COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT STANDING COMMITTEE ON TREATIES

Reference: Statute for an International Criminal Court

TUESDAY, 9 APRIL 2002

SYDNEY

BY AUTHORITY OF THE PARLIAMENT

JOINT COMMITTEE ON TREATIES

Tuesday, 9 April 2002

Members: Ms Julie Bishop *(Chair)*, Senators Bartlett, Cooney, Ludwig, Mason, McGauran, Schacht and Tchen and Mr Adams, Mr Baldwin, Mr Bartlett, Mr Ciobo, Mr Martyn Evans, Mr King, Mr Bruce Scott and Mr Wilkie

Senators and members in attendance: Senators Bishop, Cooney, Schacht and Tchen and Mr Adams, Mr Bartlett, Mr Ciobo, Mr Martyn Evans, Mr King and Mr Wilkie

Terms of reference for the inquiry:

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

WITNESSES

Committee met at 1.36 p.m.

McCORMACK, Professor Tim, Chairman, National Advisory Committee on International Humanitarian Law, Australian Red Cross

CHAIR—I declare open this meeting of the Joint Standing Committee on Treaties. Today, as part of our review as to whether Australia should ratify the Statute of the International Criminal Court, the committee will hear evidence from the Australian Red Cross and the Australian Institute for Holocaust and Genocide Studies in relation to the exposure drafts of two bills to implement the Statute of the International Criminal Court. I also welcome the press and members of the public to this hearing.

Prof. McCormack—I appear in my capacity as Chair of the Australian Red Cross National Advisory Committee on International Humanitarian Law. I bring with me apologies from my colleague the Reverend Professor Michael Tate, who is a member of that committee and was very helpful in the preparation of our submission. His priestly duties required him to remain in Hobart today, but he was very keen to be with us and asked me to pass on his apology.

CHAIR—But you are certainly happy to represent the Red Cross today before the committee?

Prof. McCormack—I am more than happy to do that, and I am also happy to do it individually, even though it would have been nice to have had him with me.

Senator COONEY—The call of God is always greater than the call of man.

Prof. McCormack—He had a couple of funerals to officiate at today.

CHAIR—Before we start, there are a couple of formalities. The committee does not require you to give evidence under oath, but I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We have received several submissions. Do you wish to make some introductory remarks? We can then proceed to questions.

Prof. McCormack—My intention is to address the content of only the most recent submission on the draft legislation and not to go back to the submissions in relation to the committee I appeared before in Melbourne in March last year.

CHAIR—That is our expectation as well.

Prof. McCormack—I would like to make some introductory comments—obviously I will not read out the submission—and to highlight a couple of key points in the submission and to take questions and comments as we go. I am happy to do that as we go or at the end of my introductory remarks if that is your preference.

CHAIR—I think you will find that if people have a burning question they might interrupt you, but we try to get your remarks to flow and then have questions later.

Prof. McCormack—I am relaxed either way, so that is fine. I want to state at the outset that the Australian Red Cross's reaction to the proposed legislation is a very positive one. We see the two draft bills as a comprehensive approach to the incorporation of the crimes within the Statute of the International Criminal Court, as well as the issues of cooperation between Australia and the court being covered by both bills. The comments that we do have about specific aspects of the proposed legislation are only relatively minor points.

We are particularly happy about the approach, in relation to substantive crimes, of giving to Australian courts the so-called universal jurisdiction—that is, the capacity to try individuals who happen to be in Australia, in the future, who are alleged to have committed one or other of these crimes but were non-Australian nationals at the time they allegedly committed those crimes, they committed them outside Australian territory and they committed them against non-Australian victims. That, from the Australian Red Cross's perspective, is a very important aspect of the global approach to the enforcement of international criminal law—where the International Criminal Court will not be capable of trying every individual alleged to have committed one of the crimes within the purview of its statute just because of sheer numbers and will be completely reliant on individual sovereign nation states complementing the work of the court by the conduct of national trials. So, from our perspective, we are happy about the broadest possible jurisdictional approach that is proposed in the legislation and in fact is proposed in the national implementing legislation of other states which have already ratified the Rome statute or are in the process of doing so.

Although the legislation does appear bulky and complex—it is certainly very large, and perhaps creates the appearance of being quite cumbersome and unwieldy—the approach that has been taken by the parliamentary draftspeople is unique amongst states that are contemplating ratifying the Rome statute. But we think that there are some advantages in that approach. The approach I am talking about, which has resulted in this incredible level of detail, is the spelling out of the specific elements of each individual crime—not just the individual crime of war crimes but every different type of war crime, all 72 of them in fact. Similarly for genocide. There are five different crimes of genocide and 16 different crimes against humanity.

The approach that the Australian legislation takes to spell out the specific elements of each of those crimes is helpful in the sense that it creates clarity and certainty about each individual element that has to be proved beyond reasonable doubt. So it creates certainty for the prosecutors, it creates certainty for defence counsel and it creates certainty for judges—and juries, if they are involved—in the future. Although it results in very bulky legislation, I think that is quite a helpful approach.

The other aspect of the approach is that it is consistent with implementing legislation that the parliament has already enacted in the past into the Criminal Code Act to implement other treaties dealing with international crimes. The most recent of those is the treaty on the safety of UN and associated personnel, where the amendments to the Criminal Code Act of 1995 take exactly the same approach as is done here—that is, they spell out the specific elements of each separate crime.

CHAIR—Just on that point, you do not see any danger in it being overly prescriptive?

Prof. McCormack—No, I do not. I think that the specific elements that are referred to in respect of each offence do not absolutely mirror—but certainly follow closely—the elements of crimes document that the states involved in the negotiation of the Rome statute have agreed to. Because we are basically following the approach of that document, the legislation will very closely mirror, or will be closely related to, the scope of jurisdictional competence of the court itself. So we can only say it was prescriptive in the sense that the Rome statute and the elements of the crimes themselves are prescriptive.

The intention of the legislation is to implement our obligations, assuming that we actually become a state party. So there is consistency in the spelling out of the detail rather than it being too narrowly prescribed. There are a couple of occasions where our legislation goes a little further than the Rome statute does. I think those particular provisions are welcome, but we are not advocating that it ought to be more open-ended than it currently is.

There are probably four key aspects that we raise in our submission, and I will refer to them without really dealing too much with the details. I will then leave it at that, unless anybody wants to ask specific questions. The first of them is the reference in both of the bills to the complementarity formula in the Rome statute: the provision of the statute which will allow the International Criminal Court to exercise its jurisdiction only where a national state or territorial state—that is, the state on whose territory the alleged crime occurs, or the state whose national it is who is alleged to have committed the offence, if those two states are in fact different—is either genuinely unable or unwilling to exercise its own national jurisdiction. So the complementarity formula, which we have argued before this committee on previous occasions, protects Australia's sovereign interests and will preclude the International Criminal Court exercising jurisdiction over an Australian national, unless the Australian government chooses for whatever reason not to prosecute them.

We are of the view that the references to that formula in both of the exposure drafts—clause 3 of the International Criminal Court Bill, and clause 268.1(2) of the International Criminal Court (Consequential Amendments) Bill—do not state the reservation as strongly as they could. In our view, we think the wording of the legislation could be strengthened to indicate that the Australian government would presume its primary jurisdictional right over an Australian national. It might choose to waive the right to exercise that primary national jurisdiction, but we have suggested some wording in our submission that we think could strengthen the clause in both of the exposure draft bills and result in a clearer expression of the parliament's intention in respect of the primacy of Australian national jurisdiction.

CHAIR—Do those amendments that you propose refer to replacing the word 'primary' with 'primacy'?

Prof. McCormack—Yes. I certainly agree that it is a fairly minor issue, because I think that the wording that is there is expressing a particular intention; but, in our view, we could do that in a slightly stronger way.

CHAIR—So 3(2) would read: 'This Act does not affect the primacy right of Australia to exercise its jurisdiction ...'

