criminal court that is on the other side of the coin from the International Court of Justice, which operates in disputes between countries, as you would realise, rather than against an individual.

There is to be a pool of 18 judges, and no two judges may be nationals of the same state. The quorum for the trial is three judges, and a decision may be by a majority. So, of necessity, we have two judges from different parts of the world which, as far as I can see, is exactly parallel to the International Court of Justice. Furthermore, in article 41 there is express provision for objection to a judge sitting if there is any reason to doubt his or her impartiality 'on any ground'. Those are the words in the statute. So there would be the ability if somebody said, 'Joe Blow is not going to hear this case properly,' for an objection to that person sitting to be taken on any ground.

The likelihood of political bias is less if you have an ongoing court as opposed to an ad hoc tribunal. The ad hoc tribunals—and we have recent experience of them with those which are applicable to the former Yugoslavia and Rwanda—are doing a good job within their terms of reference, but I think there is more likelihood of an ad hoc tribunal being affected by political considerations because it is appointed after the event and it has the atmosphere of the victors over the vanquished tag, which was the tag that was applied to Nuremberg and so on—and I do not think you can ever eradicate that tag. Whereas an ongoing permanent court would be established and in place before situations erupted that produced any charges. I think it is less likely in that situation for judges of that court to sit with any political bias.

The next point is that the initiation of prosecutions may be politically motivated. In the conference in Rome in 1998 this was a matter which occupied a lot of attention, but there are three trigger mechanisms which in my view, together with what follows when those trigger mechanisms are activated, go about as far as one can to ensure that the prosecution is not politically motivated. I suggest that it is less likely to be politically motivated than a prosecution that might be brought within Australia by a DPP, who is appointed by a single minister—and I do not mean to suggest for one moment that we have many politically motivated prosecutions in Australia, but the mechanism for appointment of our DPPs, the people who make decisions for prosecution, have far less safeguards in it than I perceive are in the statute for an International Criminal Court.

The first trigger mechanism is a reference by the Security Council under article 13(b). At the moment the Security Council can appoint ad hoc tribunals and there is no filter mechanism to screen out political considerations which might have motivated the Security Council to appoint an ad hoc tribunal. But, if the ICC is established, if the Security Council exercises its power under article 13(b) to initiate a prosecution, it must be investigated by the prosecutor, who himself has gone through a pretty big screening process, and if the prosecutor thinks there is a case that ought to be addressed then it goes to the pre-trial mechanism. Then there is a pre-trial hearing by a judge, where a further filtering process takes place, and it is only when that judge presses the green light and says, 'Yes, let it proceed,' that a summons can be issued to bring the person before the court and the prosecution can be mounted. So in the case of references by the Security Council the in-built mechanisms that are in this statute provide more filtration mechanisms to bleed out political considerations than is the case with the appointment of ad hoc tribunals at the moment.

The second triggering mechanism is by state parties—that is, participating states. The same filtering process occurs. They can ask that somebody be prosecuted. It goes to the prosecutor and he or she investigates. If there is a case to answer in that person's view, it is then filtered again by the pre-trial chamber. This differs from our system because in our system in Australia

somebody can be prosecuted and brought before the court without any hearing or judicial scrutiny as to whether or not the prosecution is justified. We then have a preliminary hearing if it is a jury case to decide whether or not it is to go before a jury. Here that preliminary hearing in effect takes place on paper before even a summons is issued and the prosecution is allowed to proceed. Those are the safeguards there.

The third trigger mechanism is initiation of an investigation by the prosecutor. All I can say is that there are very stringent requirements as to his qualifications and election—it is an elected person—which is by a secret ballot by an absolute majority of the assembly of state parties. I cannot think of a better mechanism to appoint a prosecutor. I think that is about as good as you are going to get in terms of finding somebody who, hopefully, is not going to be motivated by political considerations.

So my only answer to the argument that the initiation of prosecutions may be politically motivated is to draw attention to those considerations and to suggest that, if we really do want to get out of the sky in terms of big pronouncements about human rights and get down on to the ground of actually bringing perpetrators of these atrocities into a court, then this is about as good a practical way of going about it as I could imagine.

