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JOINT STANDING COMMITTEE ON TREATIES

Reference: Statute for an International Criminal Court

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JOINT COMMITTEE ON TREATIES

Monday, 24 September 2001

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

Senators and members in attendance: Senators Ludwig, Mason and Tchen and Mr Adams, Mr Baird, Mr Bartlett, Mr Haase and Mr Pearce

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 10.06 a.m.

BLACKBURN, Ms Joanne, First Assistant Secretary, Criminal Justice Division, Attorney-General's Department

HODGES, Mr Christopher, Principal Legal Officer, International Branch, Attorney-General's Department

SKILLEN, Mr Geoffrey, Senior Legal Officer, International Branch, Attorney-General's Department

WILLING, Ms Annette, Acting Assistant Secretary, International Branch, Attorney-General's Department

GATELY, Commodore Warwick McLean, Director General, Joint Operations and Plans, Department of Defence

OSWALD, Major Bruce Michael, Deputy Director, International Law, Department of Defence

GORELY, Ms Amanda, Director, International Legal Section, Legal Branch, Department of Foreign Affairs and Trade

ROWE, Mr Richard, Legal Adviser, Department of Foreign Affairs and Trade

CHAIR—Good morning, ladies and gentlemen. Thank you for giving us your time this morning. I declare open this meeting of the Joint Standing Committee on Treaties. This morning we are taking evidence related to the International Criminal Court and, specifically, the exposure draft on the International Criminal Court (Consequential Amendments) Bill 2001 and the exposure draft on the International Criminal Court Bill 2001. We have representatives here from the Department of Foreign Affairs and Trade, the Attorney-General's Department and the Department of Defence.

Although the committee does not require you to give evidence under oath, the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. I invite officers to make some introductory comments.

Ms Blackburn—I have a very short opening statement to make on behalf of the delegation which appears before you today. As the committee is aware and as has been stated in the national interest analysis, which has been tabled, the establishment of the International Criminal Court has been one of the government's prime human rights objectives. The reasons for the government's support are well documented and have been provided in evidence to the committee.

The government has also made clear that it will carefully consider the recommendations of the treaties committee before taking any further steps to bind Australia to the terms of the ICC statute. The government has produced draft legislation—the International Criminal Court Bill

and the International Criminal Court (Consequential Amendments) Bill—which are designed to enable Australia to ratify the statute. These bills have been produced as exposure drafts and were referred to the committee by the Attorney-General on 30 August 2001. When referring the draft bills, the Attorney-General expressed his hope that the opportunity for the treaties committee to study the legislation would assist it to make comprehensive recommendations on the statute.

Government officials here today are available to brief the committee on any aspect of the draft legislation, but I would like to take just a few minutes to draw the committee's attention to the approach taken in preparation of the bills and some of their provisions. The timing of the development of the bills has coincided with the committee's inquiry. The government has remained closely engaged with the work of the committee and has taken note of the views that have been expressed to it in both written submissions and evidence given to it. These views have been taken into account in the preparation of the exposure draft bills.

The government is aware of concerns which have been expressed about the effect of ratification of the ICC statute on Australia's sovereignty. The principle of complementarity expressed in the ICC statute is regarded as an adequate and appropriate protection. Under this principle, the jurisdiction of the ICC is complementary to national jurisdictions. The statute affirms the duty of sovereign states to exercise their own jurisdiction over the crimes within the ICC's jurisdiction.

To reinforce the importance of the principle of complementarity, specific reference has been made to it in the draft legislation. I would draw your attention to clause 3 of the International Criminal Court Bill, which provides that the parliament intends that the ICC's jurisdiction is to be complementary to that of Australia and that the act does not affect the primary right of Australia to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC. The consequential amendments bill contains a similar provision.

Views have also been expressed that some of the offences in the ICC statute are too vague and capable of unduly broad interpretation. The committee's attention is drawn to the precision with which the offences in schedule 1 to the consequential amendments bill have been drafted. The method used is consistent with the manner in which offences are drafted in the Commonwealth Criminal Code.

The view has also been expressed that the ICC could be used as a vehicle for the prosecution of an agenda based on what has been called social engineering. The relevant provisions in the consequential amendments bill that deal with the crime of forced pregnancy provide that, to avoid doubt, they do not affect any other law of the Commonwealth or of the state or territory. This is to make clear that the offence has no effect on national laws on subjects like abortion.

We should note that the exposure draft has been made available to assist the committee and others in forming views on whether Australia should ratify the statute. Comments on the bill and its provisions are both welcome and essential to the formulation of the bill for its introduction in parliament should a decision be made to ratify the statute. We would be pleased to take questions on any aspect of the legislation or any related matters from members of the committee.

Mr BAIRD—Thanks very much for your outline. I suppose the nub of the concern of the committee in relation to the ICC is the question of sovereignty, and you have rightly talked about that this morning. There still is a question of the countries that do not join these proposals, and even those that may be vulnerable to having various military personnel called to the ICC. How effectively is it, in reality, going to work in terms of this complementarity principle on the basis that countries that are signatories could simply declare, 'We are going to process these claims within our own courts, and it's none of your business'? On the other side of it, the countries that are likely to be the worst offenders are not going to be signatories anyway. It seems to me to suggest that it is a bit of a charade. I agree with the principles of what you are trying to achieve—and that is great—but, on the one hand, you really agree to national sovereignty and believe in courts to process the claims within their own countries; on the other hand, you have other counties that simply will not be signatories, and we can guess what countries they will be. How much use will the provisions of the ICC be? I am asking that more as a devil's advocate type question.