Prof. McCormack—Or just 'would not affect the primacy of Australia's rights' rather than 'primacy right'; yes. The wording that we have suggested is on page 2 of our submission.

The second issue that I would like to raise is the definition of rape as either a war crime or a crime against humanity. There are two issues in relation to the definition of rape. One is that the proposed definition precludes the possibility of the victim being forced to engage in sexual penetration of another person. That possibility, however unlikely, is covered by the definition of rape in the elements of crimes paper in the three different offences where rape is referred to. In relation to article 7 of the International Criminal Court statute—the Rome statute—the crime against humanity of rape is one of the references; in relation to article 8, there are two separate references: the war crime of rape in an international armed conflict and the war crime of rape in a non-international armed conflict. So there are three separate occasions.

In the elements of crimes paper, in the definition of each of those three separate offences, there is the possibility that the victim of the attack can be forced to sexually penetrate another, whereas the Australian legislation limits the definition of rape to sexual penetration of the victim only. Our submission is that there does not seem any reason to us why the Australian legislation ought not reflect the same breadth of definitional capacity that the elements of crimes paper includes.

The second aspect about the definition of rape, either as a crime against humanity or as a war crime, is the issue of the lack of consent expressed by the victim. The proposed Australian legislation requires as one of the elements—again, in each of the three separate offences of rape—the lack of the victim's consent. But the elements of crimes paper, rather than focus on the question of the individual victim's consent or lack of it, talks about the environment in which the rape happens and, if that is a coercive environment, the question of an individual victim's consent or otherwise is irrelevant.

The implementing legislation adopts this approach of looking at the coercive environment rather than the individual victim's consent or lack of it, in respect of several other war crimes and crimes against humanity of a sexual nature, particularly the sexual offences of forced pregnancy, enforced prostitution and sexual slavery, and sexual violence—and that is entirely consistent with the approach taken by the elements of crimes paper. But, for whatever reason—and I am not sure exactly what it is—the proposed legislation departs from the approach of the elements of crimes paper in respect of this particular issue for rape. Our submission is that we ought to be consistent with the approach taken in the elements of crimes paper and should allow the court, if a person was being charged with a war crime or crime against humanity of rape, to look at the question of the coercive environment which might make the particular individual victim's consent or lack of it irrelevant to the prosecution of the crime. Again, the details of that are spelt out in our submission.

Senator COONEY—You say that rape as a crime against humanity then can be a war crime; it is a crime in any event. The penalties are the same in each case. What is the idea of separating them out? Why not just have a general—

Prof. McCormack—A singular offence of rape?

Senator COONEY—Yes.

Prof. McCormack—The reason for separating them out is that there are different threshold requirements for the commission of a war crime and the commission of a crime against humanity. War crime obviously has to happen in the context of a war, an armed conflict. My own view is that it would be better if international law got rid of the distinction between an international armed conflict and a non-international armed conflict altogether. If an armed conflict exists, irrespective of the actual character of it, and a rape is committed in the context of that, it ought to be a war crime. But the reality is that international law has maintained the distinction between international armed conflict and non-international armed conflict, and so that distinction is reflected in the Rome statute, in the elements of crimes paper and in our own legislation, including in the existing Geneva Conventions Act 1957, in fact.

The fact is that a war crime happens in the context of an armed conflict. A crime against humanity can happen outside the context of an armed conflict but with a different threshold requirement. That relates to the general element that applies to each of the 16 separate crimes against humanity: that the specific act—whether murder, rape or one other sexual offence, or apartheid or persecution—happens in the context of an attack against a civilian population, in either a widespread or systematic way. So there are some threshold requirements, both quantitative and qualitative in fact, for proving that a crime against humanity has occurred. The fact that they can happen in different situations and require different threshold elements is the reason there are separate offences in either category, even though the actual offence itself is similar.

Senator COONEY—A number of people have ratified the treaty: is their legislation the same as this? Is this template legislation around the world?

Prof. McCormack—No, it is not template legislation; it is actually unique in its approach, because most other pieces of implementing legislation, especially that from other common law countries—New Zealand, Canadian and UK legislation—are very different in their approach. Each of those incorporates into the legislation the definitions of the crimes, which are fairly nonspecific and quite broad, either in the statute itself, or in the elements of crimes paper which details the specifics. So it is quite minimalist legislation, which just refers to the international instrument for the purposes of identifying the specific elements required.

Senator COONEY—Could a prosecutor go in for forum shopping—that is, send your accused to particular forums?

Prof. McCormack—The prosecutor of the International Criminal Court, or the Director of Public Prosecutions in Australia, do you mean?

Senator COONEY—No. Say that you have a war crime and that the system, if you like, can channel people around the world, wherever they want to go.

Prof. McCormack—If the prosecutor of the International Criminal Court decides not to issue an indictment against the individual because the state of nationality of that individual or the territorial state—either of those two—wants to try the individual itself, then those states have the first claim on jurisdictional competence. I think the possibility of forum shopping is pretty remote. In Australia's case, unless the individual is an Australian, or is a non-Australian but the alleged atrocities they have committed have occurred in the territory of Australia, it is

extremely unlikely—in my view—that the Australian government would be interested in prosecuting a non-Australian for acts committed outside our territory against non-Australians, unless the individual has come here and perhaps lied about their past when applying for whatever visa that allows them to stay in the country. Even in those circumstances, I do not think we are going to see a flood of prosecutions of people like that. There are limitations to the possibility of forum shopping, although there could be in some cases two or three different alternative places where the individual could be tried, depending on their nationality and where the act occurred.

Mr KING—Or article 20—

Prof. McCormack—Yes, I think so. That would have been the more sensible answer, actually, wouldn't it?

Mr KING—Regarding the issue you have just raised about rape and the gravity of the offences involved, could you look at article 8(2)(a)?

Prof. McCormack—Of the statute?

Mr KING—Yes. Why is it called a statute and not a treaty?

Prof. McCormack—It is a treaty, and 'treaty' is a generic term that covers a whole range of different types of instruments. So the Charter of the United Nations is a treaty, but it is a charter in the sense that we are using that term to describe a constitutive instrument that sets up a new organisation. It is called a statute because that is a common international term used to describe an instrument which establishes the jurisdictional competence of a court. For example, in relation to the International Court of Justice, the World Court in the Hague, we refer to the international treaty as the statute of the ICJ.

Mr KING—Perhaps you could have a look at article 8(2)(a).

Senator SCHACHT—The lingo of all of this is very confusing.

Mr KING—That speaks of a war crime as meaning a 'grave breach' of the Geneva convention. Then it says 'namely, any of the following acts against persons or property protected under the provisions of the convention'. But it is not clear to me what is actually meant by that phrase. Are they proscribing any grave breach of the convention, or any act which is a breach of the convention? There is a very important difference between the two.

Prof. McCormack—Absolutely.

Mr KING—For example, you could wilfully cause someone to suffer grievous bodily harm in a circumstance which is not grave—

Prof. McCormack—Yes.

Mr KING—and, from one reading of this convention, it could be a war crime.

Prof. McCormack—Yes, that is a good question. The answer is that the four Geneva conventions themselves, as well as additional protocol 1 to the Geneva conventions, actually specify in relevant provisions in each of them which breaches are considered to be grave breaches. In relation to Geneva Convention IV, for example, it is article 147 that lists those acts which constitute grave breaches—or it might be article 146. Then the following provision obligates states parties to the Geneva conventions to implement legislation to penalise grave breaches of conventions in their own domestic law. In fact, if you looked at the Australian parliament's Geneva Conventions Act 1957, grave breaches of the Geneva conventions, all four of them, and of additional protocol 1 are already crimes under Australian domestic law and have been since 1957, when that legislation was enacted. The qualification of 'breach' with the word 'grave' is not an issue for determination by a court as to how serious or not a particular breach was; it refers to a specific section of each of the conventions that specifies those breaches which are considered grave.

