COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT STANDING COMMITTEE ON TREATIES

Reference: Statute for an International Criminal Court

WEDNESDAY, 10 APRIL 2002

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BY AUTHORITY OF THE PARLIAMENT

JOINT COMMITTEE ON TREATIES

Wednesday, 10 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 Ludwig, Mason, McGauran, Schacht and Tchen and Mr Adams, Mr Bartlett, Ms Julie Bishop, Mr Ciobo and Mr Wilkie.

Terms of reference for the inquiry:

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

WITNESSES

Committee met at 9.05 a.m.

GREENWELL, Mr John Henry, Member, Government Liaison Group, Amnesty International Australia

CHAIR—I declare open this hearing of the Joint Committee on Treaties. I welcome Mr Greenwell from Amnesty International. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mr Greenwell—Thank you. I think the address that I would like to read to the committee has been distributed. Amnesty International Australia supports the draft legislation tabled by the government in the last parliament to implement the statute. The effect of ratification of the statute upon Australia's sovereignty was canvassed before the previous committee, and my comments are addressed to that issue in the light of the legislation. Section 3 of the International Criminal Court Bill 2001 provides that:

(1) It is the Parliament's intention that the jurisdiction of the ICC is to be complementary to the jurisdiction of Australia.

(2) Accordingly, this Act does not affect the primary right of Australia to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC.

Accordingly, ordinary canons of construction would require every Australian court, when called upon to apply or interpret the legislation, to ensure that it does not affect the primary right of Australia to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC. This is not at variance with the terms or intent of the statute, which emphasises in article 1 that the International Criminal Court established under the statute 'shall be complementary to national criminal jurisdictions'. If, therefore, Australian prosecution authorities were to investigate a war crime alleged to have been committed by an Australian soldier and decide not to prosecute 'the person concerned', the soldier could not thereafter be prosecuted before the ICC 'unless the decision resulted from the unwillingness or inability of the Australian authorities genuinely to prosecute'. That is in paragraph 1(b) of article 17.

In other words, only if the grounds for our not prosecuting the Australian soldier were non-genuine could the International Criminal Court assume jurisdiction. To be non-genuine, those grounds would have to be the shielding of 'the person concerned' or the reliance upon some extraneous consideration—article 17 paragraph 2. It follows that, if we assume Australian prosecuting authorities were to conclude after investigation there was no prima facie case, the ICC prosecutor could not take over the matter. He or she could not do that even if they were of the view that the Australian authorities were wrong in their conclusion.

But suppose the prosecutor, either through error or bias, considered the Australian decision lacked genuineness. The ICC prosecutor could not simply on that account proceed. First, he or she would have to come before a pretrial chamber of three judges. The pretrial chamber would have to decide that there was a reasonable basis for investigation before the prosecutor could proceed to investigation—article 15. If the pretrial chamber authorised an investigation, the prosecutor could not then go forward before going before a further panel and sustaining the

position that the Australian authorities were genuinely unwilling to prosecute. In those proceedings Australia could specifically challenge any attempt at prosecution, but it is to be noted also that under article 19:

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

So this priority of Australian jurisdiction does not have to be dragged out of the Rome statute, so to speak. In essence, the entire aim of the statute is to stimulate national jurisdictions to do the job but if they do not the ICC is there to step in. This is reflected also in the request for cooperation provisions of the implementing legislation. There are two general features of those provisions which bear upon Australia's sovereignty. The first is that the surrender provisions depend for their execution upon a finding of admissibility; that is, that national jurisdictions are found to be either unwilling or unable to carry through the proceedings. The second feature is that execution is subject to the request being consistent with Australia's obligations to a foreign country under international law or international agreement. A request is in general to be carried out in accordance with Australian law and the Attorney-General is to consult with the ICC without delay if any problems arise in execution—section 12. A mandatory obligation is imposed upon him to refuse a request inconsistent with Australia's international obligations to a foreign country unless that foreign country consents—section 13.

A request for surrender of a person can only be made after issuing an arrest warrant, except in the case of a convicted person, and that is issued by a pretrial chamber—section 8. That can only be issued by the pretrial chamber under article 58 of the ICC. Article 58 requires that the chamber is satisfied 'that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court' and that the arrest appears to be necessary. Under the implementing legislation, surrender must be refused where Australia is carrying out an investigation and the ICC determines the case to be inadmissible—section 35(3).

In a case of competition between an ICC request and a foreign country extradition request, priority will be given to the ICC only if it has made a determination of admissibility and if the foreign country in question is a state party to the statute. I have noted—in the paper that has been distributed as 37(4)—it should have been section 37(2). Where a foreign country is not a party to the statute, Australia will extradite if it is under an obligation to do so, unless the ICC has determined in favour of admissibility and the Attorney-General exercises his or her discretion to surrender after considering all the relevant matters, including those specified—and I said section 39, in what was distributed, but it is actually section 38(7); section 39 refers to it—in favour of the request.

So throughout the provisions there has been a very careful consideration of Australia's sovereignty. Similarly in relation to the provisions concerning disclosure of information or documents likely to prejudice Australia's national security interests. Part 8 in effect provides that where the Attorney-General is of the opinion Australia's national security interests would be prejudiced he must first follow the procedures specified in sections 141 and 142. But section 138(2) provides that, if at the end of the day, after following those procedures, the matter cannot be resolved, the Attorney-General may refuse to authorise disclosure. The procedures specified in sections 141 and 142, which refer to the statute, are consultative and may involve various devices such as the taking of evidence ex parte or in camera to enable the evidence to be used without prejudice to national security, but the bottom line is as set out in section 138(2).

Amnesty International Australia hopes the committee will endorse the legislation—even if with some suggestions for improvement—and that, together with ratification of the treaty, it will be speedily enacted.

Forgetting the court altogether for a moment, it is a noteworthy fact that the Rome statute has reduced to common form almost all the offences under international humanitarian law and that many nations have already incorporated these offences into their domestic law. That in itself is a remarkable, although not self-sufficient, contribution to mankind's endeavour to replace impunity with law.

Madam Chair, that is the initial address, but I did pass to the secretary for distribution another note on the question of official capacity and state immunity. If I could just turn to that and deal with that Article 27 of the statute in effect provides that the official capacity of a government official, whether head of state or otherwise, shall not be exempt from criminal responsibility on that account. That provision is not reflected in the draft Australian legislation and so a question arises whether, by virtue of its omission, an official could claim immunity in Australian proceedings. Amnesty International Australia believes no official should be immune from criminal responsibility for acts contravening the statute and that article 27 should be embodied in Australian legislation. It may, however, be suggested that Australian law sufficiently covers the matter.

There are two aspects to state immunity. The first is that the acts of an official may be immune because of their official character. The other aspect is that the official may be personally immune by reason of his official status. It may be said that, under the Foreign Sovereign Immunities Act and the Diplomatic Privileges and Immunities Act 1967, crimes against humanity cannot, by definition, constitute official acts. It does seem to be accepted that these crimes cannot be characterised as official if, according to Pinochet No. 2, there is an established mechanism for enforcing them. In that case, the torture convention, to which the UK, Chile and Spain were parties, provided such a mechanism.

The government, in omitting article 27 from the legislation, may take the view that, because the statute renders the crimes specified in it enforceable, they could not be characterised as official acts. This may be so but it is undesirable for that aspect to be left in doubt—but it would, in any event, leave an official immune by virtue of his status, and thus exempt from liability whilst he remains an official. We say it is far too late in the day for some future Hitler to extend his cover of immunity by some future enabling law. The quintessential feature of these crimes is that they are committed by or authorised by government officials. In our view, there should be no immunity, and article 27 should be introduced into the legislation.

CHAIR—Thank you, Mr Greenwell. I take you to clause 3(2) of the principal bill and the use of the word 'primary'. The concern has been put to us in a submission from the Australian Red Cross that the draft legislation does not convey the mandatory pre-eminence of national criminal jurisdiction as strongly as the Red Cross would like, and it has suggested a form of words. I was wondering if I could have your comments on that. They would replace the word 'primary' in this way:

Accordingly, 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.

Without asking you to draft on the run, do you see—

Mr Greenwell—Would you mind reading those words again?

CHAIR—The wording is:

Accordingly, 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.

It is replacing the word 'primary' with 'primacy'.

Mr Greenwell—No; I see no difficulty with that.

CHAIR—Do you see it as preferable?

Mr Greenwell—Quite frankly, I do not think it adds greatly to it, but I certainly see nothing against it.

CHAIR—The second matter I wish to raise before I go to questions from the committee is the issue of the jurisdiction of the ICC where Australian authorities have or have had jurisdiction, in that they have investigated or prosecuted already, and the issue of whether the Australian proceedings were not genuine, not independent or not impartial. Can you envisage a scenario where, in a situation of conflict involving governments unfriendly to Australia, the prosecutor could take an attitude that we might think is lacking in efficacy, biased or based on what we would deem to be faulty or contrived evidence? If you could envisage such a scenario, do you believe that there are sufficient safeguards in the statute to avoid that scenario?

Mr Greenwell—I do. I will not comment on the likelihood of the scenario arising except to say that it seems to be highly unlikely; but, suppose it were to occur, both the statute and the legislation provide more than adequate safeguards. The whole procedure, before the ICC can start, is such that he cannot even commence an investigation, which is the most preliminary stage in the whole process, until he has satisfied a pretrial chamber of three judges—and let me emphasise that: it is not just going to some superior prosecutor or making an application to some chamber judge; it is a pretrial chamber of three judges—and then you only get to the stage of power to investigate. If he wants to prosecute, the next stage is that he or she must go to another pretrial chamber and, as I said in the address, that must examine whether Australia is being genuine in its refusal to prosecute before the prosecution can commence. Australia can appear in those proceedings and challenge them. So the likelihood of a prosecutor going berserk is really getting a bit unreal, I think quite fanciful.