The next argument which I think has been put to this committee and, indeed, agitated elsewhere is that the crimes justiciable by the proposed court are too loosely defined. I have heard this comment from eminent criminal barristers with whom I have discussed it. But, after all, it is a court which, it is emphasised in the introduction of the statute and throughout the statute, is there to exercise its jurisdiction over persons for the most serious crimes of international concern. I do not think that a court that is set up with responsible jurists sitting on the bench is likely to ignore the underlying thesis upon which the statute is drawn up. More importantly, although I do not doubt for one moment that criminal lawyers can make an argument out of some of these definitions—I have heard criminal lawyers for many years now and I think they could make an argument out of most things—the fact is that the drafters of the statute did not intend to offer complete definitions of the crimes.

I am sure the committee has been informed that it was always intended—indeed, it is provided for in the statute—that elements of the crimes would be defined. Australia has participated in the definition of those elements. I had a copy printed off the other day as it has only recently been published, at least on the Internet. It is all very well to refer to the various definitions which are contained in the statute, but that will be history if this court gets going. When this court is established, the charges will be framed and pursued in terms of the elements as defined, which are much finer in detail and much more specific and which answer some of these criticisms. The elements which have been defined have been defined at the moment in draft form for approval by the assembly of state parties, when the court is established, after considering just the sorts of arguments that you have been hearing and made by some very eminent jurists.

One of them, Professor James Crawford, happens to have come from Adelaide. He is one of the major authors of this statute—an international lawyer of some renown. These people are very sensitive to the suggestion that you cannot have a criminal statute that defines crimes too loosely, and the attempt has been made and no doubt it can be improved on. When the court is up and running, one of the first things which the assembly of national parties is going to do is sit

down and look at that definition of 'elements'—which are the fine workings out of this broad statement of crimes that we see in the statute—to see whether they are happy with them. Every participating country can have their say about it, and the sorts of considerations that have quite properly been raised in the context of the statute itself no doubt can be dealt with. So I think there is nothing new about these arguments. I do not question the bona fides of those who are raising them, but I think what is proper to point out is that the statute is only half the story in terms of the definition of the crimes. The other half is the definition of elements, which is already well down the track and will be considered by all of the state parties.

The next argument is that, if the United States does not ratify the statute, this court will be doomed. A lot of very eminent countries, important countries, have signed and are likely to ratify. The last print-out I had suggested that whereas only 120 voted in favour—I do not mean 'only' in the sense of a little number—of the statute in Rome in 1998, there are 139 signatories at the moment. So already the number who voted in favour of it has increased in terms of those who have taken the trouble to sign. Countries such as the United Kingdom and Russia have signed, and most of the European Union countries have signed.

In terms of ratifications, I think the number stands at 29 and includes Canada, Italy, France, New Zealand and so on. I think that a lot of other countries are likely to ratify who have signed because, in the first place, for a country to take the serious step of signing, one would think that in most instances they would ratify. In the second place, many who signed did so in the last six months of last year, and the ratification process does take some time in international treaties of this kind. My expectation is that enough will ratify for this to come into being.

CHAIR—Can I interrupt there. We have only a few minutes left and the members have had to come interstate for this hearing. We really ought to start asking questions, otherwise we will not have the opportunity to do so. I appreciate what you said.

Justice Perry—I said earlier that I really did not want to say too much in case you wanted to ask me some questions. I am happy to wind down, leave you with a summary of those points and the other ones that I have not reached. I will be only too happy to answer questions if I can.

Senator LUDWIG—I was happy listening to the summary, because they were putting paid to some of the issues that I had formulated in my mind. So I will wait for the summary and, if there are any matters, I might ask the committee to get back to you.

Justice Perry—It is here. I do not know if I have—

Senator LUDWIG—That is what I was trying to elucidate from some of the earlier submitters—putting up the major issues and asking them to comment on them as a way of dealing with whether we should or should not, as a committee, deal with ratifying.

Justice Perry—Yes. Would it be of assistance to the committee if I gave a copy of some flow charts? To be honest with you, they were transparencies that I used when I delivered a paper—

CHAIR—Yes, whatever written material you have, you are welcome to leave it.

Justice Perry—I did not know quite what to expect today, and I had then prepared something in case it would be of help to you.

Senator LUDWIG—I might also say that, notwithstanding your earlier evidence about the usefulness of your paper, I did take the opportunity to read it and I did find it very useful and helpful in the committee's deliberations. I do thank you.