The reason why the Rome statute begins with the first category of war crimes as 'grave breaches of the Geneva conventions' is because all 189 states parties to the Geneva conventions accept that that particular category of offences already constitutes war crimes.

Mr KING—I understand that. But I just think it is a recipe for disputation and uncertainty to leave it in the form that it is in at the moment.

Prof. McCormack—I think that one of the reasons the elements of crimes paper takes the approach that it does to spell out the specific elements of each of the offences—so that, in relation to article 8(2)(a), there is the war crime of wilful killing, the war crime of torture, the war crime of inhumane treatment and the war crime of biological experiments—it goes on to cover quite a few—

Mr KING—Wouldn't it have been better if you had just left out all the words after '12 August 1949'? I am not trying to draft this thing for you, but—

Prof. McCormack—No, I understand.

Senator SCHACHT—You might as well have a go; everyone else does, Peter. Don't feel restricted.

Mr WILKIE—We are going to be talking to the department about that tomorrow.

Mr KING—The other problem—and I think it is reflected too in paragraph 2(b)(xxii) of article 8—is that there is a distinction between a form of sexual violence constituting a grave breach and one that is not. I just think there is a little uncertainty in there which is going to be worrying for people.

Prof. McCormack—If you look at the terms of the statute itself, that is a very valid observation. My own response to it is to suggest that the elements of crimes paper tries to specify the elements which must be proved, and the court will use that paper to determine, when the prosecutor is making the case, whether in fact each of those elements has been proved beyond reasonable doubt. I think the same thing will happen in the case of the application or the implementation of the Australian legislation: the court will have each of those specific elements

which introduce the level of clarity and certainty that we are looking for. The Australian court will not just be looking at the definition of the Rome statute; it will be bound by the provision of the Australian legislation, which will say that, for whatever war crime we were looking at—inhumane treatment—

Mr KING—Rape will do.

Prof. McCormack—rape—the prosecutor must prove beyond reasonable doubt 'the following elements'. That is where the certainty comes in. The court will not need to go back—

Mr KING—Where is that statute?

Prof. McCormack—That is the statute we are looking at at the moment: the International Criminal Court (Consequential Amendments) Bill. Schedule 1 of that bill is the proposed amendments to the Criminal Code Act. It lists all the separate offences that will become crimes under Australian law.

Senator COONEY—I was trying to look at 268.73, outrages upon personal dignity. That makes fairly clear just what you are saying. This is on page 41 of the International Criminal Court (Consequential Amendments) Bill 2001. That is what you mean, is it?

Prof. McCormack—That is exactly what I mean, yes.

Senator COONEY—That is a good illustration.

Prof. McCormack—Thanks for that clarification.

Mr KING—I have a couple of other questions, but have you finished?

Prof. McCormack—No, but I will be soon.

CHAIR—Perhaps you might continue, Professor McCormack, and then Peter King can ask a few more questions, then Kerry Bartlett, and then Chris Schacht.

Prof. McCormack—There are two other issues that I want to draw your attention to but I will do it as briefly as I can. The first of those two is proposed subdivision H of schedule 1 to the International Criminal Court (Consequential Amendments) Bill. This is a subdivision which proposes to incorporate into our domestic law grave breaches of additional protocol 1 to the Geneva conventions. The fact is that the Rome statute identifies grave breaches of the conventions themselves as a separate category of war crime, but then article 8(2)(b) of the statute—the section dealing with other serious violations of the laws and customs of war—does not specify grave breaches of additional protocol 1. Australia is a state party to additional protocol 1 so, in our Geneva Conventions Act 1957, grave breaches of additional protocol 1 also constitute crimes under Australian domestic law. This particular subdivision—subdivision H—adds to the Rome statute by bringing into our domestic law those particular grave breaches of additional protocol 1 that are not covered by the Rome statute, because it is not exhaustive or comprehensive in respect of this particular category of grave breaches.

The problem is that, because of the way subdivision H is currently drafted, there are a number of grave breaches of additional protocol 1 which are also already listed as either grave breaches of the conventions or other serious violations of the laws and customs of law. Some examples are listed in the submission, so I will not go into the details. The problem that arises is that, where in this subdivision H some of the particular offences are repeats of offences already covered in subdivisions D or E, there is actually some disparity in the specific elements for those offences. Then you really do have an issue of forum shopping: the prosecutor thinks, 'Do we charge the person with grave breaches under subdivision H or under subdivision D or E?' depending on which of them is easier to prove, and that has to be fixed up because there are some inconsistencies which I hope can be remedied.

The final point I want to make is not in relation to schedule 1 of the consequential amendments bill but in relation to schedule 3—I think it is—which proposes the repeal of part II of the Geneva Conventions Act 1957. The point we were concerned about here is that the existing legislation covers, with universal jurisdiction, those grave breaches of the Geneva conventions committed after 1957—legislation obviously has no retrospective effect. Our concern, if this relevant part II of the Geneva Conventions Act is repealed, given the fact that these bills will apply only prospectively—in the future—and not retrospectively, is that there is then, potentially, a gap in our legislation for the period 1957 to when these two bills are enacted, and we wanted to be sure that the repeal of part II by this new piece of legislation of the Geneva Conventions Act does not have the effect of actually wiping out the application of the Geneva Conventions Act in the interim period, between 1957 and the date of enactment.

I raised this issue with the Attorney-General's Department and discovered a provision of the Acts Interpretation Act 1901, section 8, which deals with this very issue and which brings us some comfort because that provision basically says that, unless the legislation says otherwise, when it is repealed, the repeal takes effect only after that date, not retrospectively. So I am assuming that that is the interpretation a court would apply if there were an issue where, for whatever reason, the Australian government wanted to prosecute an individual for alleged crimes committed between 1957 and 2002, or whenever, under the Geneva Conventions Act. I do not expect the legislation to refer to this issue explicitly, but we would be very keen to see some reference in the explanatory memorandum, perhaps, which accompanies the second reading of the bills, to clarify that that is the understanding—that that particular provision of the Acts Interpretation Act would apply and the Geneva Conventions Act would continue to have potential application for the period between when it was enacted and when these bills are enacted and make it no longer necessary.

CHAIR—Professor, you said that you raised this issue—the loss of the temporal window, as you called it—with the Attorney-General's Department. Are you saying that the Acts Interpretation Act perspective was confirmed by the Attorney-General's Department—you found it, and they confirmed?

Prof. McCormack—It was actually in the context of a conference that we held at the University of Melbourne in February. Geoff Skillen, who is down the back there, from the Attorney-General's Department, was giving a paper on the International Criminal Court and I asked this specific question of him. That was the provision that he referred to. I then went back and read the provision of the Acts Interpretation Act because I was not aware of it myself prior to his input. I understood exactly what he was saying. My original concerns were alleviated greatly

by that, but I think the Australian Red Cross would be very keen to have some sort of explicit reference, perhaps in the explanatory memorandum, which confirms that.

CHAIR—Just for clarification.

Prof. McCormack—I think that is enough from me, probably. They are the points that I want to make. The detail is in the submission.

Mr KING—I have a few problems with this. I will deal with the question of their utility in a moment. But just going on from your point about the substantive offences provided for by this convention, I see that under 'genocide', imposing measures intended to prevent births within a group is an act of genocide. I do not know whether that would bring in with it the one-child policy of the People's Republic of China, but I would have thought that there would be some concern about that. Is there any official view about what that means?

Prof. McCormack—There is no case which prosecutes an individual so far for the act of genocide.

Mr KING—No, that cannot be right. This whole so-called statute is intended to deal with individuals, not nations.

Prof. McCormack—No, I am making the argument that no individual has ever been tried for the act of genocide—

Mr KING—To date.