CHAIR—Who would have standing to make submissions to that tribunal of three judges?

Mr Greenwell—Certainly any interested state—and there are a number of categories specified in article 19 of the Rome statute:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

That is a rather special case.

Mr WILKIE—Yesterday, the Australian Red Cross raised with us a problem with the definition of rape in schedule 1 of the draft legislation in that it differs in some way from what the ICC draft elements of crimes suggested. Do you have any problem with those definitions?

Mr Greenwell—No, I do not, but I had heard somewhere that the Red Cross had difficulties with it. I really cannot comment on it.

Mr BARTLETT—It seems to me that so much of the protection of Australia's sovereignty depends on the definition of 'genuine' or 'non-genuine', and that obviously is very subjective. You said that the pretrial chamber consists of three judges and they would have to decide whether or not a case was warranted. Would that be a majority decision or a unanimous decision?

Mr Greenwell—I do not know, I am sorry. I assume a majority.

Mr BARTLETT—Perhaps you could find that out for me, if you do not mind.

Mr Greenwell—Yes.

Mr BARTLETT—The second question is: is it your view that we could argue genuineness on the basis of the definitions of those crimes included in our enabling legislation? As you would be aware, in that legislation we have clearly spelt out the requirement of intent to harm. That is much clearer than in the statute itself. Could we argue on the basis of a lack of intent that an unintended harm occurred but, through a lack of intent, there is no case to answer and therefore argue that we genuinely did not prosecute—

Mr Greenwell—Unquestionably. I would not have thought there was any doubt about that.

Mr BARTLETT—How effective would that be, do you think, in the eyes of the court?

Mr Greenwell—The prosecutor and the pretrial chamber would accept Australian legislation in its terms as implementing the Rome statute and, if our prosecution here, taking account of our legislation—the elements of intent—decided not to prosecute, I cannot see on what basis they would override it. It is not quite correct to say it is purely subjective as to what is genuine. I think one gets a clue about what it means from article 17.2(a) and the reference to 'shielding the person concerned'. I accept that that is not controlling on the word, it is not to be looked at as a definition, but it does give the clue to what is meant. It is where the proceedings, the investigation, the prosecution is designed in some way to deliberately avoid a person who has committed, or who is likely to have committed, these crimes not being prosecuted. In my view, there would be no problem in reference to what you are suggesting.

Mr BARTLETT—Thank you.

Mr ADAMS—Article 27 of the statute provides for an 'official capacity' of government officials. Is your organisation convinced that this covers heads of state and everybody who would be issuing instructions for criminal responsibility to apply? I understand that neither the Diplomatic Privileges and Immunities Act 1967 nor the Foreign States Immunities Act 1985 could be used to get around this legislation; is that correct?

Mr Greenwell—Firstly, as to article 27, I think there is no doubt that it covers heads of state and all officials. Secondly, so far as Australian legislation is concerned, we are troubled by the omission of any provision along the lines of article 27. The only way officials could be immune is if by virtue of the legislation you have referred to they could be immune. As I mentioned, I think it is open to question: that legislation would seem to confine the immunity to what are described as official acts or to officials. The view is open that crimes against humanity cannot on any ground be described as official. I do not know whether it is quite as simple as that. But, over and above that, they would not allow prosecution of an official whilst he remained official. Even if the acts were not official, if the official had done it, he would be able to retain immunity during his period of being head of state. That is why I put in that we do not believe that any future Hitler should, by enabling a law, be able to extend the cover of immunity. That is the point we are trying to make.

Senator LUDWIG—Has the suggestion in your submission—it must be the one dated 7 February 2001—in relation to the New Zealand provision, section 8(1)(c), been resolved?

Mr Greenwell—Is this in the first submission?

Senator LUDWIG—It is in the one dated 7 February 2001. Unfortunately, my attendance has been a bit disjointed, so it is easier to ask you whether or not it is still unresolved. I am curious because it dates so far back. It is the New Zealand amendment. The paragraph starts:

> Amnesty International urges Australia to confer universal jurisdiction upon Australian Courts in respect of the ICC offences. New Zealand has done so, by giving effect to the ICC Statute in its domestic legislation.

Do you still pursue that?

Mr Greenwell—Yes.

Senator LUDWIG—You mentioned that the USA has not. I was wondering whether that is still the case.

Mr Greenwell—Yes, the position by virtue of article 12 of the statute is that you do not have universal jurisdiction, as you know. By virtue of the current Australian legislation, in effect universal jurisdiction has been conferred and we approve and applaud that. We say that that is a good thing, because in principle it is right. Firstly, it being a crime against humanity, it should be universal. Secondly, universal jurisdiction is accepted under international law in regard to all of these things. Thirdly, you have other countries who have extended universal jurisdiction such as New Zealand which is mentioned in this submission. I did not mention Canada but Canada has also extended universal jurisdiction and, in substance, the United Kingdom has. We would also say that it is in conformity with Australian legislation.

I mentioned here the Crimes (Torture) Act, but one could mention other legislation such as slavery offences in the Criminal Code—which was in 1995 but which has just come into force—and, indeed, the Geneva Conventions Act 1957. Universal jurisdiction is the accepted thing. Article 12 was a deviation from it and one would have to go into negotiations and so forth and one would not trouble about it. No, we think that the current Australian legislation is perfectly correct.

Senator LUDWIG—You note that the USA has not endorsed article 12. Do you know whether they have ratified, or intend to ratify, the ICC?

Mr Greenwell—The USA?

Senator LUDWIG—Yes.

Mr Greenwell—I would think that under the present administration it is most unlikely. We do not know, but eventually one hopes they would. It is a sad thing that the US have decided to be on the wrong side of history over this particular matter, but one must remember it was at the instigation of the USA, at President Truman's insistence, that the Nuremberg trials were held and that the Nazi war criminals were not arbitrarily executed. So I suspect, given the oscillation of American views—I refer to their international leadership on the one hand and such remarkable periods as immediately after the war, and the present unilateralism has been a feature of American history—that they will move back in time to their natural position, and a country like Australia, which is an ally of the United States, should encourage them to do so.

Senator LUDWIG—What I was trying to lead to was that the only outstanding issues you have are those which are detailed in the document that you tabled on Wednesday, 10 April 2002; they are a summary of the issues that you still pursue and state?

Mr Greenwell—Yes. The only issue that we have raised with the legislation is the one over state immunity. We approve the legislation and we commend it to the committee.

Senator LUDWIG—Thank you very much.

Senator MASON—Mr Greenwell, mine is not so much a question as the tabling of a concern. I understand this is the final hearing on the International Criminal Court for this committee. It seems like forever that we have been looking at this issue. People have been very patient, both the bureaucracy and non-governmental organisations like yourself. To me it comes down to two major issues. One is the legal issues and then there are political issues or issues of political judgment.

With regard to the legal issues, we have touched on sovereignty a hundred times, and we have talked about complementarity. People are concerned about claims of judicial bias and so forth and the incompatibility of national judicial systems and the capacity of people to judge other people's judicial systems. I was not at the last hearing, but I know that Senator Ludwig and others have raised extradition in the past and this committee has commented adversely on the no-evidence principle in extradition, and I do not want to go down that road again—we have touched on that. There are issues raised, too, about the development of a different jurisprudence by the ICC potentially as opposed to Australian domestic courts. For example, the definition of

genocide might be different in the ICC from the way it is under Australian domestic law. I do not even need an answer, but it has been raised. I think we are nearly exhausted by it all. I am tabling a concern.

Senator LUDWIG—You need to ask a question.

Senator MASON—Let me get to it. Senator Schacht has heard me on this before, but I will table the concern again.

CHAIR—I am happy for you to proceed, Senator. Get it off your chest.

Senator LUDWIG—But don't co-opt me into it.

Senator MASON—They are some of the legal issues, but there are others.

Senator SCHACHT—I would like a dollar for every time you say this.

Senator MASON—It has got to be said because I think there is some support for this.

CHAIR—It is the final hearing.

Senator MASON—Then there are the political issues and, in a sense, they merge with some of the legal issues. Dr Spry has said, somewhere in the evidence, that he is concerned that the ICC prosecutor will assume jurisdiction unnecessarily and, in a sense, take away our sovereignty. You have mentioned article 15 this morning and said it is more complicated than that. This is where politics melds with law. I am not sure that Dr Spry is right that the ICC will wantonly assume jurisdiction in areas. I think it will often not want to assume jurisdiction in certain areas.

For example, I am concerned that the ICC would be reluctant to assess the legal system of the People's Republic of China to be unjust or inadequate, and even if they assumed that jurisdiction, what the response of the People's Republic of China would be. We are getting into politics here, and that is the nub of the problem. This covenant strikes me as bearing upon open, accountable and democratic nations more readily than it will upon totalitarian or authoritarian ones. In essence, that is why the United States will not sign it. They believe that it is a fetter on their foreign and defence policy that they do not want to live with. They believe that this will be a fetter on democratic nations much more than it will be on authoritarian ones. The example they often cite—I have read this in the literature and this comes from Republicans as well as from Democrats in the US—is the secret bombing of Cambodia in 1970. There was great concern about that. It was an outrage and that if America was fighting—

Senator SCHACHT—It was. It was illegal.

CHAIR—Senator Schacht, I think we will get to the end of this if Senator Mason can speak and then we can hear from Mr Greenwell.

Senator SCHACHT—You ought to go to Cambodia and see what they did and see the leftovers.