Senator COONEY—I have one issue. Perhaps I should leave it to Senator Mason because it is the issue he raised. The material you have given to us, as Senator Ludwig has said, has been quite outstanding in elucidating things, but there does seem to be in the material you have put before us the proposition that this is going to be a perfect court. You say that the judges are going to be good judges because they are elected by this process, that nothing but good will come of this and that this system is probably going to be better than ours because—and I think you only addressed this to the issue of the DPP—the judges and the DPP are appointed by the government. You seem then to ignore the culture, the convention and the tradition that we have behind our judicial system.

You then compare the International Criminal Court to the International Court of Justice, which deals with civil matters. That seems to ignore the highly emotional matters that are implicated in this where you are going to try someone for what he or she did in the theatre of war and from a particular country. The problem really is that there seems to be expectations put on this court that some members of the committee have some doubts about. Have you any comments on that? You say, 'There is article 20 and, yes, it does give the court the opportunity in some circumstances to take action even though the person has been dealt with in the domestic court, but really that would not happen in the case of Australia. That is for other countries.' So what happens in the end is that you explain away the difficulties that may arise from this statute. You take the 'Don't worry, we'll deliver this. The cheque is in the mail. We'll love you in the morning' approach. Have you any comments on that?

Justice Perry—Yes. I have fallen into the advocate's trap of perhaps overstating the case. I am the first one to accept that absolute propositions are likely to fray at the edges and that the bland assertion that 'she'll be all right, Mate' is not good enough. I would not for one moment suggest that either the statute is perfect or that the court when it is established is likely to be a perfect judicial organism. I have been knocking around too long to accept such bland assurances. I hear those sorts of bland assurances every day in my working life, but I generally have to look around the corner a little to see where reality lies.

But I say in all sincerity to this committee that I have spent quite some time looking at the statute and quite some time discussing and writing about it. I have convinced myself that it is a rather remarkable document. About 150 or 160 nations were represented in Rome—and I find it hard sometimes to see how even two nations can agree on some things of importance like this—and 120 after three weeks of intensive sessions put their hands up and agreed on the form of this statute. It has some warts, but I think it is a rather remarkable achievement to have got as far as that—to get international consensus on such a complicated and sensitive area and on a statute which is so complex, as it necessarily has to be.

So, without wanting to be glib and without wanting to be overemphatic, it seems to me that one ought to recognise the remarkable nature of that achievement. Of course, we must take a

hard-nosed look at it. That is why you are sitting here and that is why I have come over from Adelaide. But, at the end of the day, my view, for what it is worth, is it is about as good as we are going to get if we want to put one foot forward in the third millennium. The last 50 years of experience, starting from the Holocaust, have been one of the bloodiest chapters in human history—there can be no question about it. High sounding statements, such as the statements on human rights and so on that have emanated from various treaties and so on, have not stemmed the tide of atrocities. I think we have reached a point in history when we need now to put our feet on the ground to try to get some sort of practical mechanism going. I accept your criticism—and it is a perfectly good point to take—but that is my view.

Senator MASON—Thank you for your submission. It was enlightening and very useful. By way of observation, I am not as convinced as you of the democratic utility of the United Nations General Assembly. I think that there is a tendency to romanticise the democratic elements of that body and, similarly, parties that sign up to conventions. I am not convinced as yet on the evidence that we cannot say that judges will not be politically motivated, and so forth.

Let me give you a concrete example of that. You mentioned that the Americans are concerned about signing up, specifically because that will compromise their capacity to use their international power effectively. Quite frankly, if we went back 25 years and they were fighting the Vietnam War—let us talk about numbers; I am a politician so I know a bit about numbers—the numbers that the United States would have been able to call upon in an international court of any sort would have been very small. Daniel Patrick Moynihan, when he was the US ambassador to the UN in that period, 1975-76, said that the United States could call on the general support in the United Nations General Assembly of about a dozen countries.

This was the time, when I was a kid, when Idi Amin was applauded at the UN General Assembly—you remember this—Yasser Arafat was applauded and Zionism was racism. I remember all that stuff. So I am not convinced of the democratic utility of the United Nations General Assembly. Many of these countries have changed, and democracy has come on in leaps and bounds in 25 years. But things change. Similarly to the United States, I am concerned that this will inhibit our capacity at times to do what we think is right—against the wishes of states that I do not necessarily regard as as democratic as we are—in Australia's interests.