Ms Blackburn—I would like to make two general comments in response, and then I will invite my colleagues from Foreign Affairs and Trade and Defence to add anything if they wish. There are a number of starting points with this system. The first is that a country like Australia can take the opportunity to make the crimes which are the subject of the statute part of our domestic law and to use our quite effective legal system—our existing legal system—to ensure that, within the jurisdiction that Australia already has within its courts, it can prosecute those offences. In terms of countries which might choose not to do that, you have the possibility for the International Criminal Court to take action in circumstances where it adjudges that a country is unable or unwilling to take the action that it might. However, in that context, I think one cannot at this stage categorically state which countries will sign on and which will not. We have had previous discussion in the forums about the question of whether the United States will sign on. So it is not just a question of the good guys and the bad guys. There are many reasons why states parties will form their own view on whether to be part of this system or not.

The final comment I would make is that the idea of the international system that this statute is setting up is that it leaves no safe haven for people who have committed the crimes, either through the capacity of national jurisdictions to take action in relation to the crimes or through the capacity of the International Criminal Court to take those actions. That is all I would like to say. Would Foreign Affairs like to add anything further?

Mr Rowe—This is obviously a key question, but I think one point that we need to bear in mind is the strong international support that does exist for the establishment of the court. Ideally, of course, we would like to see as many countries as possible become parties to strengthen the regime and what I would call almost the deterrent effect that the court will represent in terms of its contribution to international peace and security and the strengthening of international justice. If certain countries do not join up and say that they are going to handle particular matters their own way and that the court should in effect back off and not interfere, there will nonetheless be opportunities for scrutiny of those particular situations through the framework set up by the court. Indeed, if necessary, the Security Council could refer a matter to the court—the Security Council being one of the trigger mechanisms—and that in itself would, I suggest, be a means of pressure and added focus on particular countries which, hopefully, would lead those countries to feel obliged to abide by the principles underlying the statute.

One of the key points behind the Australian government's very strong and consistent support for the ICC is the desire that we see that, through establishing such a body which has broad, almost universal, support, we will create this entity which will make a major contribution, will be a deterrent to the commission of these acts through making anyone who commits them very fully accountable. If they do not look after these allegations of particular situations or breaches of the statute, then we believe they will still be under a lot of focus and a lot of pressure to demonstrate that credibly they are in fact administering justice in their own countries.

You are quite right: obviously, not every country will join up because it is a national decision, but I would suggest that the breadth of support that exists is one of the almost positive aspects that is attached to the actual statute. As I say, on the question of complementarity, as was mentioned in the opening statement, from an Australian perspective, it is critical—and this is reflected in the legislation—that we will be able to demonstrate as a party that we are taking care of our matters and our own situations, and we will be able to do that very credibly, I think.

CHAIR—On the issue of complementarity, section 3 of the draft legislation it seems to me still leaves unanswered one of the fundamental questions that a number of us have—that is, section 3 refers to the act not affecting the primary right of Australia to exercise its jurisdiction but, notwithstanding that, it still does not allow for the exclusive right of Australia to exercise its jurisdiction. So under the terms of article 17, Australia can exercise its primary right but still, for some reason, depending on the interpretation of the judges sitting on the ICC, it could be adjudged as not being willing or able to have acted genuinely to bring about a course of prosecution that the ICC would think appropriate.

Ms Blackburn—That is a correct statement. By accepting the statute and accepting its obligations, you accept that there are circumstances in which the ICC can operate and that they are circumstances which are separate from Australia exercising its jurisdiction. You mentioned, and I think it is a correct statement, that the ICC could adjudge Australia to have been unable or unwilling and could therefore use the powers that it has under its statute. That is a true statement. The obvious next part of the discussion is the question of the extent to which you think that is likely to happen and whether that is a risk which it is appropriate for Australia to take as part of its participation in this system—whether the benefits from the participation are such that they outweigh what I would suggest is a very, very small risk, certainly in current circumstances, of the ICC making that judgment on Australia's exercise of its rights and obligations under the statute.

CHAIR—Doesn't this question of benefits come back to Mr Baird's question that, really, the effectiveness of this convention is limited by the weakest link in the chain? If you have countries that are not involved and that would be willing to harbour criminals who perhaps had been involved in a crime that the ICC might pursue, the effectiveness of the convention is limited anyway.

Ms Blackburn—There is no doubt that the effectiveness of any international convention is affected by the extent to which the international community participates in it and abides by its obligations and responsibilities. I believe we have had evidence given before this committee of the extent of international support for this statute in its making and there have been continuing statements in the international community of support for it, but your proposition is correct.

Mr ADAMS—If Australia were in a situation where the International Criminal Court had to act—for example, in a general situation of our High Court or our courts not taking care of the criminals we are talking about or the people who have committed the acts—Australia would not be a very nice place to be living in, would it?

Ms Blackburn—I think that is a statement you could make, yes. If we were being judged as unable and unwilling, some members of the community might see it as appropriate that the ICC has the power to take action.

Mr ADAMS—Would it be that our courts would not be operating as they presently do?