Senator MASON—I worked there for two years, Senator Schacht, as you know.

Mr ADAMS—Have a look at the trail.

Senator MASON—This is exactly the point. Let us say Senator Schacht is right. The capacity of America to wage war would be compromised and maybe it should be.

Senator SCHACHT—It should be, if they break their own law.

Senator MASON—Certainly they would be taken to the International Criminal Court by their own people or whatever. The process does not matter. Would the North Vietnamese have been taken to the International Criminal Court? Would their capacity to wage war have been compromised? No, and that is the problem. They can walk into neutral Cambodia. They can use it as a supply line and when the United States starts to bomb it, to destroy their supply lines because the North Vietnamese went in there first, there is outrage from the Left. The Left get up there and say, 'Isn't this disgusting? You can't bomb Cambodia. It's an outrage.' Yet the United States, fighting a war where it has got hundreds of thousands of troops there, where everyone is upset about—

Senator SCHACHT—Did you volunteer for Vietnam?

Senator MASON—Hold on—what the United States is doing and no one gives a damn about North Vietnam going into neutral Cambodia because that is okay. And that is the problem, Mr Greenwell, and that is why the Americans will not sign it. Do you have a comment?

Mr Greenwell—Yes, Senator.

CHAIR—Can we hear from Mr Greenwell?

Senator SCHACHT—Do you want a megaphone to reply as well?

Mr Greenwell—If we can break the questions up, I will take the question regarding the United States first. Broadly, you have raised two questions and you have merged them a bit together—that is, the question of the United States' nonratification and the possibility that this court is directed, not against the baddies, but against the goodies. I think if I can say it, those are your two broad points.

Senator SCHACHT—Yes.

Senator MASON—No, it has the capacity to affect the conduct of the goodies and the baddies. I am not saying it is black and white. There is a greater capacity to hinder foreign and defence policy for democratic, open and accountable nations than for authoritarian ones. I have never heard an argument that that is not the case.

Mr Greenwell—I will endeavour to deal with each of the questions separately. Firstly, let us take the United States. The reason that is frequently offered by the United States is simply concern that their soldiers would be prosecuted by the International Criminal Court. I am not going to spend much time on that because given that, by and large, America has disciplinary procedures that are quite unexceptional, there would be no doubt that they would, or ought to, prosecute their soldiers in the field. If they do commit war crimes, and if they deliberately do not, there is of course justification for the ICC stepping in.

I think the problem of the US goes a little bit further. It goes somewhat nearer to what you were suggesting—that is, they feel they might be unable to engage in military operations designed to deal with, say, terrorism or to protect themselves. I think that is the other ground. The point is that you do not find any offences in the ICC statute which really detract from that, and none have been put forward by any American observer. Senator, if you go to the letter that the minority report to the joint standing committee on the United Nations quoted, there is a long and distinguished list of American officials but no lawyer, no State Department legal adviser—

Senator MASON—Because it is not a legal problem; it is a political one.

CHAIR—Senator Mason, please let Mr Greenwell finish.

Mr Greenwell—Nor was there in the letter any reference—in relation to legal advice—to a provision in the ICC statute which would inhibit the United States. You have to be able to refer to something in the statute which can be suggested as inhibiting the United States. I am trying to think of something, and that is the bombing provisions. Let us take them. The first is the deliberate bombing of civilians. Surely the world has reached a point where we do not want any more Guernicas. The second is—and it is a basic international law—bombing where the objective is military but incidentally you may kill civilians.

I take you to the offence because it is quite important to realise how weak and almost illusory this concern is. It is clause 268.37 of the consequential amendments bill. In order to sustain that offence not only do civilian deaths have to outweigh the military advantage but that must be clearly so, clearly excessive, and the perpetrator must have known that. In other words, it is really dealing with somebody that is grossly negligent. The onus is on anybody seeking to prosecute the alleged offender to prove all that. So I cannot see that there is any base for it, unless of course the United States do want some kind of free hand to do anything—and that is not open.

Senator MASON—Can we look at the question more specifically, away from the law and towards politics and perhaps defence. My concern is that the ICC statute will serve as a fetter on our capacity—or the capacity of the United States et cetera—to conduct foreign defence policy. It will be a fetter imposed on our bureaucrats and our executive machinery. By doing so, because we have an open and accountable government, courts will know about it and people will know about it. It will be a process that will be quite visible. But in authoritarian nations, that fetter simply will not amount to very much and, therefore, in comparison our capacity—and I use the 1970 Cambodian example again—will be far greater. I have never heard any answer to this question. I have asked it—as my colleagues will agree—repeatedly. In the end, the answer is, 'That is a political judgment,' and I am afraid that is what it is.

Mr Greenwell—Senator, I must assume a common premise: you are not seeking for the United States, Australia or any other country to be given a free hand in the sense of being able to engage in deliberate civilian bombing.

Senator MASON—No.

Mr Greenwell—So I suggest that there has been no instance where these common rules of international law have inhibited any country to date.

Senator MASON—They would have in the Vietnam War, and they would have been picked up by internal dissidents and used—perhaps correctly. That is not the point. The point is: they would be. They would not be used in those countries about to sign—Mongolia, Cambodia or Bulgaria. And that is the problem. The fetter is on open, democratic and accountable governments and not on people who are about to sign it.

Mr Greenwell—There are, admittedly, only 60 at the moment.

Senator MASON—The biggest fetter in a democracy is the people—perhaps rightly so.

Mr ADAMS—Mr Greenwell, the Cold War is over. There is an international approach to trying to solve issues of the world. We have globalisation, we have the WTO, we are looking at global issues in law of trademarks and people's rights to intellectual property. China is joining the WTO and is opening up. People are going in that direction. Do you think this court is moving us in the same direction internationally as we are moving in many other spheres?

Mr Greenwell—Yes, I do. In answer to Senator Mason, the disparities in power in the world and the disparities in systems are acknowledged, and nobody is putting this forward as a panacea—certainly not at the moment it comes into operation. But the object is to really penalise impunity that is done by any government, and if you do have this treaty—whether it be powerful or not—and this organisation started, you will, I think, tend to build up momentum. It may take time before all countries in the world belong to it. But I think that is the starting point.

The secondary aspect of your concern about the lack of impartiality, or the problems that might arise, is that you can have a Security Council resolution to deal with problems that could occur in the case of civil war or something endangering security.

Senator MASON—Thank you.

Senator SCHACHT—When Amnesty spoke with the Australian government, what reason did they give to Amnesty for excluding article 27?

Mr Greenwell—I have not been in touch with the government about that, I am afraid. I don't know.

Senator SCHACHT—I see. Of the 37 other countries that have already signed the statute, have any of those that you know of excluded article 27?

Mr Greenwell—I don't know.

Senator SCHACHT—I will have to ask the department that question about article 27 when it turns up next, and in view of Senator Mason's outburst I have a fair idea why the article was excluded. The next question is on penalties. The statute lists a series of penalties which are basically up to life imprisonment et cetera if a case goes to the international court. But a country can choose to deal with the case first—that is correct, isn't it?

Mr Greenwell—Yes.

Senator SCHACHT—Some of these countries, including the United States of America, still have the death penalty. First of all, take a country that did sign up and put some of their own persons through a case and found that they were guilty of war crimes and that under their own law that meant the death penalty. Is it possible that could override the statute that they have signed, that you can impose the death penalty in a country where they deal with it themselves rather than accepting the criteria laid down in the statute that the international court has penalties up to but not including the death penalty?

Mr Greenwell—Yes, my understanding is that insofar as national legislation is implementing the statute they could not include the death penalty.

Senator SCHACHT—They could not include the death penalty?

Mr Greenwell—Yes.

Senator SCHACHT—So if some of the countries listed here who in Senator Mason's view are not totally democratic and do have the death penalty, including the United States, used the statute to find someone guilty in their own court of war crimes or whatever it was, they could not impose their own death penalty on that person?

Mr Greenwell—They could do it, but they would not be implementing the statute doing it. They could have their own domestic law with the death penalty and they could—

Senator SCHACHT—I see. It is highly unlikely, I know, but I could just imagine a situation in a Third World country, to use that broadest of terms, or a non-democratic country where Mr Saddam Hussein might say that a Kurd in the northern part of his country created a war crime against non-Kurdish people and therefore 'we're going to hold a trial, find you guilty and execute you'. But that would be contrary to the provisions, even though he would be saying—if he had signed up—'we're using the standard procedures'?

Mr Greenwell—Yes. You have to assume that Saddam Hussein signed the order.

Senator SCHACHT—Yes, that he signed it. If you have a cynical view like Senator Mason's, some people like that may sign to give themselves a brownie point and then ignore some of the provisions that do not suit their political purpose.

Senator MASON—It would be very unusual with human rights treaties, wouldn't it be, Senator Schacht?

Mr Greenwell—It is, speaking generally, quite important not to take your camera shot at just one particular time. Senator Mason perhaps can recall that Chile not so long ago was a country governed by a torturer, and South Africa likewise, so nothing remains static.

Senator SCHACHT—He would say it was governed by a free marketeer—

Senator MASON—No, Senator Schacht, I wouldn't.

Mr ADAMS—put there by Senator Mason's mates.

Senator MASON—It was the Left that said nothing about Mao Zedong, my friend. It was the Left that failed human rights in the 20th century, not the Right; it was your lot.

CHAIR—Senator Mason, please! I would like to wrap this up shortly, and there are still some people who have some questions. Mr Greenwell, have you finished your answer to that question?

Mr Greenwell—I have finished, yes.

CHAIR—Senator Schacht, do you have any more questions?