Prof. McCormack—To date; that is right. So the answer to the question 'do we know exactly what it means?' is not, in a sense, that we have a case to look at where a fact or situation is evaluated against the specific elements of the offence. The only thing I can say in answer to the question is that that part of the definition of genocide has been accepted by the overwhelming majority of the international community since the adoption of the genocide convention in 1948. This definition of genocide in the Rome statute is a verbatim replication of the definition in the genocide convention. That was a deliberate decision in Rome not to play around with the definition. So each of the specific acts which constitute genocide have constituted the international crime of genocide since 1948.

Mr KING—I know. Things have moved on a bit since 1948, though.

Prof. McCormack—Indeed.

Senator SCHACHT—China has a one-child policy. You have government policies such as you get increased taxes if you have two or more kids, and you get other social and financial penalties. It is arguable whether abortions are forced or you have to have an abortion because financially you are too disadvantaged. I remember once in 1981 meeting the Deputy Governor of the province of Szechuan, who was in charge of the policy. Would he be, therefore, chargeable under—

Mr ADAMS—No, because there is no war taking place.

Prof. McCormack—There doesn't have to be a war for the crime of genocide.

Senator SCHACHT—As I say, one of our colleagues in the Senate might say that this person should be got at—

Prof. McCormack—Perhaps not only one.

Senator SCHACHT—in that case. In East Timor because of the civil war, or the war of independence—whichever side you want to be on in East Timor—there were claims that half a million people in the population one way or the other died and therefore were not able to reproduce, and that the way the Army or the Indonesian government administered East Timor led to a lower birth rate. Was that, therefore, genocide of the population? Under this statute, in one form or another, as difficult as it may be, could someone launch an individual case against the official, in my case the Deputy Governor of the Szechuan province, or the Governor of, as it then was, the East Timor province?

Prof. McCormack—No is the answer, and the reason is because part of the definition of the crime of genocide is the intentional targeting of an ethnic, racial or religious group.

Senator SCHACHT—In East Timor they would claim that they were a different ethnic, racial and cultural group from the rest of Indonesia because there had been a mix for 500 years of Portuguese cultural development—whatever you want to call it—and they were of a different religion.

Prof. McCormack—Yes. In my view, genocide is much more difficult to prove because of the definitional criteria than a crime against humanity is. In genocide, first of all you have got this very limited, exhaustive target group: it has to be racial, religious, ethnic or political.

Senator SCHACHT—That is for genocide?

Prof. McCormack—That is for genocide. So in the case, for example, of Cambodia and the Khmer Rouge, the overwhelming majority of the victims were not the subject of genocide, even though we describe it as genocidal, because they were urban dwellers, professionals or whatever else; they were not part of an ethnic, racial, religious or whatever other group. Some people would argue that is in fact a major limitation of the definition of genocide. Whether you agree with that or not, in the case of the Chinese one-child policy, this is not a deliberate targeting of a specific group on one of those grounds. It is—

Senator SCHACHT—Just a point: the Han Chinese have it strictly imposed on them, and they are just under 1,200 million people out of 1.3 billion. The 80 to 100 million ethnic minorities actually are able to have two or three children. So the majority could claim that they are having it imposed on them.

Prof. McCormack—Okay. In some circumstances, maybe it is possible that technically the elements of genocide have been satisfied in respect of a particular identifiable group. In the case

of Cambodia again, you could argue that the ethnic minority groups that were targeted along with urban dwellers would have been victims of genocide.

The other problem is that you have to also prove a very high threshold of what, in criminal law, we call mental element, intention: you have to be able to show that the policy is being carried out with the intention of physically destroying, in whole or in part, this particular group. That is not an easy thing to prove, and is one of the reasons there have been very few successful prosecutions of genocide since 1948. The fact also remains—

CHAIR—It is a type of mens rea.

Prof. McCormack—A very high threshold mens rea requirement—extremely high. Some people also say too high, in fact.

CHAIR—Had you finished your answer, Professor?

Prof. McCormack—I would just like to say in relation to the Chinese that there is a political reality as well, irrespective of the legal technicalities. We had this same discussion in Melbourne over 12 months ago.

Senator COONEY—A very interesting discussion it was, too.

CHAIR—We are obviously about to have it again.

Prof. McCormack—The fact is that the International Criminal Court will be as subject to international political reality as any other multilateral institution in existence at the moment. By that I mean that it will be almost impossible for the court to prosecute an individual national of one of the five permanent members of the Security Council. The prospect of the court being able to try Chinese officials for the one-child policy or US service men and women for alleged violations of the statute committed in Europe, or wherever else in the world, is extremely remote because of the political realities. It would be naive of me as an international lawyer to try and suggest that all we look at is legal technicalities. The court is not going to be able to deal with everything because it is going to be subject to that.

Senator SCHACHT—I am sorry to take these examples but there is a minority that claims it has been hard put on: the Tibetans. And there is pretty substantial circumstantial evidence that, through a series of cultural policies, the population has suffered, there have been arrests, murder, extrajudicial killings et cetera, as well as people having their whole livelihoods affected. The Dalai Lama and his supporters around the world are pretty well organised and have access to a large amount of money. Are you saying that if they tried to launch a case against the Chinese governor of Tibet—I cannot remember the Chinese name for Tibet—that would not get anywhere because China, as one of the five permanent members of the UN Security Council, would say, 'We'll get even with you, America, somewhere else'?

Prof. McCormack—No, I am not suggesting that we are talking about a tit for tat threat. There are only three ways that a case can come before the International Criminal Court. One of them is by a Security Council resolution. There is no way, obviously, that China is going to allow a resolution to happen. There are only two other ways that that can happen. One is if a state

party to the statute makes a complaint and says, 'In this case, this policy, you've got to look at it and charge some individuals for it.' The third possibility is where the prosecutor acts on their own initiative: they have received evidence from whatever source, including, possibly, the Dalai Lama or whoever else—other NGOs or states who do not want to be named—and decide to initiate proceedings against an individual. That case then has to be presented—I guess in a manner similar to committal proceedings in our domestic criminal law—to a panel of three judges of the International Criminal Court, and they decide whether there is in fact a case to answer and to allow the prosecutor to proceed.

I think that is the point at which the political reality kicks in. I personally do not believe that the judges of the International Criminal Court are going to want to get into attempting to prosecute members of influential states in the world for alleged offences that are seen to be intensely political. My view is that, in the first few years, the primary work of the International Criminal Court will come from resolutions of the Security Council. Let us take the example of East Timor, post ballot 1999. The first operative provision of resolution 1264 says that the Security Council condemns the outrageous atrocities committed against the civilian population and 'demands that those responsible for such acts be brought to justice'. If a similar situation arises after the court is established, all the Security Council has to do in its first operative provision is say, 'We condemn the outrageous atrocities against the civilian population and we empower the prosecutor of the International Criminal Court to investigate this situation and to issue indictments.' That is where the work of the court is going to come from, in my view.

Senator COONEY—It is the way you come at this; what you are really saying, I think, is that this procedure will catch some people who deserve to be caught, but it will miss out lots of people who deserve to be caught but whom we will not be able to capture. But, just because you cannot capture everybody, does not mean to say that you should not proceed against those whom you can.

Prof. McCormack—That is it in a nutshell.

Senator COONEY—It all works anyhow.

Prof. McCormack—My view is that what this court will enable the International Criminal Court to do is capture some people who deserve to be caught and tried but who currently cannot be because there is not a forum in which to do it. So, yes, I agree with that.

Mr KING—I have two issues concerning the power of the judges to refer proposals to the assembly to amend the substantive provisions. I do not agree with the judges having that power. I think that should come through the state parties. If a particular judge wants to amend the law, he or she should do it through the home state of that particular judge. I think that gives an inappropriate power to a judicial officer.

The other issue is the power of the prosecutor of his or her own motion to bring proceedings. I think you have just acknowledged the possibility of a prosecutor bringing a case against the United States, China or Australia over something they do not like about what we have done in Afghanistan, East Timor or somewhere else like that; it is not improbable. I have some grave reservations about conferring that power upon the prosecutor, except by reference from either the UN or a state party.