Ms Blackburn—That would be my expectation, yes. I think everyone's expectation at the moment would be that Australia's judicial system is a very well regarded system internationally, and if it were operating in its current form, the likelihood of an international court finding that that judicial system was operating ineffectively would be extremely low.

Mr PEARCE—As I understand it, the US at this time is unlikely to become a signatory to the statute. Do you have a view on that and on any impact that would have on Australia?

Ms Blackburn—The Australian government's view on whether the United States does something is not something which I can comment on. Does DFAT wish to comment on that?

Mr Rowe—I would like to say that the United States have been very actively involved in the negotiation process from the outset, and they in fact have made an enormous contribution to the statute text. The United States, as I think we have explained to this committee before, still have some concerns about the regime in the statute—in other words, they would wish to strengthen the, as they see it, safeguards in the statute to ensure that US nationals, and particularly service personnel, would not in any circumstances be brought before the court without the consent of the United States government.

There have been a number of proposals which the US have put forward. Some of those were included in the Rome statute. The US have a number of other proposals on the table in the current preparatory process which are still being considered, because that process has not been concluded yet. So obviously the US are working to try to achieve their objectives in relation to the text. From the Australian perspective, we have very close working relationships with the United States on these issues. It is really a question I think of the negotiation process to see if their ideas—which I say are currently on the table—can be adopted and accepted.

Senator MASON—After the several months now that we have been looking at this issue, I believe the departments have done a terrific job in distilling the legal issues that still concern the committee. But, to be honest, the issue that still remains—for me at any rate—is, like so often in these issues, a political issue rather than a legal one. The political issue, to recast what Mr Pearce said, is that I still am concerned that this treaty will be more of a thorn in the side of liberal democracies than it will be a fetter to the foreign and defence policy of authoritarian or totalitarian governments. Do you want to comment on that?

Ms Blackburn—I think what you have expressed is a view which is the ultimate judgment which will be made by the government and the parliament as to whether this statute is one to

which Australia wishes to be a party and wishes to implement in Australia. I cannot comment on what you just said.

Senator MASON—But you see the broader point.

Ms Blackburn—The broader point is clearly on the table. It is not one that officials attending this hearing can comment on.

Senator MASON—I understand that, and I would not expect you to. You have addressed the legal issues extremely well, and I must say that the patience you have shown the committee over a long time has been terrific and the legal advice has been wonderful, but it is that gnawing political question about who is fettered—authoritarian and totalitarian countries rather than democratic communities—which concerns me. But that is a political question. I will ask one specific question which I think you can address. The Extradition Act 1988 governs extradition with respect to the International Criminal Court and Australia's obligations thereof.

Ms Blackburn—I am sorry?

Senator MASON—If Australia had to extradite people under its jurisdiction to the ICC—and the act obviously has to make allowances for that possibility—is it the Extradition Act 1988 that governs that process? What governs the extradition process?

Ms Blackburn—I will ask Mr Skillen to deal with your questions in detail, but the International Criminal Court Bill puts in place a series of administrative arrangements for dealing with requests for assistance to the International Criminal Court.

Mr Skillen—The Extradition Act itself would not apply to a request by the ICC for the surrender of a person to the court. The provisions that would govern such a request would be those contained, as Ms Blackburn has said, in the International Criminal Court Bill itself. I do not know whether you want me to take you through them.

Senator MASON—Please do.

Mr Skillen—We are talking specifically about part 3 of the bill which commences at clause 17. Basically, it indicates the way in which Australia expects that a request would be made, the documentation which is required to accompany a request for an arrest and surrender, and the way in which such a request would—

Senator MASON—My colleague Senator Ludwig wants to pursue this in more depth. Before I hand over to him, could I just ask one thing: Mr Skillen and Ms Blackburn, are you aware of this committee's concern about the extradition arrangements that currently operate in this country?

Ms Blackburn—We are certainly aware that the committee has completed an inquiry into it and has made recommendations, and the government has not yet responded to that report.

Senator MASON—We are just concerned that these extradition arrangements you are about to discuss reflect, or perhaps are at least sympathetic to, the attitudes that this committee has discussed in the past, but nonetheless it is a matter for government. I will pass to Senator Ludwig.

Senator LUDWIG—Sorry, I did not really want to interrupt your flow. All I wanted to do was add the additional questions in relation to that area that I was interested in. Could you outline—and you may wish to take this on notice—how similar they are to the extradition arrangements under the Extradition Act 1988? Are they more akin to the no evidence rule system that is used in the civil law countries and, given that we are a common law country, is the no evidence rule appropriate in that circumstance? That would then lean to the civil jurisdiction, as distinct from where we also have in relation to the Commonwealth a prima facie requirement. Why did you make the decision to go the way you did, which appears to me to be leaning more towards the no evidence rule in a sense?

Ms Blackburn—I will make some brief comments, and then my colleagues may wish to comment in more detail. The surrender provisions in the exposure draft bill draw from two sources: they draw from the requirements of the statute itself clearly, and they also draw from our common experience in Australia and our current systems for handling the surrender and transfer of people. However, the systems are different because there are different requirements in the Statute of Rome, and we can come back to the specifics of those differences.

In terms of the no evidence provision, the statute requires that the provisions that are implemented in the domestic law are no more burdensome than the domestic law. As this committee is aware, the default provision in the domestic law in Australia in many of its treaties is a no evidence provision.