Senator SCHACHT—I raised yesterday and at previous hearings the question of those who sign up and then elect people and that once they get to 60 those 60 will elect the first 18 judges, the prosecutors et cetera. Does Amnesty have a concern that some of the people who may be elected will be elected for political purposes in countries whose leaders are doing deals with each other to elect their favourite son or daughter, irrespective of their legal qualifications?

Mr Greenwell—None whatsoever. It is true that the election is done by the assembly of states, but a two-thirds majority is required for the appointment of a judge. I think if you go through the points in the statute that have to be satisfied, not only does the nominee have to be suitable for the highest judicial office in their particular country but they have to have qualifications in either criminal law or international law. Those qualifications have to be specified in writing at the time of their application. The qualifications themselves are vetted by an advisory committee.

Most importantly, on a point that I think has been neglected, the whole structure of the International Criminal Court is based upon the allocation between two divisions: the international court division and the criminal court division. So, of necessity, when you are coming to an election, you are focused on whether the particular appointee has the requisite criminal law or international law qualifications. What is more, the numbers in those two divisions must be kept in parity.

In addition, judges are elected for nine years, they cannot do any other work in the meantime and they have no prospect of re-election. So at the end of that, while I do not suggest that you

are necessarily going to have eighteen Owen Dixons, you are going to have a pretty good court. The analogy that some people suggest about the election process to the human rights committee is a false one.

Senator SCHACHT—This is my last question. I notice here on the list that Mali is a participant and that it has also signed. Unfortunately, that country has had a history of slavery right up to the present—only in the eighties did they formally abolish slavery under their law, and informally enslavement still continues. They might say it is a cultural issue or something or other—whatever their excuse may be. If Mali has now signed and an individual antislavery committee—there is one at the United Nations—or another NGO finds that there are individual or collective cases of enslavement in Mali, if Mali itself does not take action, that body could then put before the prosecutor of the international court the evidence to investigate. That would mean that if there was enough evidence it could go to a hearing. Is that correct?

Mr Greenwell—That is correct.

Senator SCHACHT—Even if Mali strongly objected to it?

Mr Greenwell—Certainly.

Senator SCHACHT—If Mali refused to hand over officials that had turned a blind eye to the informal slavery trade, what sanction does the court have to call those officials to the hearing of the court?

Mr Greenwell—It is ultimately a matter of pressure and also, finally, of referral to the assembly of states, but there is as yet no police action that can be taken.

Senator SCHACHT—So there is no police action but there is moral pressure, and, if other member states choose to impose other sanctions, that is their choice.

Mr Greenwell—Yes.

Senator SCHACHT—But it is not mandatory. So in that sense, although Senator Mason has raised the point that some developing countries or countries without our developed level of transparent democracy may sign up, once they have signed up—in the case of Mali, for example—they may be on a treadmill that may in the end be useful to the development of getting rid of the problem of informal slavery in that country.

Mr Greenwell—I agree.

Senator TCHEN—Mr Greenwell has presented the information from Amnesty International cogently and clearly.

Senator SCHACHT—Under Senate standing orders, I should declare an interest here. I am a member of the Amnesty International committee in the parliament and elsewhere, so I should declare that interest so that people can see that I have asked you a series of dorothy dix questions.

Senator TCHEN—Mr Greenwell has presented Amnesty International's case very cogently and credibly. My question is somewhat of a tangent from today's topic, and it came about from a comment which Mr Adams made. I am interested to find out: what is Amnesty International's position on globalisation? Before you do that, Mr Greenwell, can I make a comment, Madam Chair?

CHAIR—Please bear in mind the time, Senator.

Senator TCHEN—Yes. I am a little bit alarmed to see Senator Mason displaying a tendency of assuming Senator Schacht's mantle as this committee's hector. He has some way to go yet, but no doubt Senator Schacht can show him the right way in the next few months while he is still here. I am disturbed about the practice that seems to be creeping in, where members of this committee make liberal use of hypothetical shortcomings of real nations and societies during questioning and comments. I think we should pass any reference to comments on historic occurrence of other nations, such as what the US or North Vietnam might have done in Cambodia. Those are facts of history.

Senator MASON—It is an example of history, Senator Tchen, but it was not answered because it is fact. It is exactly what happened and would happen again—that is the problem.

Senator TCHEN—Okay, but I am a little bit concerned about the fairly free use of hypothetical shortcomings of friendly nations of this country and—

CHAIR—Senator, I understand your concern. I do not think that at this point any harm of the type you anticipate has been done. People are speaking hypothetically. In previous instances they have been talking about historical incidents. Their view may well be somewhat coloured by history but, nevertheless, they are expressing opinions as opposed to statements of historical fact. I take your point, and we will certainly bear it in mind. In view of the time, do you have something you would like Mr Greenwell to comment about?

Senator TCHEN—They are the only comments I wanted to make, and I thank you for your clarification, Madam Chair. Mr Greenwell, perhaps you can briefly comment about Amnesty International's position on the globalisation process because, as Mr Adams pointed out, this International Criminal Court is in fact part of the social globalisation process. At the same time, recently there has been much disturbance about globalisation from other non-government organisations, so could you please make some comments about that.

CHAIR—Mr Greenwell, that is a very general question. With the greatest respect to the senator, if you can answer it in terms of the reference that we are looking at, I think it would be useful, otherwise it might be useful for you and Senator Tchen to have a conversation at another time.

Mr Greenwell—We see the International Criminal Court as part of the process of internationalisation and of universalising human rights, which had its prime instrument as a result of the United States and the Universal Declaration of Human Rights in 1948 and has been succeeded progressively by a number of international instruments. Therefore, we see this as not the culmination but as just one step in that process.

Senator McGAURAN—Madam Chair, I am aware of the time. This is actually the first hearing I have attended for this inquiry, but it is the last hearing for this committee on this matter. I do not want to join the sceptics so quickly—I am very fresh on this—but perhaps you could accelerate my understanding, Mr Greenwell. I was particularly impressed by your legal approach to matters—to the frustration of my colleague next to me and no doubt the Americans. So if this true to life scenario were set up, could you just give me your legal opinion on it. I believe you said that civilian loss that outweighed military gain or deliberate attack on civilians is a prima facie case. Let us take the current situation in the Middle East as an example, where we have deliberate suicide bombers attacking civilians for no military gain. In your legal opinion, if the Israelis caught a senior Hamas leader, do they have a prima facie case?

CHAIR—This is exactly what Senator Tchen was warning us against but nevertheless.

Mr Greenwell—Let me be clear. What you are asking is: what would happen if the Israelis capture a Hamas leader? Is that what you are supposing?

Mr ADAMS—And shoot him before they get to trial.

Senator SCHACHT—I think they would shoot him before it got to trial.

Mr Greenwell—What do the Israelis do with—

Senator McGAURAN—Would they have a prima facie case to—

Mr Greenwell—Against the Hamas leader?

Senator McGAURAN—Yes. Before the court.

Mr Greenwell—The statute does not cover terrorism as such. You have to look at some of the offences and assume that Hamas is engaging in a systematic attack on civilians—going to article 7 of the statute. That is the starting point. I think one can say that there are sufficient multiple acts. The point I am making is that an isolated act of murder does not fall within the statute. It also has to be organisationally inspired, and we can say that Hamas is an organisation and the attacks are inspired by it and they result in murder. That forms part of article 7 and would form part of our law too. Therefore, it would fall within the jurisdiction of the court.

Mr WILKIE—I would like to make a couple of comments. Firstly, the next closed committee meeting where this matter is discussed will be quite interesting. Secondly, I believe that there is no way a country can hold other nations accountable for their actions, particularly totalitarian ones, if you are not prepared to apply the highest standards to your own nation. That is just a comment. Yesterday one of the people from the Australian Red Cross, Professor McCormack, suggested that even if the United States did not sign or ratify the agreement they would still be held accountable if they committed some crime. Would that be your understanding?

Mr Greenwell—Yes. If American soldiers—we assume they have not ratified and they will not ratify—allegedly commit war crimes in, say, the territory of a state party, then that would fall within the jurisdiction of the ICC, just as, for example, if we assume Kuwait becomes a party and Iraq does not and if the kind of situation that prevailed in 1990 is repeated and Iraq

commits crimes against humanity against Kuwait, then Iraqi troops would be subject to the court's jurisdiction.

CHAIR—That situation would apply equally to Australia: if we do not ratify that does not mean that it would not be applicable to Australia in certain circumstances. Do you see other compelling reasons why Australia should ratify sooner rather than later? I am taking it that you believe Australia should ratify.

Mr Greenwell—Yes, and sooner rather than later. I am not sure whether I have answered the question.

CHAIR—Do you have a comment on whether, in your view, Australia ought ratify sooner rather than later given that you believe we will ratify but also given the comment that this will apply to Australia whether we ratify or not, should certain circumstances apply.

Mr Greenwell—Yes. I think Australia should take part in this international endeavour anyway and be a party to it as soon as possible to the first assembly of states that is going to elect the judges and the prosecutor, given our history with regard to not only this statute but also the Yugoslav war crimes tribunal and the like. Also, I think it is in our national interest—in the narrow sense—to join the two.

CHAIR—Mr Greenwell, thank you very much for your time.

Mr Greenwell—Thank you.

Proceedings suspended from 10.15 a.m. to 10.24 a.m.