Prof. McCormack—The first thing I would like to say is that subject matter jurisdiction is only prospective. So in terms of our involvement in Afghanistan or wherever else—

Mr KING—As from the date of adoption.

Prof. McCormack—Yes, assuming those sorts of incidences arise again. This was a very controversial issue in the Rome diplomatic conference, there is no doubt about that. There were a lot of states that opposed any notion of the prosecutor being able to act on their own initiative and a lot of other states that thought that was absolutely essential because we know that the Security Council will only refer those matters that are politically acceptable for the Security Council to refer and we know from years of experience in the human rights framework of the UN that states do not dob other states in. So if they are the only two possible ways that a case can come to the court then this court, in the view of quite a few states, is going to be very limited.

So, although the US was one of the most outspoken critics of the concept of the prosecutor being able to exercise their own initiative and kept talking about rogue prosecutors who get out of control and on their own hobbyhorse, the fact is that the majority of states agreed to the proposal on the basis of the safeguard of the panel of three judges receiving the documentation from the prosecutor and deciding whether or not there really is a case to answer here. If it is a frivolous prosecution then that is the safeguard to try and throw it out and get rid of it and say, 'No, this is being done for the wrong reasons.'

CHAIR—Let me clarify that. If it is referred by the Security Council, it is referred to your panel of three.

Prof. McCormack—If it is referred by the Security Council, that is it; the prosecutor goes ahead. If it is referred either by a state party or by the prosecutor acting on their own initiative, that must be cleared by the panel of three judges.

CHAIR—I understand.

Senator SCHACHT—How many judges are there?

Prof. McCormack—Eighteen, in different chambers: two trial chambers and one appeals chamber. This will be a panel from the trial chamber.

Mr KING—When you speak about being cleared by three judges, you mean the pre-trial process.

Prof. McCormack—Yes, that is right.

CHAIR—A case to answer.

Mr KING—But that happens after the prosecutor has prepared a case and it becomes public and is brought to the pre-trial process. The pre-trial process is in effect a trial process. It still lies with the prosecutor to bring the proceedings.

Prof. McCormack—Yes, absolutely. Do you want an Australian judge on the court to be involved in trying to make sure it happens properly?

Mr KING—So you think therefore we should pass it immediately.

Prof. McCormack—No, not immediately, but very soon.

Senator SCHACHT—On this point, is the structure of the running of the system of the court more like the continental European system, an inquisitorial arrangement, or like our adversarial system coming out of the United Kingdom?

Prof. McCormack—It is a combination of both, actually—

Senator SCHACHT—Don't tell me we have got the worst of both: we will be in real strife.

Prof. McCormack—There is no question that it will not be perfect. But there will be elements of both. It is interesting to observe—

Senator SCHACHT—Don't go into detail; I just wanted to find that out. The other question—

CHAIR—Senator, can I get Peter King to finish. I think he has one more question.

Mr KING—I did have a couple of minor queries about text and so on, but I am happy to leave that.

CHAIR—We might get some more general questions around the table.

Mr BARTLETT—As you are aware, the concerns I have expressed before have been that, while I agree with the whole concept and the objectives of the court, there is the potential to undermine Australia's sovereignty in this. It seems that your suggestions regarding the word 'primacy' have partly addressed those concerns. You have suggested there that clause 3(2) ought to read that this act does not affect the primacy of Australia's right to exercise its national criminal jurisdiction with respect to crimes within the jurisdiction of the ICC. Does that provide the protection to Australia's sovereignty that I would like to see there? Specifically, for instance, if an Australian court did prosecute an Australian citizen for an alleged breach of one of those articles and that person was acquitted, could a case still be taken to the ICC? Secondly, if a prosecution did not occur because in the view of Australian authorities that person was deemed not to have contravened any of those articles, would that then be considered a case of being unwilling or unable to prosecute? Would the inclusion of that sort of terminology guarantee the protection for Australia's sovereignty over its citizens?

Prof. McCormack—I think probably not to the extent that you are hoping for. Of the two possible scenarios that you described, the second of the two is the more disconcerting. In my view if the first happens, if an Australian individual, a national, is prosecuted under our domestic law and is acquitted, I just cannot imagine the chance happening of the court making the intensely political decision that the Australian court process is not up to the standard—that it is a

sham; that it has just been conducted by a kangaroo court, let us say since that is a good Australian icon. If the court did that, it would run the risk of a whole range of Western countries saying, 'If they're going to say the Australians can't do it right, what are they going to say about us? That's it, we're pulling out.'

The second possibility is the more concerning one in the sense of what you are expressing as your principal concern about the whole thing, because I guess you can conceive of a situation where the Australian government decides for whatever reason, rightly or wrongly, that the particular practice is not a crime and the International Criminal Court has a different view. The possibility of that is what I think the Americans are most concerned about. The reality is though that, even though this theoretical possibility exists, it exists whether or not we are a state party to the statute of the court because, if the act occurs in the territory of a non-state party—if an Australian national commits the act in a territory of a state party—as the territorial state they can hand that person over to the International Criminal Court.

This is something that the US have not really thought through well enough. Their concerns that they are articulating apply whether they are a state party or not. By staying outside of involvement in or participation in the court, they do not protect themselves against the very thing they are concerned about. As I have said to you and to other members of the committee, I think it is an extremely unlikely scenario but it can still happen if you are a non-state party. So why not actually become a state party, get involved in the work of the court, have the opportunity at the first conference of states parties to be involved in the discussion about the review of the subject matter jurisdiction, nominate a judge, have them elected and actually try—if we really think the court is going to go off the rails politically—to introduce a little bit of sanity into proceedings?

Mr BARTLETT—Given that, the fairly explicit and detailed way in which the draft legislation spells out its interpretation of these crimes really does not help at all. For instance, it includes there the deliberate intent to perpetrate inhumane acts or acts against humanity, but that does not really help in any case then because, even though there may not be the intent there, the general description—the more vague description—in the statute itself that ignores the intent could still be used to bring an Australian citizen to trial?

Prof. McCormack—The reason why we think it is worth including it is not that it necessarily limits the jurisdictional competence of the court but that it reaffirms the decision. In our view, what we are trying to do, I suppose, is reaffirm the policy decision that was taken by the majority of states participating in the Rome diplomatic conference that the correct formula for the relationship between the ICC and national courts is primacy of national jurisdiction—unlike the two tribunals, and we have talked about those before. Australia is no different from any other state that either has already ratified the statute or is currently proposing to do that in the sense that all of the states want that primacy of national jurisdictional competence protected. So the reference in the legislation reaffirms that is our intent; that is how we interpret this provision and that is how we want the court to interpret it.

Mr BARTLETT—But that is still to no real effect if the prosecutors interpret it differently?

Prof. McCormack—In the end I have to concede that, yes.

Mr BARTLETT—I have one other point along the same line. You have suggested that we ought to elaborate on the way primacy would be interpreted in the case of the Australian defence forces acting overseas, so presumably the same limitation applies there?

Prof. McCormack—That is right.

Mr BARTLETT—Even though we would define it that way, there is still no guarantee in that regard?

Prof. McCormack—No, we are again sending the articulation of our intention to the International Criminal Court, but if they choose to ignore it in very unusual circumstances that theoretical possibility still exists.

Mr BARTLETT—What if it came to a real showdown and they insisted that there was a case against an Australian who we were unwilling to prosecute? What happens in the case of a stand-off if any party simply refuses to hand over someone for prosecution?

Prof. McCormack—The critical question is who has custody, isn't it? If we have custody of the individual and we say, 'You can all go and get stuffed,' then we will be criticised by the international community, and that is not an utterly uncommon experience in our case at the moment.

CHAIR—Or generally.

Prof. McCormack—Or generally; that is right, yes.

CHAIR—It is not confined to Australia.