Senator MASON—I understand that, and that is why I want to know why you chose that one rather than what we have with our Commonwealth countries, because it appears that you can make that choice. Have you done an analysis of how many people are extradited from Australia and can you say, 'More go to civil law countries than Commonwealth countries, so therefore we go that way rather than the other way'? I was just wondering how you decided that the no evidence rule was no more burdensome than that choice under the Statute of Rome.

Ms Blackburn—The fact that the no evidence approach is used in Australia essentially as the default, and it is certainly part of the current Extradition Act and it is also part of our model extradition treaties, means that the view we have taken is that that is the general standard which is in use in Australia and the statute requires us not to impose a more burdensome approach.

Senator LUDWIG—I am curious how you come to that conclusion when it is the default only. If you analyse the extradition proceedings in Australia, do you then say that it is more likely that people will be extradited under the no evidence rule as distinct from prima facie. Is that what you are telling us? What figures do you have to substantiate that?

Ms Blackburn—Are you asking me how many extraditions we do under the Commonwealth one and how many we do under treaties?

Senator LUDWIG—Primarily, I am asking you how you come to the conclusion that the no evidence rule, because it is the default, would prima facie be the one to be chosen. Why do you say that?

Ms Blackburn—Because it is the preferred approach at the moment. I hesitate to say that, being conscious of the views this committee has expressed to the contrary, but the present government's approach and policy to extradition is the no evidence approach. There are certainly circumstances, because of treaty and convention requirements, in which we do not use the no evidence approach, but the government's present position is that the no evidence approach is the preferred approach to extradition proceedings. My colleague has handed me a useful note that the International War Crimes Tribunal similarly has a no evidence approach for surrender of people to the jurisdiction of that tribunal.

Senator LUDWIG—Thank you. I just needed you to tell me why, and I think you have done that.

Ms Blackburn—Have I answered the question adequately?

Senator LUDWIG—Yes, you have.

Senator MASON—On that issue, Senator Ludwig asked the question about numbers. I do not know the answer to this—at least, I cannot remember—but are more people extradited pursuant to Commonwealth treaties imposing a standard on the balance of probabilities than the no evidence rule? Under what test are more people extradited?

Ms Blackburn—Unfortunately I suspect I am in the same state of ignorance as you are as to the numbers. I would caution that the competing tests we are talking about are no evidence or prima facie or probable cause, which the US uses. None of those are balance of probability. We will take that question on notice.

Senator MASON—The question still stands. Perhaps that is the nub of Senator Ludwig's question.

Senator LUDWIG—The answer was effectively that—that is where I was going to, and I think we got that—the government prefers the no evidence rule. All else pales.

Mr HAASE—We have looked at the domestic law situation—the civil law situation. How does the draft impinge on military law? Has there been any accommodation of existing Australian military law? Is there any concern amongst the defence forces as to the necessity to have those accommodations made or to make modification to military law?

Cdre Gately—I will ask Major Oswald, who has a legal background, to take that question.

Major Oswald—We are currently looking at the impact the domestic legislation will have on the conduct of planning and the conduct of military operations. For our members who are serving overseas under the Defence Force Discipline Act, we would take into account the legislation that is currently being considered. So it would apply to us when we are serving overseas.

Mr HAASE—Thank you for that but, further to that, have you had to make modifications? Is this complementary in every respect or, being conscious of the draft, are you then conscious of the necessity to make modifications in military law under the ADF?

Major Oswald—At this stage we cannot see that there will be a requirement to do that, but we are still looking at the issue.

Senator TCHEN—I will go back to the extradition criteria. Ms Blackburn, your advice to us was that, because it is the government's position that the no evidence rule is favoured—and notwithstanding your awareness that this committee has expressed doubt about that—you did not take that into consideration regarding this International Criminal Court submission.

Ms Blackburn—I think I might have expressed it in a different way. The committee has tabled a report in which it has expressed a view on the no evidence rule. The government has not responded to that report, and I am not in a position to make any comment on whether the government accepts the committee's views. In drafting these exposure drafts to the bill, we have drawn on two sources: the requirements of the ICC and the no more burdensome provision I have mentioned, and the existing provisions in Australian law on extradition. Please be assured that, in drafting this legislation, we should not be interpreted as having rejected the committee's views on no evidence; they simply have not been brought to bear for decision by the government either in the context of possible change to the extradition law or in terms of their inclusion in the drafts of this bill.

Senator TCHEN—If the committee recommends in favour of this bill, it will make null and void our previous recommendation, won't it?

Ms Blackburn—Could I suggest that I was not thinking that this committee would make recommendations on the bill; I understood that the issue before the committee was a recommendation as to whether or not the government should ratify the Statute of Rome.

Senator TCHEN—I will leave that then. Let me take you to the last issue about this treaty, which is the denouncement provision. It does not necessarily mean that I understand all the complexities of this treaty or that I have given up on it. As I understand it from your explanation of the withdrawal or the denouncement provision, any state can withdraw from the treaty by written notification, and it will become effective one year after notification, but in the meantime any action commenced by the International Criminal Court would continue. The obligation would continue to be binding. Basically, that is the outline of it. Can you explain to us how it actually works?