BARTOS, Mr Ben, Legal Officer, International Crime Branch, Attorney-General's Department

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

SKILLEN, Mr Geoffrey, Acting Principal Legal Officer, International Crime Branch, Attorney-General's Department

WARNER, Ms Robin, Assistant Secretary, International Crime Branch, Attorney-General's Department

GAYNOR, Major James Morgan, Defence Legal Service, Department of Defence

HARVEY, Group Captain Simon, Director of Operations and International Law, Department of Defence

SMITH, Commodore Michael, Director-General, Defence Legal Services, Department of Defence

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

SCOTT, Mr Peter, Executive Officer, International Law Section, Department of Foreign Affairs and Trade

CHAIR—Welcome and thank you for being here this morning. We propose a roundtable discussion. For the smoother running of this discussion, I suggest to the committee and to those giving evidence that we divide this discussion into three topics: firstly, specific drafting issues and suggestions that others have made or that we believe should be taken into account; secondly, some more technical procedural issues that I know are exercising the minds of some members of the committee—such as the effect of ratification, timetabling if Australia does or does not ratify and those sorts of things—and, finally, some general or philosophical issues that I am sure some people would like to—

Senator SCHACHT—That means we will be here until this time tomorrow if Senator Mason gets going.

CHAIR—That is why I put it at that time—so that we can then wrap it up in a timely fashion. I am sure I do not have to do this, but for the *Hansard*, although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as the 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. Would either or any of the three groups wish to make some introductory remarks before we proceed on the basis I have suggested?

Ms Blackburn—With your leave, I have a short statement to make on behalf of the command delegation that is before you today. Firstly, thank you for inviting us to give evidence to the committee today. The statement is on behalf of the delegation, and then we will be pleased to take questions from the committee in the manner in which you have suggested.

We have recently received information from the Australian mission to the United Nations in New York that the 60th state—and, indeed, more than 60—is likely to ratify the statute at a ceremony tomorrow in New York. If that occurs, the statute will enter into force internationally on 1 July 2002. Under Article 112 of the statute, after the statute enters into force, the assembly of state parties is formed. All states that are party to the statute are members of the assembly.

The Australian mission has also advised that the first meeting of the assembly is likely to be held in September 2002. This assembly is expected to consider, and is likely to adopt, the rules of procedure and evidence for the ICC, the document setting out the elements of crimes and the court's first year budget. It is also expected to determine the timing and procedure for the election of judges. If Australia is to participate in the first meeting of the assembly, the statute must be in force for Australia by September. Because of the formula in the statute for the entry into force, Australia would have to deposit its instrument of ratification in New York no later than 2 July, which would mean that the statute would enter into force for Australia on 1 September. If the statute is not in force for Australia by the first meeting of the assembly of states parties, Australia can attend the first assembly but only as an observer.

Finally the most recent information we have from the Australian mission in the Hague is that the judges for the ICC will be elected at the second assembly of states parties, which at this stage is expected to be held in January 2003. For Australia to be able to vote in the election of the first judges, the statute must be in force for Australia by the start of January 2003, which would require us to ratify the statute by 1 November 2002. I am happy to go back to those dates if necessary.

Since the statute provides that judges must be nationals of state parties, the statute must be in force for Australia when nominations close for the first election if an Australian is to be nominated as one of the judges of the court. As I have said, this date is not yet known but it is expected to be set at the first meeting of the assembly of states parties in September.

As the committee will recall, the Attorney-General referred exposure drafts of two bills—the International Criminal Court Bill, and the International Criminal Court (Consequential Amendments) Bill—to the committee on 30 August. These bills are designed to fulfil Australia's obligations under the statute and allow Australia to ratify the statute. The criminal court bill sets out the procedures that allow Australia to cooperate with the ICC, which covers a range of areas including arrest and surrender of suspects, obtaining evidence in Australia, serving documents in Australia and the confiscation of proceeds in Australia. The bill also provides safeguards to protect Australia's national security interests.

It should also be noted that, subsequent to the release of the exposure drafts of these bills, the government has introduced new proceeds of crimes legislation into the parliament. The exposure drafts were prepared and released before those bills were finalised. It will be necessary to review the exposure drafts to ensure that the provisions in these bills relating to the proceeds of crime align with the new procedure regime, which is presently before the parliament.

The consequential amendments bill creates new crimes in the Commonwealth Criminal Code that cover all of the crimes in the ICC statute. This is important to ensure that Australia always has the ability to prosecute persons charged with offences within the jurisdiction of the ICC in Australian courts under Australian law. I understand proposals were made to the committee yesterday for changes to the bills to more clearly articulate the complementarity principle of the statute and the primacy of Australia's jurisdiction over crimes of the ICC statute, which under these bills would also become crimes under Australian law. The statute of the ICC clearly enshrines the principle. It is one which the exposure drafts of the bills have sought to reproduce.

I have previously drawn the attention of the committee to clause 3 of the bill and proposed clause 268.1 to be inserted in the Criminal Code by the consequential bill. These clauses provide that the parliament intends that the ICC's jurisdiction is to be complementary to that of Australia and that Australia has the primary right to exercise its jurisdiction for these crimes. The bills before the committee were released as exposure drafts. When referring the draft bills to the committee, the Attorney-General expressed his hope that the opportunity for the committee to study the legislation would assist it to make comprehensive recommendations on the statute. I am sure that hope would extend to suggestions from the committee as to how the bills could be revised to leave no doubt as to the operation of these principles of complementarity and primacy.

I also understand some issues may have been raised in the hearings yesterday about the constitutional validity of the ICC bill. We have previously provided the committee with summaries of legal advice obtained by the government to the effect that there is no constitutional invalidity in these bills. Specifically, the advice previously provided indicated that the ICC will not, through the operation of these bills, become part of the Australian court system nor will it have power over Australian courts. It will not exercise the judicial power of the Commonwealth when it exercises its jurisdiction, even where that jurisdiction relates to acts committed in Australian territory by Australian citizens. Ratification of the statute and passage of these bills will not involve a conferral of the judicial power of the Commonwealth on the ICC. The judicial power exercised by the ICC will be that of the international community. This power has been exercised on previous occasions; for example, in the International Court of Justice and the International Tribunal for the Law of the Sea, and Australia has been a party to matters before both of these judicial institutions.

I would like to also refer briefly to two issues which arose in the course of the discussion with Mr Greenwell—firstly, the question of article 27. It is the government's intention, if it ratifies and implements this statute, to implement all of the provisions of the statute. As the committee is aware, the statute does not permit reservations from it. This would include article 27. In considering the effect of that, I draw the committee's attention to article 98 which provides that:

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

To the extent that there is any concern about the way in which article 27 and article 98 are implemented in the exposure drafts as provided to the committee, any recommended changes or suggestions for changes to that to fully implement the operation of those two articles will, of course, be most welcome.

Senator SCHACHT—Are you saying that Mr Greenwell's advice to us that article 27 was excised is not correct, that it is actually part of article 98's operation?

Ms Blackburn—In preparing the exposure draft bills there was no intention to excise the operation of article 27. The two issues I put on the table were that article 27 needs to be read in conjunction with article 98 and that it remains the intention to fully implement the obligations of the statute. To the extent that there are concerns that the bills do not do that, we would be very pleased to receive advice.

Senator SCHACHT—You have all the legal drafting counsel down in Attorney-General's and we have about one between the lot of us—which is Senator Mason or somebody. I think I would rather go on your advice and review and you coming back to the committee than rely on Senator Mason's legal advice, which would be somewhere up beyond the moon on a full night.

CHAIR—Ms Blackburn, I think the point is that Amnesty International has maintained that there is a doubt because article 27 has not been included in the draft legislation. If the Attorney-General's Department concedes that there is a doubt, then perhaps it might be more prudent if that could be canvassed with us and that proposed wording put forward. If the Attorney-General's Department does not believe that there is any doubt about the operation of the legislation, even though article 27 is not expressly included in it, then perhaps we should be told.

Ms Blackburn—What I have indicated to the committee this morning is that the evidence given by Mr Greenwell has raised a question for us. I have stated the policy position, and am very happy to take on board looking at the implementation of it to assure the committee as to the effectiveness of the bill to implement that article in conjunction with article 98. It is quite a complex issue, and it is one that I would certainly prefer not to express a concluded opinion on today. I would be happy to take it on notice and to provide a statement back to the committee as early as possible.

CHAIR—To your knowledge, has the issue been raised previously and has the department considered it previously and come to a view? I appreciate your suggestion that you take it on board, but has it previously come to the attention of the department and been considered?

Ms Blackburn—The issue has certainly been considered in the course of the preparation of the bill. I am not sure I can go any further than that. Yes, it has been considered. In light of the comments that Mr Greenwell has made and that Senator Schacht raised in his questioning, I would like to go back and look at it and come back to the committee.

CHAIR—I think the committee would appreciate that.

Senator SCHACHT—Absolutely.

Ms Blackburn—I had one final issue which was raised on the question of the application of penalties. This is to cover some issues that were raised in that conversation. I draw the committee's attention to article 80 of part 7 of the Rome statute which deals with the penalties that can be imposed by the court. Article 80 provides:

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

I think this deals with the question that Senator Schacht raised.

CHAIR—We can now proceed on the basis of looking at some of the suggested drafting points. Ms Blackburn, could I ask for the Attorney-General's Department's comment on the suggested wording put forward by the Red Cross? It was done previously so I assume you have had notice of it. They have a suggested amendment to clause 3(2) because of their stated concern that the draft legislation does not sufficiently strongly convey the mandatory pre-eminence of the national criminal jurisdiction. Their proposed wording is: 'Accordingly, 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.' They are deleting the word 'primary' in essence. Do you have any comment on that specific wording put forward by the Red Cross?

Ms Blackburn—My view is that the wording is a change which could be accommodated if people believe that it makes the statement stronger. The primacy principle is clearly articulated in the statute. It is intended to be clearly articulated in the legislation which implements it in Australia. The words themselves, the changes proposed—I personally do not have any difficulty with them at all.