Senator SCHACHT—You mentioned 18 judges and the prosecutors. There are 18 judges to be appointed by those who sign up. You mentioned before about the power of the big five, one of them being China. I know this dates me a bit but, in 1991 on a human rights delegation I led to China, I had a meeting with four members of the supreme court of the Chinese judiciary. Not one of them had had any legal training. They were all appointed to the position to be on the supreme court of China because they were loyal members of the central committee of the Communist Party and had spent 45 loyal years serving the party. If China insists on one of those or someone similar being on the bench, one of the 18, what powers do the rest of us—who have a bit more idea that due process and maybe some legal training and independence would be useful—have to say to China, 'Mr Jay Wong Tong is not really up to it; and we think he'll bring discredit on, or won't be able to serve, the court'?

Prof. McCormack—The first point I suppose is that there is no way China is going to ratify before the election of judges—

Senator SCHACHT—That is the way we get out of it?

Prof. McCormack—It is one of the ways we do get out of it. Non-states parties will not be able to nominate judges.

Senator SCHACHT—Okay. That takes China out.

Prof. McCormack—Yes.

Senator SCHACHT—Just say one of the regimes of the world that are one-party states get in and sign up for whatever reason—

Prof. McCormack—And they nominate the judges, yes.

Senator SCHACHT—Say that they are rounded up by the usual suspects, by America or Great Britain, and we find out that they appoint somebody who is the dictator's brother-in-law—a pretty good junket job to be on this court—

CHAIR—Even if you just assume somebody who has no legal experience or training.

Senator SCHACHT—Actually there are some good Australians who have no legal experience who would be probably better than some judges, but that is a personal opinion.

CHAIR—We need not go there.

Prof. McCormack—No, we will not go there. The answer to the question is, in my view, Senator Schacht, those people have to be elected. The group of states parties elects those 18 judges. Every state that nominates a judge usually puts in a CV, and there is a bit of a dog's breakfast about—

Mr KING—There is a process for election—

Prof. McCormack—Absolutely. So you do not vote for a nominee who is not up to it. Just as in any multilateral election—

Senator SCHACHT—But this is different. I am just raising these devil's advocate questions. I am in favour of the court; I make no argument about that. But I am concerned that, over a period of time as more countries accede to it or sign up or whatever, when vacancies occur—maybe not in the first batch—there are 198 or 210 countries on the UN and only one-third of them are genuinely democratic and even fewer have a history of judicial independence. Even a Premier of Queensland once could not work out the difference with the separation of powers, and so I do not think there are other countries in the world that would be any better off—

CHAIR—He had heard of it.

Senator SCHACHT—He had heard of it, but he thought it was something more to do with stacking branches in the National Party than with actually running the state. Nevertheless, what I want to come to is this. We end up with 200. You can then get the African group or the Central Asian group deciding, 'We'll scratch your back and we'll appoint Fred, Tom, Dick or Harry'—someone who has no qualifications that would get him an appointment in a country with a Western history of judicial process. How do we stop that?

CHAIR—That is the lobbying that would go on.

Senator SCHACHT—The IOC is a living example.

Prof. McCormack—Ultimately, you cannot stop it.

Mr KING—Like the world soccer organisation.

Prof. McCormack—Ultimately you cannot stop it. There is a process, and because there will be deals done within regional groupings—that is the way it works—some people will get appointed to the bench who should not be on it. But no single judge will ever decide a case on their own.

Senator SCHACHT—I understand that.

Prof. McCormack—We are talking about a minimum of three. A full bench is three. I draw some comfort, from my own perspective, from the way the two international criminal tribunals have been operating since 1993 and 1994 respectively. Especially in the case of the international criminal tribunal for Rwanda, you would have to say that not all of the judges are of the same standard—let me put it that way—and there have been some problems with the way the tribunal has operated. But, when it has come to individual trials, with the prosecution proving each of the elements of the crimes beyond reasonable doubt and the court making its decisions about convictions or acquittals, in my view that process has actually gone relatively well, and I draw comfort from that.

Senator SCHACHT—The other one about the appointment of the prosecutors, which Mr King has raised—that they can go off on a bit of a search and destroy argument themselves—who appoints the prosecutors? What balances are kept about their appointment? How long are they appointed for?

Prof. McCormack—States parties appoint the prosecutor and the deputy prosecutors. I am not sure of the terms of appointment, but in my view that appointment is much more important than the appointment of the judges, because there are 18 of them.

Senator SCHACHT—How many prosecutors do we think will be appointed?

Prof. McCormack—There will be one senior prosecutor and two deputies appointed by election, and then they will appoint their own prosecutorial staff—very similar to the two ad hoc tribunals which have to use the same prosecution cell. Fortunately, the international committee's experience in relation to the successive prosecutors of the two tribunals has been very positive. We have been fortunate to have outstanding prosecutors, but the first person who was nominated—who ended up pulling the pin—would have been a disaster if he had been appointed. That is a really critical appointment. Again, non-states parties will not have any participation in the decision of who that should be.

Senator SCHACHT—Thank you, that is very useful information for people to read in the record, Professor McCormack. In a hearing we had last year, some groups turned up and made a

number of accusations about the problem with this legislation, saying that it was part of the world government—

Prof. McCormack—Conspiracy.

Senator SCHACHT—Movement, conspiracy, Zionist plot et cetera. There was also an accusation that it was all a Fabian plot.

Mr KING—A Fabian socialist plot.

Senator SCHACHT—A Fabian socialist, Zionist plot in favour of world government. Just for the record—because your organisation, the Red Cross, has strongly supported this—have you many members of your organisation who are (1), Zionists; (2), Fabians; (3), in favour of world government—

CHAIR—If this is a conspiracy, Senator—

Senator SCHACHT—I just want to get it clear. Is it that you do not know how many members, if any, and why would you be worried if any of those people were members of the Red Cross, I presume?

Prof. McCormack—Correct.

Senator SCHACHT—Have you been lobbied by any of those groups to come and talk to you about their concerns?

Prof. McCormack—None of them at all. I have been abused by some of them, but not lobbied by them.

Senator SCHACHT—I am disappointed because I did identify myself at the hearing as a Fabian member—

Prof. McCormack—Did you?

Senator SCHACHT—and I would like to see a couple in the Red Cross. It would be rather useful.

Prof. McCormack—Are you a member of the Red Cross, Senator Schacht?

Senator SCHACHT—No, I am not, actually.

CHAIR—The conspiracy deepens.

Senator SCHACHT—There is a conspiracy, obviously.

Prof. McCormack—There are ways and means!

Mr ADAMS—I am a member.

Senator SCHACHT—I have one last question—about a citizen of Australia who came here and was subsequently found to be a war criminal. I think the most celebrated case, unfortunately, is that of Kalejs, who got Australian citizenship by lying when he filled in his application to be an Australian citizen. By the time we all worked it out that he had a very dubious past, to say the least, the 10-year limit on taking citizenship away from him had expired. Do you think we should, separately, in the case of those who have lied to get citizenship and are found, prima facie, to have a case that they are war criminals, be able to take their citizenship off them?

Prof. McCormack—I need to answer the question in a different capacity, if that is permissible. I would be happy to answer it—

Senator SCHACHT—Citizen of Australia, go for your life!

CHAIR—Tell us the capacity, and then proceed.

Prof. McCormack—Professor Tim McCormack, University of Melbourne. Absolutely. I was outraged by the fact that there was a claim that we could not do anything about revisiting the decision to grant citizenship in the case of Konrad Kalejs. I also believe that action should have been taken against him decades earlier than it was, and that is why he died at 89 years of age without ever actually facing justice. But I certainly think there should be capacity to revisit the granting of citizenship when it has been granted on misleading grounds.

Mr ADAMS—With this court in place, do you believe that this will put pressure on some of the leaders or regimes that may commit some of the acts that this court will deal with? Do you think that will add a level of pressure in the world?