Ms Blackburn—The statement you have made is essentially a correct statement. If Australia is a party to the statute and for reasons decides to no longer be a party to the statute, there is a process for withdrawal that would have the effect that, for the period within which Australia is a party, it remains subject to the jurisdiction. The article that you have referred to in the convention does have a one-year delay period. So the statement you have made is correct. In terms of understanding it in a domestic context, the parallel is there, for example, with regulations that are made and come into force on the day that they are gazetted. They have the full effect of law. Any actions taken under them is lawful and any obligations and responsibilities incurred during the period that they are in force remain and are valid;

nonetheless the parliament can then disallow those regulations. From the date of disallowance, it becomes as if the law had not been passed in the first place, but for the period of its effective lawful operation, it has full effect. It is the same situation with the convention—if Australia becomes a party to it, then for the period it is a party, it has effect and the obligations and responsibilities remain. The one-year delay is part of the statute itself.

Senator TCHEN—There is no provision to stand still on the part of ICC once a state notifies it of its intention to withdraw?

Ms Blackburn—Notification of an intention to withdraw?

Senator TCHEN—Notification of withdrawal.

Ms Blackburn—No, the article says it will not have effect for one year.

Senator TCHEN—So, should Australia decide for any reason after ratifying this treaty to withdraw from it, essentially it means that we are obliged for the year?

Ms Blackburn—That is correct.

Senator TCHEN—And any law we pass to examine any action or any individuals would not be legal because we would still be under the international obligation?

Ms Blackburn—I am sorry, I did not understand the last part of your question.

Senator TCHEN—What I am getting at is this: if Australia decided to withdraw from this treaty at some later date to protect certain citizens whom we do not believe should be surrendered to the ICC, under the provision of article 127, the ICC will insist that citizens are obliged to be extradited to face charges. So Australia can withdraw from the treaty but, during that one-year period, any action we take to protect those citizens or class of citizens will be ineffective.

Ms Blackburn—We might articulate some steps in that process. The first assumption you make is that the International Criminal Court is acting in a way which the Australian government is unhappy with.

Senator TCHEN—That is the primary assumption should that sort of thing happen.

Ms Blackburn—The system that the statute and the legislation encompasses is a domestic law regime which enables Australia to take action in relation to the crimes under the statute in Australian courts. If you were positing a situation whereby the International Criminal Court was taking action, we would say that the court would be doing so on the basis that Australia has been unable or unwilling to take action against an individual whom the International Criminal Court believes has engaged in the crimes in the statute. But there are a number of protections in the legislation: Australia has, and retains under the detail of this bill, a number of discretions in terms of the assistance it will provide to the Criminal Court and the question of whether it will surrender people to the Criminal Court.

Senator TCHEN—But those provisions are able to be overridden by the provisions of article 127.

Ms Blackburn—Only to the extent that, if we put in a notice of withdrawal, we cannot terminate today. If we put in a notice today, one year from today our obligations will cease. The argument for putting in that provision is that, if the International Criminal Court takes action against particular people for these crimes, and then there is a change of government in another country—perhaps driven for the specific purpose of trying to prevent that jurisdiction—you could have a government terminate that activity from day 1. The phrase that has been used in some of the literature is about rogue governments, and this one-year delay seems to be directed at precisely that point: to stop your having a change of government and a withdrawal from this because the ICC has taken action against particular groups of people. It goes back to the conversation we had a little earlier about there being benefits and obligations and some risks. The weighing of them is a matter for judgment.

Mr PEARCE—As you may know, I am a new arrival at parliament—and, more particularly, a new arrival on this committee. The purpose of my question is essentially for clarity and edification. I read in the background material that in 1998 Australia clearly played a leading role in the creation of the Statute in Rome, as I understand it. I would like to be clear in my own mind: has anything changed from the original contemplation in 1998 to what we have today and what we have before us in terms of the bill? Is it substantially the same?

Ms Blackburn—The bill is a very recent creation which has been drafted in order, essentially, to assist understanding of what implementation of the Statute of Rome would mean in Australia. If your question is in terms of anything having changed in the statute, I might refer that to my colleagues—

Mr PEARCE—Is there any substantial change from what was originally contemplated—or are we talking about almost the same thing, three years later?

Ms Blackburn—I may not be understanding your question. The Statute of Rome was concluded in July 1998. The statute has not changed since then.

Mr PEARCE—That is fine. I just wanted to make sure that we were talking about precisely the same thing that has been noted.

Ms Blackburn—No. The Statute of Rome was concluded at that point and it has not changed. These bills are our first interpretation of what kind of legislation, if Australia were subject to the obligations of the statute, we would need to put in place in Australia to meet the obligations we accept under the statute.

CHAIR—Pursuing that further, it is a very detailed exposure draft of the consequential amendments to our Criminal Code, to be consistent with the Rome statute. Is there any indication that they would necessarily be agreed to by the ICC? Is it still possible that, as detailed as they are—and this goes back to my initial question—an interpretation could be given by the ICC that was inconsistent with those amendments? Or, going further, for instance, section 268.12 talks about ‘mental pain’, which we have tried to define there: is it possible that

the ICC's interpretation of 'mental pain' might be very different from that of the Australian courts, the Australian government, or the DPP?

Ms Blackburn—That is a possibility.

CHAIR—So, no matter how detailed our amendments to the Criminal Code, it is still possible that our courts or a DPP could find that there is no case to answer by an Australian citizen but that the ICC could still find a case to answer?