CHAIR—Do they change the intent in any way? Are they preferable? What is your view?

Ms Blackburn—Personally, I can go with either of them. I do not see that they make a significant difference. A lot of the wording, particularly in objective clauses, is designed to convey, as clearly as possible, the objective which the legislation is intending to achieve. At this point, I should hasten to add, I do not think my personal view on whether that is a clearer statement or not is relevant. If the committee believes that is a clearer statement of the primacy principle then that is a recommendation that the government would certainly take on board in its consideration of finalising these bills.

CHAIR—I think the suggestion is that the word 'primary' could be read in a different way—that 'primacy' clarifies the situation more than the word 'primary'. Do you have any comment?

Ms Blackburn—No.

CHAIR—Does anybody else have a comment on that specific point?

Cdre Smith—We would be bound by the Attorney-General's outcome.

CHAIR—That is fair enough. Mr Bartlett, did you have a question on drafting points?

Mr BARTLETT—That was my question, Chair.

CHAIR—Any other specific questions?

Senator LUDWIG—I was not sure if I got a clear answer from Amnesty International in relation to article 12. Is that now reflected in the drafting? It is the comparable provision to

section 8(1)(c) in the New Zealand legislation. I have read through it a number of times, but I am sure you would know if it is in there.

Mr Skillen—As I understand it, Senator Ludwig, the provision in the New Zealand legislation to which you refer is a provision which governs the geographical extent to which the crimes under New Zealand law apply.

Senator LUDWIG—Yes, it is extraterritoriality.

Mr Skillen—They apply extraterritorially and, indeed, to non-New Zealand nationals.

Senator LUDWIG—Yes.

Mr Skillen—The equivalent provision in our draft legislation is in the consequential amendments bill—the amendments to the Criminal Code.

Senator LUDWIG—Take me to the page, please.

Mr Skillen—It is clause 268.123, which appears on page 70 of the consequential amendments bill.

Senator LUDWIG—I have schedules on that page.

Ms Blackburn—It is schedule 1, and at the top of the page there is a reference to '268.123 Geographical jurisdiction'.

Mr Skillen—The subheading of the clause is 'Geographical jurisdiction'.

Senator LUDWIG—Where is category C and category D?

Mr Skillen—We would need to refer to section 15.4 of the Criminal Code, which is a provision which applies, effectively, what we call loosely 'universal jurisdiction'. The result is that the jurisdiction that is applied is—

Senator LUDWIG—Unlimited unless you limit it. Is that what you are saying?

Mr Skillen—Yes, it is the same result as—

Senator LUDWIG—Yes, criminal law can play extraterritorially unless you limit it.

Mr Skillen—Yes, as is the case with the New Zealand provisions.

Senator LUDWIG—So, in short, the answer is yes?

Mr Skillen—Yes.

Senator LUDWIG—As I understand the way the primary bill will work, for the provisions to work—in other words, to enliven the provisions to give power to the police in Australia to do search and seizure and all the other things—you will need a request from the ICC or its prosecutor. Is that right? We could no launch into utilising the International Criminal Court Bill without a request, could we?

Mr Skillen—That is correct. If we are called upon to cooperate in an investigation launched by the prosecutor of the International Criminal Court, it would be necessary for us to receive a request in order to enliven the provisions in the primary bill. That, of course, ignores the possibility that we may decide to investigate the crime ourselves under the provisions of our domestic law.

Senator LUDWIG—Yes, I understand. My question was only in relation to enlivening the provisions contained within the bill. The Attorney-General could obviously request the DPP to examine it or the DPP on their own volition could examine it more broadly under the Criminal Code.

Mr Skillen—Correct.

Senator LUDWIG—You exclude the Federal Magistrates Service from the definition of 'appropriate court' under clause 4. Is there a reason for that?

Mr Skillen—My understanding is that because the Federal Magistrates Service has jurisdiction given to it by the provisions that create the service, or by other provisions in Commonwealth law that endow it with jurisdiction, the government has concluded that it is not appropriate for the Federal Magistrates Service to be involved in the provisions of this statute that require the involvement of a court.

Senator LUDWIG—So you do not want the Federal Magistrates Service doing it?

Mr Skillen—That is the government's intention at the moment.

Senator LUDWIG—That is okay; I was trying to clarify that. So if there is a request for a warrant, then that has to go either to a federal court or a supreme court?

Mr Skillen—No. If the court asks Australia to arrest—

Senator LUDWIG—Sorry, I should have said, 'or a state magistrates court', not a federal magistrate.

Mr Skillen—Yes. That is correct.

Senator LUDWIG—Why is that? You are happy with state magistrates but not with the Federal Magistrates Service?

Mr Skillen—The decision has been made at the moment that the jurisdiction of federal magistrates is to be restricted to certain particular matters.

Senator LUDWIG—And they exclude that? I am sorry to cut you off, but I know we have limited time.

Mr Skillen—Yes. That is right.

Senator LUDWIG—If you take a look at division 3—Arrest of persons, the provisions in clause 21, on page 19, say:

(1) If:

(a) the Attorney-General receives a request for arrest and surrender of a person; and

(b) Division 2 has been complied with in respect of the request;

the Attorney-General must [require written notice].

Many other provisions effectively give the Attorney-General the power to delegate to the DPP, but not this one. Is it implicit in the legislation that the Attorney-General would effectively give the power to make the decision to the DPP—which is an independent statutory office—rather than to the Attorney-General as a political officer?

Ms Blackburn—Senator, if you go to clause 176 of the bill, it provides:

(176) Delegation

The Attorney-General may delegate … his functions, other than [certain specified ones] to:

(a) the Secretary of the Department; or

(b) an SES employee in the Department.

Senator LUDWIG—Yes. So there is a delegate provision. But it is curious that, through the drafting, some expressly delegate and others do not. When you read the bill, there are some places where the Attorney-General can expressly delegate, and then here it does not. Although, you then have a catch-all in the end. Is that just a mechanism of cleaning up your drafting?

Ms Blackburn—Could you perhaps point me to one of the sections where you are suggesting the Attorney-General is delegating to the DPP?

Senator LUDWIG—We will get to that. We may have to wait until I get to the other parts as I flip through, but I shall come back to that if we hold that thought for a while. In relation to the remand provisions, I take it that there is no maximum period that a person could be on bail or on remand. It does not say ‘reasonable time’ either, as I can understand it. I did see in ‘release from remand’ a reference to ‘60 days’. Is 60 days the total length of time a person could be on remand for? Obviously, it could be longer if they were subsequently going to be charged, but it does not seem to have a caveat of ‘reasonable time’. From my recollection, much of the Crimes Act includes references to ‘a reasonable time’. Is it your view that 60 days is a reasonable time?

Mr Skillen—Senator Ludwig, you yourself have referred us to clause 26, which provides that if the person has been arrested and the person remains on remand—

Senator LUDWIG—Yes, but they have not been charged at that point, have they?

Mr Skillen—Australia has received the information—

Senator LUDWIG—We have got a request, we have arrested the person and they obviously have not got bail and so they are on remand—and there are conditions in relation to that, I suspect—and then we can hold them for 60 days. Is that the intention?

Mr Skillen—That is the intention, on the basis that the request for arrest and surrender would need to comply with the provisions of the ICC statute and that, in particular, the court has issued a warrant of arrest which contains the name of the person and any other relevant identifying information, a specific reference to the crimes within the jurisdiction of the court for which the person's arrest is sought and a concise statement of the facts which are alleged to constitute those crimes. So it would be upon the receipt of a warrant of arrest from the court which contains that information that the arrest would be made, and then the person would be remanded either on bail or in custody.

Ms Blackburn—Those requirements of the statute are set out in clause 20 of the bill.

Senator LUDWIG—Yes. I know what the requirements are; I have read them as well. The point I was trying to get to was that there is no reasonable time limitation—60 days is the limitation. Do you say that is a reasonable time?

Mr Skillen—We do.

Ms Blackburn—Yes.

Senator LUDWIG—In relation to division 4, on page 24—and perhaps decisions made by the Attorney-General really start at that point—is the decision of the Attorney-General or a delegate under 176 reviewable? I am asking if it is reviewable on two counts: is it court reviewable or is it, alternatively, only ADJR? Or does it have merits review under the AAT?

Ms Blackburn—The draft bill does not provide for merits review of the Attorney-General's decision. The decision would be reviewable either under ADJR or under the 39B jurisdiction.

Senator LUDWIG—The other matter that came to me was in relation to evidence that was obtained. It lays out, in short, provisions whereby you can have a person answer questions before a magistrate. We do not know the content of those questions, because they could be from the International Criminal Court, who set out the questions they want answered, as I understand it, as one of the provisions. Correct me if I am wrong, but this has been on a cursory read. Is there derivative use immunity or use immunity available, or could any of the evidence that was obtained then be used for other actions or offences?

Mr Skillen—The normal protections apply in that case. The provisions in the statute that deal with that sort of scenario are, I think, contained in division 5 of part 4 of the statute, commencing at clause 63. Those provisions are modelled on the provisions that exist in the Mutual Assistance in Criminal Matters Act 1987, and the same regime is envisaged to apply as applies under that act to requests by the court for the taking of evidence.

Senator LUDWIG—So, in short, the normal protections have been maintained—that is, use immunity and derivative use immunity. You have not removed those anywhere in the bill?

Ms Blackburn—Senator, I think the more important point is that the right to silence has not been taken away.

Senator LUDWIG—No, I understand that; that is included in it. I was wondering about the issue of derivative use immunity.