Prof. McCormack—I think it will add a level of pressure—I do not want to be unrealistic about how much pressure. For example, it is interesting to look at the leverage that finally had the impact, firstly on Croatia and subsequently on Serbia, to release indicted war criminals to the Hague. It was done for financial reasons, not because of the threat of the possibility of prosecution. You only get the international aid that you desperately want and need when you hand these people over, and that is what galvanised them into action.

My position—and the position of the Australian Red Cross—on that is that the existence of the court will be very important to be able to utilise, or maximise, the leverage against regimes that ought to be handing people over. Again, we need to stress that there will not be retrospective jurisdiction. It will only be for atrocities that occur after the court is established. But if the court is there, then states will possibly be encouraged to hand over individuals who they should have handed over years before but did not because they had to wait for a change in the political environment to make it possible. It is not even a possibility if the court does not exist. So I am very much in favour of the early establishment of the court for that reason.

CHAIR—That concludes this session. Thank you, Professor McCormack, for your time and for your evidence. It has been very helpful.

Prof. McCormack—Thank you.

[2.47 p.m.]

MARGOSSIAN, Mr Ara, Director, Australian Institute for Holocaust and Genocide Studies

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that the hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We have a submission from you dated 3 March 2002.

Mr Margossian—That is right.

CHAIR—Do you wish to make some introductory remarks before we proceed to questions?

Mr Margossian—I do. I have written something which I would like to read out. First and foremost, I would like to thank the committee for asking me to appear here today. In addition to the study and teaching of genocide, the Australian Institute for Holocaust and Genocide Studies has a deep interest in international and domestic initiatives aimed at outlawing the heinous crime of genocide, crimes against humanity and war crimes. The institute believes that the establishment of the International Criminal Court is a step in the right direction. Although the statute has drawn much controversy, including criticism that ratification will involve an abdication of sovereignty, we believe the benefits associated with the ratification of the Rome statute outweigh the risks.

Clause 3 of the International Criminal Court Bill makes it clear that the jurisdiction of the ICC is complementary: Australia will have the right of first prosecution. Many of the uncertainties that existed with respect to the definitions of 'genocide', 'crimes against humanity' and 'war crimes' have already been resolved by the international criminal tribunals for Rwanda and former Yugoslavia. Other uncertain aspects of the Rome statute are likely to be resolved following the prosecution of Slobadan Milosevic in the Hague. The International Criminal Court Bill and the International Criminal Court (Consequential Amendments) Bill are, by and large, well written and will readily satisfy Australia's obligations under the Rome statute in the event of ratification. The constitutional problems—which I will discuss if the committee wishes—are not insurmountable.

CHAIR—Just on that point, as I understand it, your submission argues that ratification of the Rome statute is not likely to violate the Australian Constitution.

Mr Margossian—Yes.

CHAIR—Yet you have also noted that there is potential in certain circumstances. Do you want to elaborate on that? You were suggesting in circumstances where there is a request for the surrender of an alleged offender and the like.

Mr Margossian—There are two scenarios. The first instance is in circumstances where Australia is simply unwilling or unable to prosecute. In those circumstances, no constitutional problem arises because the surrender of an offender to the ICC is analogous to an act of extradition between two sovereign states. You are completely bypassing the Constitution, in a sense, so it does not invoke chapter 3 of the Constitution, which is my primary point of concern. The other scenario is where the ICC requests the surrender of an offender when an Australian court has exercised or is in the process of exercising jurisdiction over that offender. Chapter 3 of the Constitution, as you are probably all aware, has been interpreted in such a manner that interference with the judicial power of a chapter 3 court, such as the High Court or the Federal Court, is unconstitutional on the grounds that it undermines the independence of the judiciary.

The problem that arises is that all the High Court authority on this particular issue has been cast in the context of interference with the judicial power by either the parliament or the executive arm of government. So what we have here is a completely novel scenario. Interference by a foreign judicial entity is something that has not been considered in the case law. What is likely to happen in this novel scenario is a novel approach by the High Court. I made a point in my submission where I identified some American case law that states that adjudication of a matter by a non-chapter 3 court is permissible in circumstances where it does not affect the independence of the judiciary. This is probably such a circumstance because, in this particular instance, a request by a foreign legal entity for the surrender of an offender does not interfere with the judicial power of the Commonwealth in the sense that its independence is undermined. In that sense, there is unlikely to be any huge constitutional obstacle. I think the High Court, should it decide this scenario or be required to make a ruling on this—which is quite unlikely—will probably follow American case law.

CHAIR—Does that not raise some worrying concerns? You are suggesting that it is reasonable for them to ratify their own statute when there are still questions about its compatibility or otherwise with the Australian Constitution. However likely or not, it is still questionable. And, secondly, relying on US case law is somewhat worrying, given that there are very strong arguments that there are constitutional issues within the United States that would prevent the adoption of the statute by the United States. There are arguments to that effect. Are they not two worrying aspects of this for you?

Mr Margossian—Not particularly. With respect to constitutional issues in America, I have canvassed a few of those in my written submission. Most of the criticisms that I have read—before parliamentary inquiries in the US, for example—often cite particular cases but fail to refer to other cases. It tends to mislead and it is not a complete picture of what a US court is likely to do with respect to the surrender of an offender to the ICC. It is quite likely that the Australian High Court—at least people such as Michael Kirby, who favours an international perspective in his reasoning—is likely to adopt that particular interpretation. I do not think it is really a huge concern. If you look at High Court decisions in freedom of political communication cases, for example, the High Court has always looked at American authority or Canadian authority. It is quite common for appellate courts in Australia to look at the decisions of other courts throughout the world, especially in the common law world. I think it is quite likely that the High Court will follow the decision which I have cited there.

Mr KING—Thank you for your and the institute's paper. The estimate is that this is going to cost Australian taxpayers $5 million per annum. Is that money well spent?

Mr Margossian—It is hard to say. That is probably a political decision more than anything else, and that is up to the parliament to decide. Personally, I think that is quite a good way to spend money. Prosecuting and punishing people that commit heinous international crimes is something that will easily be in the national interest and spending $5 million to implement such a policy is great for the country. I think it is in the national interest.

Mr KING—Have you had a careful look at the list of war crimes in article 8?

Mr Margossian—I have read through it, yes.

Mr KING—And you do not have a problem with that catalogue?

Mr Margossian—Is there a particular provision that you are concerned about?

Mr KING—No. I was just interested to see whether you had looked at it in detail.

Senator SCHACHT—Is it too restrictive, or has something been missed out that you would like to see added?

Mr Margossian—No, not really. I think it is quite comprehensive. The definition of war crimes has evolved over the years. What we have here is something that is far more comprehensive than the definition of war crimes, say, 20 years ago. It covers a lot of new categories. Some are quite controversial, such as the provision regarding forced pregnancy. A few right to life groups, for example, have criticised that provision because they fear that they may somehow be caught by that particular prohibition. In Kosovo in 1999, for example, the Catholic Church, which was conducting humanitarian work, refused to hand out the morning-after pill to victims of rape. I have read that some people regard that as constituting a 'war crime' under the forced pregnancy provision. It is a bit far-fetched though.

Senator SCHACHT—Senator Harradine will have a heart attack when he hears that.

Mr Margossian—It is a bit far-fetched. It is important to construe things like the 'war crimes' prohibitions in context. If you do, when you read through it, it is quite a reasonable definition.

Mr KING—The only other question I have concerns an issue of civil procedure which has some human rights overtones to it. In article 15 the prosecutor has the power to re-present a prosecution on new facts or evidence. If the pre-trial procedure has been knocked back, it says that the prosecutor can come back again against the same individual with so-called new facts or evidence. It worries me that the prosecutor can keep having a go—especially if the prosecutor has the power to act of his or her own motion—not simply on fresh evidence but simply on new facts or material. It is a very broad power, and it does expose people who have defeated one potential prosecution to yet a further prosecution for a similar offence. Having regard to the serious nature and the cataclysmic effect of proceedings on an individual, you would think that that ought to be impermissible. What is your view about that?