Ms Blackburn—It is possible, but there are some specific requirements that the ICC has to find, when it is using the test 'unable or unwilling': there are specific provisions in both the statute and the bill, and I will ask my colleagues to talk to you about content of those provisions.

Mr Skillen—Article 17(2) provides that, in order to determine unwillingness in a particular case, the court shall consider whether the proceedings were being taken, or the national decision was made, for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court; whether there has been an unjustified delay in the proceedings and whether the proceedings were not or are not being conducted independently or impartially or in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. Those are the tests which the court is obliged to observe when determining whether a national jurisdiction has or has not acted in a genuine way.

Senator MASON—On that point, the chairman raises an interesting issue. Isn't it possible that the ICC may develop a jurisprudence that is different from Australian common law jurisprudence? For example, they may broaden the definition of, let us say, the notion of 'accomplice'—and the events in the United States a couple of weeks ago may be an example of that. It may not be true to say that the Australian courts are unwilling or unable to try someone. It may be a bona fide trial and a bona fide outcome, and the outcome may be a finding of not guilty; but within the jurisprudence of the International Criminal Court, which had a broader definition of 'accomplice', that person may be more likely to be found culpable.

Ms Blackburn—Senator, lawyers are extremely good at articulating the worst case scenarios and the extreme possibilities.

Senator MASON—I thought Mr Bartlett raised a very good question.

Ms Blackburn—As for what you just said, yes—and I have said this in response to many propositions this morning—the propositions are possible. Certainly, the ICC will undoubtedly develop its own precedents and its own jurisprudence in terms of its own operations.

Senator LUDWIG—That could also arise where the differences might be more likely to be attributed to the difference between the civil jurisdiction and the common law jurisdiction, where you may have as a consequence of that—I put it more guardedly than you—that the ICC may not develop a body of case law if they use the civil system as such. We would recognise it, anyway, as precedent setting but, that aside, that could also apply in that instance, couldn't it?

Ms Blackburn—The ICC will operate as a body with judges who are designed to represent the principal legal systems of the world. In fact, my colleague is fortunately pointing at the article in the statute here which requires that, in the selection of judges, the membership of the court is to include representation of the principal legal systems, equitable geographic representation, and an appropriate gender balance as well, and finally, that no two judges may be nationals of the same state. So any state is going to get one judge on the court. As for how you describe the nature of the legal system that it ultimately develops, I understand that presently there is a preparatory commission in the process of drafting the rules and procedures for the court. One would assume that those rules and procedures are going to be a mixture from a variety of legal systems, and I do not think we can at this stage say that the ICC will operate, strictly speaking, as a civil law system.

Mr Rowe—Could I make one comment to add to what Joanne has said? Article 9 of the statute provides that elements of crimes shall assist the court in interpretation and application of those three core crimes. The elements of crimes were negotiated and in fact adopted in July last year in the preparatory commission. Those elements—and there is a text available—have been adopted in the preparatory commission. They will have to be endorsed by the general assembly of states parties, when the statute comes into force. What is important about those elements is that they do reflect in fact a very heavy common law approach. Sure, they are just to assist the judges in interpreting the crimes, but what I am suggesting is that those elements—and of course common law countries were very heavily involved in drafting those, particularly our Attorney-General's Department—do in fact mirror the sorts of jurisprudence, in terms of those specific offences, that we would find in Australia.

Senator MASON—I am sure that is right. I can remember studying contracts, and the first thing I learnt was that the law can develop from one source but develop in different streams. I think that is the chairman's point. It will differ, and it will have to differ.

CHAIR—Certainly, when there are issues there regarding crimes against humanity, mental pain and mental suffering, there is a degree of uncertainty or ambiguity there—and, thus, the possibility of interpretations that might not be in accord with the interpretations we would have in the Australian system.

Ms Blackburn—That is undoubtedly true, as it is between Australian courts. There are many people who would say to you that they have difficulty predicting the outcomes of what Australian courts will find in some areas. There are many of our laws which are based on the use of words which we think we understand until we come to sometimes apply them. In the common law, the 'reasonable man' is the well-known example. We all know who the reasonable man is, except that perhaps she is female and perhaps she comes from a racial minority, and she is possibly disabled at the moment as well. But we all know what the reasonable man would come to in a conclusion. So the subjective element in legal decision making undoubtedly exists.

To assist your further consideration on that point, I am not sure if Richard was in fact referring to it but article 21 of the statute sets out clearly the laws which the court is required to apply: in the first place, the statute, the elements of crime and its rules and procedures; in the second place, applicable treaties and the principles and rules of international law, including the established principles of international law of armed conflict; and, failing that, general principles derived from national laws of legal systems of the world.

Also, picking up the point Senator Mason was making, article 21.2 clearly states that the court may apply principles and rules of law as interpreted in its previous decisions—so the statute clearly contemplates the development of a series of precedents that the court might refer to in its work.

Mr BAIRD—Ms Blackburn, I have a question in terms of retrospectivity. To what extent does the legislation ensure that we do not have an extensive amount of retrospectivity in terms of reviews of Australia's involvement in previous theatres of war or activities which are considered to be criminal?

Ms Blackburn—The statute at article 24 is specifically and directly non-retrospective in its application. The statute is non-retrospective and so, similarly, the Australian laws will have no retrospective application either.