Justice Perry—One would have to look at the composition of the general assembly of participating states in the first place, because that will be the deliberative body that will stand behind this court, rather than the United Nations General Assembly.

Senator MASON—I accept that. But, as an example, if they roughly shadowed, or reflected, each other 25 years ago, there would be a very good argument that, in principle, the United States could have been brought to order by an international criminal court for its activities in the Vietnam War.

Justice Perry—Yes.

Senator MASON—That is very worrying. Unlike some, I am not apologetic about Australia's role in the Vietnam War.

Justice Perry—Or bombing in Kosovo.

Senator MASON—Perhaps.

Justice Perry—I understand those arguments, and they are of concern to me too. I think it is a good question. We talk about opposition by the United States, but President Clinton did sign. It was the last executive act of his reign.

Senator MASON—Yes, he did.

Justice Perry—My own reading suggests—and I do not pretend to be expert on it—that the opposition in that country is coming largely from the Pentagon rather than either house of parliament. I do not think it has been considered at a political level in Washington—I do not know, but I would be interested to see evidence of that. I think America very likely signed in order to become part of the process of refining this statute and to have an influence over its final shape. It might still be changed if the participating states agree to any change, and I think that the United States wanted to be in on the action.

I have to accept—and your point is perfectly well taken—that, at the end of the day, the United States may not see its way clear to be a party to it, but there will be enough ratifying states for it to be implemented. The proof will be in the pudding. I believe it is about as good an effort as we can make in this direction and, if it works reasonably well, I do not think that the United States would have any concerns and that it would inhibit them. After all, if the United States has servicemen in other countries who commit a crime—if a serviceman rapes a local girl or if there is an attack on civilian population—it has to be manifestly substantial, it has to be something targeting them. I do not see why the United States or any other country in the world should be unaccountable.

Senator MASON—I do not think they should be, but it is whether it compromises their capacity to conduct foreign affairs to a degree which they think is contrary to their national self-interest.

Justice Perry—They may take that view. I would only encourage them to be disabused of it. I am reasonably confident that the United Kingdom and other major powers will ratify. What else can we do?

Senator MASON—On page 15 of your submission you say:

> Despite the saving provisions, the potential for sham investigations or prosecutions designed to deflect liability under the Statue is manifest.

Thank you for that observation about the potential for sham investigations. You accept it is a possibility.

Justice Perry—It detracts from the efficacy of the court, but it does not detract from our sovereignty. It means that some things will go unpunished.

Senator MASON—I accept that.

Justice Perry—It does not mean that people are going to be punished who do not deserve to be.

Senator MASON—That is right. I accept that.

CHAIR—Many thanks for your testimony today. It was very kind of you to come, especially from Adelaide, to do so.

Justice Perry—Thank you very much for hearing me.

CHAIR—If our inquiry continues for another couple of months and you want to put in something in some written fashion, please do so. We are more than happy to consider supplementary submissions.

Justice Perry—I sometimes say that to counsel when I think perhaps I have heard enough but they might want to say more!

CHAIR—No, we have just got other witnesses to deal with.

Justice Perry—I certainly would not want to stand in your path there. Thank you for that invitation; I will consider that and let you have anything further if I think it might help.

CHAIR—Thank you, we appreciate that. We have had requests from two people, who did not put in written submissions, to make a short statement to the committee. One of them, Mr Denis McCormack, is here.

[4.18 p.m.]

McCORMACK, Mr Denis Myles (Private capacity)

CHAIR—Welcome. Are there any comments you wish to make about the capacity in which you appear?

Mr McCormack—I am here as an individual. I used to work for a federal parliamentarian, the former member for Kalgoorlie, Mr Graeme Campbell. I still work with him, but I do not get paid for it any more.

Firstly, from a philosophical point of view, I am very pleased to hear the deep, ingrained and heartfelt scepticism about this whole 'globocourt' scenario. I have heard elements of it coming from all of you. In an age where people are worried about globocop, there is not enough emphasis put on globocourt and the various traps that will evolve there over time. You have to remember you are dealing with a very long-lived, sophisticated, internationalist inclined element of elite society. It goes right through the political parties, the judiciary, the NGOs. There are many books I could cite to you that go back a century now, looking at the usefulness of bigger, broader and more overarching government. I put it to you that the future is not as rosy as many suggest that it will be, that we are able to conduct and coordinate at will the sorts of institutions that there is currently talk of setting up.