Mr Margossian—It is hard to say how that particular provision will be utilised in practice. Much depends on the cases that come before the court. If established practice from the interna-

tional tribunals for Rwanda and the former Yugoslavia is anything to go by, the prosecution actually conducts very thorough research, and only when it basically has all the data required to form part of its indictment will it actually issue an indictment. I think that practice will probably be mimicked by the ICC and its prosecutor, once that comes about. I think it is a bit too early to tell how that particular provision will be used, however.

CHAIR—I want to ask about retrospective legislation. In your submission you are supporting a notion of retrospective application?

Mr Margossian—Not of the International Criminal Court bills. The International Criminal Court will not, by virtue of articles 11 and 24, operate retrospectively. That is very clear. What I am arguing there is that it is one thing for Australia to ratify the Rome statute and to implement the International Criminal Court bills domestically. That will outlaw genocide and crimes against humanity and war crimes for acts that have occurred after the statute gains entry into force. The problem, though, is that there is a bit of a gap in Australia's ability to prosecute people prior to the entry into force of the statute. In the United Kingdom, for example, the Genocide Act was enacted in 1969. So, if there was someone residing in the UK who was accused of committing genocide, prior to the entry into force of the Rome statute, the British government would have the legal means by which to prosecute that individual. Currently in Australia, because we do not have any antigenocide legislation, we do not have the legal means to do so. That is the argument I am putting forward.

CHAIR—You are not referring to any specific prospective cases?

Mr Margossian—No. It is just a general way of covering all bases, I think. I do not have any particular genocidal event in mind. The other point to be made is that, if there is retrospective antigenocide legislation, its retrospective operation can begin only from 11 December 1946 or from another time after that date that the parliament deems fit. With retrospective legislation that outlaws war crimes and crimes against humanity, that is a different kettle of fish in the sense that the definitions contained in the Rome statute on the topic of 'crimes against humanity' and 'war crimes' have evolved and developed over time. So you cannot pass retrospective legislation to cover those offences because the accused could argue that, although those are crimes in 1998 when the statute was passed, the conduct was not in fact a crime prior to 1998. In those particular instances it would not be wise to introduce retrospective legislation. Genocide is the exception, simply because the definition contained in the 1948 convention is mirrored by article 6 of the Rome statute.

Senator TCHEN—Mr Margossian, you also argue—and it is something we have not canvassed yet—that the ICC could be used as a basis for fighting the war against terrorism. Normally, an act of terrorism would be dealt with under domestic laws because it would be an action against the citizens of that particular country. Are you suggesting that perhaps the ICC would be a better court to deal with acts of terrorism than domestic courts?

Mr Margossian—It is not necessarily a better option, but it is an alternative. Terrorism per se was not included within the definitions that you see before you in the Rome statute. However, the definition of a crime against humanity in article 7 of the Rome statute is sufficiently wide to cover some terrorist activities. It would not cover, for example, an isolated incident that occurred over US airspace involving the hijacking of a plane, but it would cover—assuming this

occurred after the statute gained entry into force—things like the September 11 attacks because they were part of a widespread attack and were preceded by other attacks on the United States. So you could effectively prosecute people like bin Laden before the ICC had September 11 occurred after the statute gained entry into force.

Senator TCHEN—Normally, a domestic court of any nation will constitute judges from that particular nation only, whereas the ICC will comprise people who arguably will be coming from a different background or a different political situation or a different political belief. One would expect that the ICC will provide a more impartial, or perhaps more lenient, judgment than domestic courts. Would you say that, if the ICC is used as an alternative venue for prosecution of acts of terrorism, it would provide a more objective or impartial forum?

Mr Margossian—That is certainly a possibility but, with the way the statute is structured, national jurisdictions have the first right of prosecution. For example, if a terrorist was reprimanded by US authorities—assuming the US ratifies the statute—the ICC would prosecute the case in America, so it would effectively exercise American judicial power and the case would be tried by American judges and, possibly, even an American jury. It is only in circumstances where, for example, either the state in which the perpetrator resides is unable or unwilling to prosecute or the perpetrator is in another country that is a party to the statute that the ICC can exercise jurisdiction over the offender. The possibility that the ICC will exercise jurisdiction over a terrorist is quite minute, given the fact that states have the first right of prosecution.

Mr BARTLETT—In terms of the composition of the court, in section 4.2 of your submission you have admitted that there are 'obvious risks associated with the composition and operation of the ICC'. However, you have gone on to say that we can overcome those risks of the ICC being 'nothing more than a political tool of unfriendly powers' but that, in order for us to overcome that, we need to sign up early and be part of the process. That is an argument that has been used a number of times in other submissions. I have to say that I am still not convinced, given that there are 18 judges in total and at least 60 state parties. That still gives Australia only one vote in 3½ or whatever and, even if Australia were to have a representative elected to one of those positions early on, the terms are not infinite—I think it is nine years for the judges—so it seems to me that that argument does not carry the weight often attributed to it in protecting Australia's interests. Would you like to comment on that?

Mr Margossian—Personally, I am of the view that I would rather have an eminent Australian judge sitting on the court.

Mr BARTLETT—Sure, we all would.

Mr Margossian—That is fine.

Mr BARTLETT—But I am saying that the chances of that happening are still less than one in three.

Mr Margossian—In practice, though, I think we should strive towards having an Australian judge on the court but, even if that is not possible, and I know Professor McCormack made a few comments on this—sorry, I have lost my chain of thought.

Mr BARTLETT—I am saying that the frequent admonition is that we sign up to be part of the first 60 so that we have a vote as to who forms the composition of the judges panel. I am saying that that still does not really guarantee any protection for Australia because the chances are still reasonably small that we would be one of them and we are only one voice in 60 in determining who is on the panel; and, even then, the panel changes after a number of years.

Mr Margossian—That is right, but there are likely to be a few judges of a high calibre that will sit on the court. By the way, there are appeal processes as well, so if, for example, a rather shoddy political apparatchik makes a particular decision in one particular case that decision can always be appealed on the grounds that the reasoning is flawed, that it is a wrongful conviction or on another technicality. There are procedural and evidentiary safeguards in place which might allow those concerns to be alleviated.

Mr BARTLETT—Whether or not Australia is one of the first 60 does not really alter that significantly, does it?

Mr Margossian—Probably not, but the point I was making in my submission is that I would much rather have an Australian judge as one of the 18 judges on the court than, for example, a judge from China.

Mr BARTLETT—But that does not really alleviate the concern you expressed about the obvious risks associated with the composition and operation of the ICC.

Mr Margossian—Yes, it is a risk; I admit that.

Mr KING—There are some pretty good judges from China too, but your point is taken.

CHAIR—I guess any suggestion on how Australia could exert such influence would be welcomed.

Senator TCHEN—I suppose the simple answer, Madam Chair, to Mr Bartlett's comment is that you have to be in it to win it.

CHAIR—The timing might be against us.

Mr BARTLETT—But being in it does not mean you will necessarily win it.

CHAIR—Your submission is quite clear, but do you believe that any further amendments to the bills are required? Do you have any other amendments to suggest?

Mr Margossian—No, I do not. I think the bills are quite well written. I think the Attorney-General's Department has done quite a good job in drafting them. There are some provisions, especially in part 3(4), which are of concern, however. They do not seem to attempt, through drafting techniques, to overcome some of the constitutional problems I identified earlier. Proposed section 32, for example, gives the ICC the power to prosecute if the previous prosecution was not conducted independently, impartially or was for the purpose of shielding a person from the jurisdiction of the ICC. In that particular scenario, if the ICC declares a case to

be admissible, the Attorney-General must surrender the offender to the ICC, and that initiates the constitutional problem that I identified earlier. The same problem arises under proposed section 34. I think a better job could possibly have been done in drafting that.

CHAIR—We will pass your thoughts on. There are no further questions. Thank you very much for your time in appearing before the committee today—it is much appreciated.

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

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 3.13 p.m.