Mr BAIRD—Because peacekeeping operations are often part of a UN sponsored activity, does that change the nature of it, if they are Australians, even if they are part of a UN international peacekeeping operation? Would they still be tried within Australia, within Australian courts, if they are an Australian national, even though they are a part of an international group?

Ms Blackburn—I am sorry, but we have gone way beyond my expertise at this stage. I might ask my Defence colleagues to take this question.

Mr ADAMS—Maybe you could deal with different methods of engagement or peacekeeping when you are at war. Maybe you could answer that.

Major Oswald—If I understand both questions correctly, your questions are directed to what the impact on ADF members would be if they were serving on overseas operations, whether that be in a UN operation or other ones?

Mr BAIRD—That is right.

Major Oswald—By this domestic legislation being passed. The answer to that question is that we are still studying the complete impact of the legislation upon us. We do not see it as having an adverse consequence yet, but it will have an impact upon the way we train our members and on the way we conduct our planning and the actual conduct of operations.

Mr BAIRD—What do you mean 'in the way you train your members'?

Major Oswald—With regard to nearly all of the offences—in fact, I cannot think of one that does not fit into this category—everybody in this room would feel quite comfortable in saying that they are offences against our domestic law, in some shape or form. So what we need to put in place for our ADF members to understand is what the impact of that will be on the way that they plan and conduct their operations. So we need to draw out the threads, identify exactly what the elements of these crimes are and ensure that our people are trained to understand what they need to consider before they conduct their operations on leaving this country.

Mr BAIRD—So they are not trained in those matters now?

Major Oswald—They certainly are trained, but, as with all the different bits and pieces of legislation, you need to identify exactly what the elements of that legislation are and how it would impact upon the operations. That is what we are looking at. We want to make sure that these elements are exactly the same elements as we have trained for in all our other operations that we have conducted so far. It is not a matter that they have not been trained; it is to ensure that we reach all the training standards required by this legislation.

Mr PEARCE—To take Mr Baird's point a little further: from a practical perspective, there might be frequent occasions where the ADF forces have gone into a particular region for peacekeeping missions or some other purpose, where the levels of jurisdiction and government and law enforcement have all broken down. How does that practically work for us? Would our ratifying this be a significant advantage to the Australian Defence Force?

Cdre Gately—It will, in fact, help us. If we go back to the East Timor example, there were not those agencies there to put those measures in place. Our people, by default, were necessarily involved in that. It would take away that requirement to do crime scene investigation, for example. Those matters could be drawn to the attention of the ICC to undertake that. That would alleviate our having that responsibility.

Mr ADAMS—When we first went to East Timor, what rules of engagement were we operating under?

Cdre Gately—That was a chapter 7 operation. It still is a United Nations chapter 7 operation, which allows the peacekeeping force to use force to enforce the UN mandate.

Mr ADAMS—Has there been the situation where we have been peacekeeping and it has not been rule 7 but another rule?

Cdre Gately—In recent times, I cannot recall that.

Major Oswald—The deployment to Rwanda was a chapter 6 operation.

Mr ADAMS—Is that something to do with shooting first?

Cdre Gately—Chapter 7 is the more robust.

Mr ADAMS—We are dealing with what the ICC may do with an interpretation. In a changing world, where we are coming to grips with criminal law and trade law and we are seeing the movement of criminality across the globe at a much faster rate, wouldn't it be an advantage if law enforcement agencies and law-makers from different countries with different systems came together into one body to explore how different countries and their legal systems operate and to look at some of the interpretations that are coming down now? Could there be pluses in that?

Ms Blackburn—There could be. I am not sure that it would ever get to resolution though.

Mr ADAMS—Harmonisation of the words.

Ms Blackburn—We have considerable difficulty with harmonisation in Australia; world harmonisation is a much larger job to tackle. Obviously there are many international conventions that are trying to achieve exactly what you are speaking of, whether it be in the field of criminal law, trade or any other area in which we have treaty obligations. You are looking to get common language between the divergent legal systems of the world. That is precisely what you are looking for.

Mr ADAMS—Our Federation gives us that opportunity because we have been at it for at least 100 years now.

Ms Blackburn—That is true; we are still working on it.

Senator LUDWIG—There are certain tendencies for and against. I do not think it has been consistently 'for'.

Mr ADAMS—There are a lot of pluses.

Mr Rowe—What you are saying is very forward looking, very constructive and very positive. In fact, a lot of initiatives at different levels have been taken and are under way in a broad sense, in a regional sense and perhaps in a bilateral sense too to try to achieve the sort of harmonisation that you referred to. That is a very important process, particularly in relation to this statute. It is happening at the moment, particularly in terms of how the statute should be implemented in domestic law in various countries. A number of studies have been done. In October there will be a regional conference on implementing the Criminal Court statute. The conference is focused on Asian countries and is sponsored by the Philippines government. That is just an example of the work that is under way.

Mr ADAMS—So there are a lot of people looking at other people's cultures, the way they operate and the way they interpret the law?

Mr Rowe—Yes, indeed. In fact, that was a key element of the negotiation of the statute. It has been said before in this committee that the statute represents a unique international instrument in that it brings together different legal systems and reflects different legal systems in the text that was adopted. That was an enormous challenge. The fact that it was achieved is widely regarded as being quite a significant development in international legal and political terms.