The gradualist approach, some of which I have heard hints of today with various people supporting the proposal, is the approach that has led to a whole lot of angst about the external affairs powers being harnessed by, let us say, a crew of internationalist elites, some of whom know very well what they are doing and some of whom are simply Lenin's useful idiots who are not quite sure where it is going but know that it feels good. In a country such as Australia where we are very comfortable—we have a high quality of life and standard of living—it feels great when there is so much dirt and ugliness, rape, war and pillage, and disgusting ways of conducting ourselves in other countries! It really feels terrific to be able to put into a system that is going to do some justice here. Well, the number of cases that are going to be handled and the number of individuals who will be dealt with by these sorts of internationally sanctioned kangaroo courts—I would suggest it really is just a moral crusade.

I want to draw the committee's attention to a passage in *Hansard* that I am just about to quote. It is only a short passage from 17 November 1993. Those of you on the coalition side who have concerns about 'globocourt' and 'globocop' will be able to perhaps empathise with the then lonely and lowly shadow industrial relations minister John Howard MP when he was crossing swords with the all-powerful and almighty government minister Laurie Brereton. Today's Prime Minister, at that stage, was still in the sin-bin. The discussion is about industrial relations but it gets down to something that is germane to this committee. John Howard said:

> I find it a supreme irony, contradiction and hypocrisy that these strident Australian nationalists, under this government, can now go to a UN committee and have a human rights claim adjudicated. I am all in favour of adjudicating human rights, but should they not be adjudicated in Australia? We abolished appeals to the Privy Council in 1986 in the name of Australian nationalism, sovereignty and independence; yet this mob, five years later, through the back door, has handed over sovereignty to United Nations committees. Some of the representatives on those committees do not even come from democratic countries; they come from dictatorships.

Laurie Brereton answered:

That's right.

Mr Howard went on:

They do. I am glad that the minister agrees with me. Under this government—and the minister has confirmed it—we got rid of appeals to the Privy Council ...

The reason I want to add that to the record is that, years ago when the UN human rights committees and conventions were worked up, I am sure there were rooms of learned people right around the world holding committees and discussing how it would work and how it would be above any sort of criticism because we would have all sorts of folk of very high repute and regard participating in the committees and nothing could go wrong, go wrong, go wrong.

We may be at the same stage with 'globocourt' issuing, as we have heard from very well-meaning folk today. Since this was brought to my attention, I have walked around shopping centres and talked to people in the aisles and in the streets. If you have a clipboard in your hand it is easier to get people's opinions, because they figure you are from some polling crowd and, in an age of democracy, they are happy to give their two bob's worth. The first person I found who actually knew of this proposal came in at No. 85 of the people I had asked. I gave up after about 120 people. This was over about three days. The knowledge out in the community on this issue is not high, but the stakes of international cooperation, I believe, are being overblown. I do not think that we can possibly know what the potential long-term damage to our sovereignty will be until things start going wrong with the scheme that is being put forward.

In closing, I would like to mention the precautionary principle that, if you have problems, you do not make them any worse; if you have doubts, you do not. There are any number of issues that could be gone into further. This is not actually my main area of interest. I have been examining, on a daily basis, immigration and multicultural policy since 1988. The issue of treaties and globalisation and internationalisation came onto my radar about seven or eight years ago, and I realised the thing that drives immigration and multiculturalism is internationalisation. When you get both left and right agreeing with so much of it, it really becomes quite a concern. If you have any questions, I am happy to answer them. I wanted to register, on behalf of the less informed specialists, that there is great scepticism out in the community and that it will be seen as Canberra again doing something very dumb and unnecessary.

CHAIR—Many thanks.

Resolved (on motion by Senator Ludwig**):**

That the documents presented by Dr Spry be received as exhibits to the committee's inquiry into the statute for an ICC; secondly, that notes presented by Justice Perry be received as a supplementary submission to the committee's inquiry into the statute for an ICC; thirdly, that charts presented by Justice Perry be received as an exhibit to the committee's inquiry into the statute for an ICC; and, fourthly, that the committee authorises the publication of evidence given before it at public hearing this day.

Committee adjourned at 4.28 p.m.