Ms Blackburn—If the right to silence remains, if a person under questioning chooses to provide the information—

Senator LUDWIG—If they voluntarily provide the information then they are in trouble.

Ms Blackburn—then the information can be used and there is no immunity granted. The concept of use immunity and derivative use immunity arises only when you have abrogated the right to silence. In that context, clause 87 of the bill as it is presently drafted includes use and derivative use immunity clauses in relation to compulsory provisions for examination, which relate to the proceeds of crime provisions.

Senator LUDWIG—Now we are getting closer to what I am talking about. You are saying that there is the right to silence in some areas, but in relation to the matters which go to proceeds of crime, there is removed derivative use immunity and use immunity. Is that what you are now telling me?

Ms Blackburn—In the sections which deal with the identification, tracing and freezing or seizure of tainted property, the provisions which are in this draft bill reflect the 1987 proceeds of crime legislation.

Senator LUDWIG—I was wondering whether I needed to be more specific with my questions, because when I asked about derivative use immunity, you went on to talk about the right to silence, which I understand, of course, gives you derivative use immunity, but you are now, under further questioning, referring to the proceeds of crime model which has been incorporated in here for the forfeiture regime, which removes it. Do I need to be more specific?

Ms Blackburn—Senator, I understand your question. The only circumstance in which the issue of derivative use immunity arises is in circumstances where the right to silence has been removed. Under the Proceeds of Crime Act and the provisions contained in this bill, the right to silence is removed and then, accordingly, the use immunity is granted. It is important for me, however, to state—and I mentioned it in my opening statement—that these provisions, currently included in this exposure draft bill, do not reflect what is in the proceeds bill which is currently before the Senate.

Senator LUDWIG—No, I was coming to that question.

Ms Blackburn—I mentioned in my opening statement that that is a consequence of the different times at which these two bills were drafted. The provisions in the current exposure draft bill will need to be reviewed to reflect the proceeds of crime legislation which is presently before the Senate.

Senator LUDWIG—That was one of the questions I was going to ask. Perhaps we can deal with it now. In relation to the Proceeds of Crime Bill and the consequential amendments bill which are currently before the Legal and Constitutional Legislation Committee, is it the intention of the government to reflect those provisions in this bill, in their present or amended form?

Ms Blackburn—It would be the intention that these provisions in the ICC legislation should be consistent with the proceeds of crime legislation as it is in force in Australia.

Senator LUDWIG—Those are the Commonwealth provisions, not the WA provisions?

Ms Blackburn—Definitely the Commonwealth provisions, yes.

Senator LUDWIG—On page 32, clause 41(2) states:

> The magistrate must remand the person in custody for such period or periods as may be necessary to enable the warrant to be executed.

There is no reasonableness in that provision. How long could that detention continue for? I am asking this question because I do not have the whole document in my head, so to speak.

Ms Blackburn—My colleague would refer you to clause 41(1), which provides—and I quote:

> ... the person must be brought as soon as practicable before a magistrate ...

and subclause (2), which provides:

> The magistrate must remand the person in custody for such period or periods as may be necessary to enable the warrant to be executed.

Senator LUDWIG—Yes, but not 'reasonably necessary'. How long can that be for?

Mr Skillen—I think the answer is contained in clause 44—Release from remand. If the surrender warrant has been issued and the person is in custody for more than 21 days—

Senator LUDWIG—Yes, subject to proposed subsection (2).

Mr Skillen—Yes.

Senator LUDWIG—And 'reasonable cause' is contained in 44(2)(b).

Mr Skillen—Yes.

Senator LUDWIG—I have a more general question: in relation to the offences which are contained, I understand, in the consequential bill, are there any which have strict liability?

Ms Blackburn—Instinctively my answer is no.

Senator LUDWIG—I am happy for you to take it on notice. I was curious as to whether any did.

Ms Blackburn—We will take the answer as no. If there is any change to that answer, I will certainly advise the committee.

Senator LUDWIG—In relation to the extradition procedures, if the person is then going to be extradited they will be extradited in accordance with the Extradition Act 1988, as I understand the intention within the bill. But if it is with a Commonwealth country or a civil law jurisdiction country, are there different rules? That is, is the no evidence rule which is applicable to civil law countries applicable and in relation to a Commonwealth country prima facie—in other words, will that still continue or is it all the no evidence rule?

Ms Blackburn—The Extradition Act will not apply. It will be done under the provisions of this bill. The provisions of this bill are drafted on a no evidence basis.

CHAIR—Senator, if you are happy to finish your drafting points in this fashion, I am happy for you to continue.

Senator LUDWIG—In relation to legal representation, the bill does not talk about what happens if a person cannot afford legal representation, as I understand it. It certainly talks about legal representation being able to be had, but what happens where a person does not have sufficient funds?

Ms Blackburn—If the prosecution is brought in Australia in an Australian court before the offence is created under the consequential bill then the ordinary procedures will apply in Australia for applicants for legal aid, and there is a hardship provision in the legislation which allows the Attorney-General to grant legal assistance in the case of financial hardship. If the matter is brought before the ICC, there is a provision in the statute—I am not sure which article—which provides for representation to be provided for people who are unable to finance their own legal representation before the criminal court.

Senator LUDWIG—What if it is simply an extradition request, if the ICC asks that the person be extradited?

Ms Blackburn—If the ICC has made a request for assistance to Australia and Australia is executing that request: is that the question?

Senator LUDWIG—Yes. What about legal representation there?

Ms Blackburn—The bill does not provide any special provision for it because it is conducted under Australian law in accordance with the normal provisions for the provision of legal assistance. There is no specific mention made of legal assistance beyond the hardship clause which is included in the bill.

Senator LUDWIG—So the normal provisions of legal aid would then have to be applied for if a person did not have any funds. Is that the intention of the legislation, to utilise legal aid in this area if a person does not have funds? They would have to pass the means test or the requirements under the various state legal aid rules depending on where the request is made.

Ms Blackburn—There is no intention under this legislation to put a person who is being dealt with under this legislation in any better or worse position than any other person in Australia who is being dealt with through our legal and judicial system.

Senator LUDWIG—In relation to the matter that I asked you to hold, under part 11, page 116—it is not the best one but it is the only one I have now come across—section 148(2) reads:

The Attorney-General is to execute the request by authorising, by written notice in the statutory form, the DPP to apply for the registration of the order ...

So the Attorney-General asks the DPP. That is the point you asked me to look for. You have satisfied my curiosity by the catch-all in 176 in any event, but I thought I would point that out.

Ms Blackburn—Thank you very much, and I apologise for putting you on the spot. It is always difficult when you have to find something in these circumstances. In clause 148, and without being picky, we are not dealing with a delegation—

Senator LUDWIG—No, with a request.

Ms Blackburn—we are dealing with an authorisation. This is a fairly standard procedure; it exists already in our mutual assistance legislation and our extradition legislation. All it is indicating is that the DPP can, and of its own motion, initiate this action. It is the Attorney-General who decides that the action needs to be initiated and he does that by authorising the DPP to take the formal action.

Senator LUDWIG—When is there an intention to then do a new draft in relation to the proceeds of crime issues? I am obviously putting words in your mouth—but is it the intention to wait for the Legal and Constitutional Committee report and do it then? I was curious as to whether this committee would have an opportunity then to have a look at it. We have indicated this is our last hearing in relation to this, so we have not had an opportunity as the treaties committee of looking at the proceeds of crime legislation that could be adopted into this bill.

Ms Blackburn—My timetable would be that we expect the Senate Legal and Constitutional Committee to be reporting this week on the proceeds of crime legislation and expect the government to then respond to that with whatever changes it proposes to make to the proceeds of crime legislation. That would be taken into account in review of this bill. I do not believe at this stage we would be reviewing this bill ahead of receiving the recommendations from this committee on the exposure draft of the bill that has been provided to the committee.

CHAIR—So it is a question of timing—what comes first, in terms of the Legal and Constitutional Committee's report or our report?

Senator LUDWIG—Yes.

Senator SCHACHT—On this issue of timing: under the archaic, anarchistic, nihilistic rules of the Senate—which are chaos theory run riot—whatever we report about this treaty, the draft bill goes before the Senate. Then the Senate might choose to put it to the Legal and Constitutional Committee or a legislative committee inquiry, a full-fledged inquiry. I have to say there are some senators in this Senate that may well choose to send it off to a hundred different committees, for various delaying reasons. Will the government automatically put the draft bills to the Senate Legal and Constitutional Legislative Committee with a reasonably firm timetable for reporting back?

Ms Blackburn—That would be a question better directed to the chair of the committee than to me.

Senator SCHACHT—No; the chair of this committee is only dealing with the treaties. When these bills hit the Senate, the Senate has a choice of putting them off to the legislative committee. They can do a lot of things but that is the usual. Will the government look at putting them to the legislative committee of the Senate with a firm timetable of reporting back? Because if you do not, they could go on forever in a legislative committee if the committee is of a mind to delay it. With another full-fledged public hearing—every fruit loop wanting to turn up and go through all we have been through—the committee could go on for, literally, a year or so. Do you have any advice from the Attorney-General or the government on how they are going to handle this?

Ms Blackburn—No, I do not have any advice from the Attorney-General that I can give you. The Attorney-General has made public statements which indicate that he is strongly committed to proceeding with the implementation of this legislation and ratification of the statute. The Attorney-General is also on public record as having stated that no further action will be taken until the report of this committee is available.

Senator SCHACHT—On this point: under the rules of this committee, whatever our recommendation may be the government can ignore it. It can choose to ratify this treaty—sign it off and so on—irrespective of the views of this committee. Those are the standing orders of this committee; that is correct. Will the government, if this committee gives an adverse report—against signing—proceed anyway, in view of the Attorney-General's public remarks and the foreign affairs minister's public remarks in support of it? Will they proceed anyway to ratify?