Senator MASON—This is perhaps a cheeky question. I cannot escape from the politics of the ICC, but I think this question may be in order. Mr Rowe, you mentioned the deterrent of the convention. Major Oswald spoke about the fact that the Army is reviewing its procedures and training in its intention to comply with the ICC. Major Oswald, do you think the People's Republic of China's army would be reviewing their procedures to comply with the ICC?

Major Oswald—I cannot answer on behalf of the People's Republic of China.

Senator MASON—Mr Rowe, do you think that the ICC statute would have a deterrent effect on the foreign policy or the defence policy of the People's Republic of China? Would it operate as a deterrent at all?

Mr Rowe—I think if the ICC comes into existence—that the court is actually established and broadly supported; we have a lot of countries that adopted the Statute of Rome and are now actively working on bringing it into force to become full parties—it will be an important legal institution globally that all countries of the world will need to take notice of.

Mr ADAMS—If China looks at the ICC, being exposed to other views and other ways might be an enlightening proposition for the People's Republic of China, just like coming into the WTO. They certainly interpret human rights differently from us. They have arguments, if you speak to them, for how their law operates. Do you think that it would provide a broader picture for them, as with many other states—and maybe for us—to look at others as well?

Mr Rowe—Let me answer that by saying that China has been very closely involved in the negotiations. It still is in a preparatory commission. We and many other states participating in those negotiations have very close contact with the Chinese delegation and we dialogue with them, so there is that ongoing interaction on this particular subject. You are right that China has not become a party to the statute at this stage, but it may in time decide to. The process of dialogue is going on with all countries. I am sure that has a mutually beneficial effect.

CHAIR—Ms Blackburn, let me ask your opinion on a hypothetical—or, perhaps, not so hypothetical—situation we discussed a couple of weeks ago in a private meeting, and that is the *Tampa* crisis. Article 7(k), crimes against humanity, refers to:

> Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Would it be possible under article 7, in a situation such as the *Tampa*, that the Norwegian government could have brought Australia to the ICC because the Australian government was not willing to act?

Ms Blackburn—I will ask Mr Hodges to take this question because he was at the private briefing and I was not.

Mr Hodges—Before you even get to invoke article 7, I draw the committee's attention to what is called the chapeau—the heading of article 7—which talks about a widespread or systematic attack directed against any civilian population with knowledge of the attack. In the situation of the *Tampa*—and I am aware of the hypothetical nature of your inquiry, so I will respond accordingly—it would be highly unlikely that anybody could say that that was part of a widespread or systematic attack directed against a civilian population. Similarly when you move to article 7(2), it is highly unlikely that any country could say that Australia's actions in relation to that matter, with consideration of our Migration Act 1958, would be regarded as a crime against humanity.

Senator LUDWIG—Should the Statute of Rome be ratified and should subsequently the consequential amendments of the Criminal Code enactment of 1995 become law, does that then satisfy those who are still seeking the war crimes convention that we signed in 1949 to be given effect in domestic law? The additional question that goes with that is whether the consequential amendments are consistent with that convention, so that it would similarly satisfy those people

who are still seeking the enactment into domestic law of the war crimes convention of 1949—the genocide convention.

Mr Skillen—The acts described in the genocide convention as genocide would in fact, were this bill to be enacted, be criminalised in Australian law, and all of those acts are covered in what is at the moment called subdivision B of the new division that would be enacted by this bill.

Senator LUDWIG—Thank you. That satisfies any mail that I might have. Lastly, in relation to the primary proposed bill, it mentions an 'appropriate court', the state Supreme Courts and the Federal Court but it does not mention the High Court. As a matter of interest, I turned to section 129, which dealt with strip searches, and it talked about a court in that section. I am wondering about the language contained here. Where is the 'appropriate court' mentioned? I am trying to find where it appears. I am sure it does appear but, not having read it word for word entirely, I could not find it. The only reference I found was in section 129: does that mean the Federal Court, or the state Supreme Courts?

Ms Blackburn—Are you looking for a definition when this bill refers to a court—

Senator LUDWIG—No. In the definition, it says 'appropriate court', but where in the rest of the bill does it refer to 'appropriate court'? Or does it simply use the term 'court'?

Ms Blackburn—Yes. It uses the term 'court'.

Senator LUDWIG—Why wouldn't it mention the High Court?

Mr Skillen—I think the best way we could answer that question is to say that the position of the High Court within the hierarchy of the Australian court system is laid down in the Australian Constitution, and it is not necessary for the bill to reflect those provisions of the Constitution that relate to the High Court.

Ms Blackburn—Yes.

Senator LUDWIG—One final question: in your view, is there any way at all that Australia could ratify this treaty and draft domestic legislation to apply the intentions of the treaty, but also make sure that Australian citizens acting within Australia and consistent with Australian law could be subject exclusively to Australian courts and not to the ICC? Or would that totally undermine our whole ratification of the statute?

Ms Blackburn—Mr Hodges will answer that question.

Mr Hodges—There is no national exclusion in the statute; and, indeed, in article 120, no reservations can be made to it.

Mr ADAMS—The world must be engaged.

CHAIR—As there are no further questions, we thank you very much for your time this morning.

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

That this committee authorises publication, including publication on the parliamentary database, of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 11.19 a.m.