CHAIR—I do not know that this is a question for Ms Blackburn.

Senator SCHACHT—The Attorney-General and the foreign minister have publicly said that they support ratification. If this committee recommends against ratification, will they then—as they have the right to—ignore the recommendation of this committee and proceed to ratify?

CHAIR—Senator, that is not a question for Ms Blackburn. You are talking about statements of the foreign minister and the Attorney-General. I do not believe it is for Ms Blackburn to respond.

Senator SCHACHT—I will put the question around the other way. Can I put it to Ms Blackburn in this way, and she can take it on notice to the Attorney-General: does the government have a view about that? They may say they do not have a view yet, that they may have a view later on—that is fine—but I would like to put that on notice—and not to you, but to the minister. The final question in terms of ratifying is this: does the government have to wait until the legislation is actually carried in the parliament before it can ratify?

Ms Blackburn—The position the Australian government takes is that it cannot ratify a convention until it is in a position to implement the convention. The legislation that we have put forward—the exposure drafts—would need to be passed and in force for Australia to be able to affirm in the international community that it is in a position to meet its obligations under the statute.

Senator SCHACHT—That leads me to this next point. That is why I am raising these questions. I am sorry, Madam Chair, but I think this is important for the committee to understand. In your opening remarks you mentioned that if we want to be in on the vote for the judges early next year we have to have this completed by the date in November this year.

Ms Blackburn—Yes.

Senator SCHACHT—What date in November was that?

Senator LUDWIG—January 2002.

Senator SCHACHT—No. We actually have to ratify by a date in November.

Ms Gorely—It is 1 November.

Senator SCHACHT—So it is 1 November. So you are telling us that this legislation, which is reasonably detailed, has to be through both houses of parliament by November this year.

Ms Blackburn—If Australia wishes to ratify by 1 November—

Senator SCHACHT—And get a vote for who the judges are?

Ms Blackburn—Yes.

Senator SCHACHT—That is why I asked the question.

CHAIR—Senator, I also think it should be noted that your concerns about delays in the Senate—I was not aware that the government controlled the numbers in the Senate—

Senator LUDWIG—I was not sure what you were suggesting.

Senator SCHACHT—What I was coming to is that the minister can automatically accept and recommend that the committee go off and, by negotiation, have a deadline of the beginning of the August session for the Legal and Constitutional Committee to report by.

CHAIR—In the event that it goes there.

Senator SCHACHT—In the event that it goes there. The Senate might vote completely differently and send it God knows where else—although I do not know where other than that, it being the reasonable committee. The Senate could send it off to a reference inquiry rather than to a legislation committee. But what I think we have to take note of, and why I want to raise this, is that the deadline for it to be carried if we are to get a judges vote is 1 November.

CHAIR—Yes, I think that is a significant point.

Senator LUDWIG—In relation to the point which Senator Schacht has partly covered, outside the issues that you have mentioned to Senator Schacht, are there any others that need to be covered for the bills to proceed? In other words, when the bills are drafted in their final form—should, in a perfect world, this committee, the Legal and Constitutional Committee if called upon, and the parliament deal with them in the allotted time—are there any other impediments outside that which would stop the executive from proceeding with ratification? It is not a policy question I am asking; it is really a procedure question. We know this: the executive requires legislation to be enacted to ratify—is that correct?

Ms Blackburn—Yes.

Senator LUDWIG—Is anything else required, outside of that—other than for the executive arm of the government to decide to ratify?

Mr Skillen—I think the answer is no. In a formal sense, the approval of the Executive Council would be required before we could deposit our instrument of ratification, but I think that has been covered by the tenor of your question, which was is there anything outside of—

Senator LUDWIG—The executive government; I was referring to the Executive Council within that catch-all. To give you some examples, is there any other legislation that is required? Are there any other steps that need to be taken? Are there any other instruments that need to be signed or ratified to allow the executive arm of the government to make a decision? That is as much of a catch-all as I can get.

Ms Blackburn—Not that we are presently aware of.

CHAIR—So the Proceeds of Crime Bill 2002 is the only outstanding bill?

Ms Blackburn—Not the Proceeds of Crime Bill; the passage of these two bills—the International Criminal Court Bill 2001 and the International Criminal Court (Consequential Amendments) Bill 2001.

CHAIR—I am sorry; the Proceeds of Crime Bill, which is before the Senate Legal and Constitutional Committee, is the only other bill that impacts upon these exposure drafts?

Ms Blackburn—Yes; and it only impacts to the extent that the bills need to be complementary in the way they deal with proceeds issues.

CHAIR—So you are not aware of any other bills that need to be complementary in the same way as that one?

Ms Blackburn—No.

CHAIR—Right.

Senator LUDWIG—Thank you, Chair; you have been very understanding.

Senator McGAURAN—Mine is a point of clarification. I am not sure whether Senator Ludwig touched on it in his educated approach, but what entitlements do we have to adjust or qualify the bill when it goes through the parliament? For example, I see here under 'War crime—employing prohibited gases, liquids, materials or devices' that the penalty is 'a period not exceeding 25 years'. What if the parliament thought life was a better penalty? Can we adjust it, or must we have consistency with the treaty?

CHAIR—With the statute.

Senator McGAURAN—I wonder where we can tinker with it in the parliament, if at all.

Ms Blackburn—The parliament is entitled to make any changes to the bill that it wishes to make. The question you are asking is whether an amendment to the penalties would make us non-compliant with the statute, and the answer is no. I referred in my opening statement to article 80, as I recollect, which expressly preserves the operation of domestic laws in relation to penalties.

Senator McGAURAN—So, if we changed it to life, the Australian parliament's life penalty would be primary or have primacy over the 25-year penalty of the court.

Ms Blackburn—If the offence were prosecuted in Australian courts, under Australian law, then the penalty provided in the Australian law would be imposed. If the matter were prosecuted before the International Criminal Court, then the statute penalties would apply rather than the Australian domestic penalties.

Senator SCHACHT—And we cannot amend that.

Ms Blackburn—We cannot amend the statute, no.

Senator SCHACHT—Or the penalties in the international court.

Ms Blackburn—No, they are part of the International Criminal Court statute, which is a concluded document. There is lengthy provision for amendment of the international document.

Mr ADAMS—At what age are persons subject to the act? Is there a lower age limit?

Ms Blackburn—There is a provision in the International Criminal Court statute which makes it an adult court only. You need to be over 18 to be subject to the jurisdiction of the court under the statute, and I would have assumed that we have reproduced that. Article 26 says that the International Criminal Court has no jurisdiction over persons who are under the age of 18. The Australian legislation would reflect that.

Mr ADAMS—What about somebody that commits an act overseas, then comes to Australia and becomes an Australian citizen? How do we deal with that, and how we deal with the issue of dual citizenship?

Ms Blackburn—The bill as presently drafted is intended to enable Australia, if the person came into Australia, to prosecute that person in Australia for the offences under the Criminal Code, provided that the elements of those offences are there, notwithstanding where they were committed nor the nationality of the person who committed them.

Mr ADAMS—So as a resident of Australia they would be prosecuted here. And dual citizenship: how do we deal with that?

Ms Blackburn—If the person was physically present in Australia then this bill would confer jurisdiction to deal with the person in the Australian courts under these provisions.

Mr ADAMS—Could they apply to the courts to be tried in another country—the country of their other citizenship? They could apply, couldn't they? There would be nothing to stop them.

Mr Skillen—It would be less a matter of the individual making such an application than the other country charging the person under whatever domestic jurisdiction they may have and submitting to Australia a request for the extradition of that person. I would imagine that in practice that is the way that that scenario would play out.

Mr ADAMS—Yes. Is Defence quite happy that Australia can commit troops to action overseas and still support the introduction of the International Criminal Court?

Cdre Smith—Defence's participation in this activity goes back some years to involvement in the drafting stage. Indeed, my predecessor, Mr Skillen, was part of that process in another incarnation. Defence, as would be expected, cooperated with the other agencies of government on direction to participate in that process. The Chiefs of Staff Committee had an opportunity last April to review what had been achieved after the several years of participation in the activity. That was done in the form of a briefing. A range of issues which may be of concern and come out before the committee were discussed. The chiefs of staff from my understanding—and I was there—appeared to be satisfied with the position that had been achieved in the negotiations and understood the implications of it. The participation of our forces overseas or even in the defence of Australia is not perceived to be compromised by the position adopted by the statute and the proposed legislation.

Mr ADAMS—Thank you.

CHAIR—The deputy chair has a series of questions.

Mr WILKIE—This really relates to a question I asked Amnesty earlier and one that was raised by the Red Cross yesterday. The definitions of rape in the proposed legislation appear to be narrower than those contained in the draft elements of crime developed by the ICC's preparatory commission. Specifically these definitions do not allow for the possibility that people might be forced to engage in the sexual violation of other people nor do they allow for the possibility of prosecution where sex has appeared to be consensual but has in fact been coerced by the fear of violence. Why are the definitions of rape in the proposed legislation narrower than those in the draft elements of crime developed by the preparatory commission? Are there any impediments to the broader definitions of rape being included in the legislation?

Mr Skillen—We have had the opportunity of looking at the Red Cross submission to which you refer. The reason that the provisions on rape in the draft bills appear as they do was to achieve consistency with other provisions in our Criminal Code that create similar offences, specifically a provision in the part of the bill in relation to offences against United Nations and associated personnel. That is why we did it in the way that we did.

I would like to say two things in response to the Red Cross submission. Firstly, I think that the government would remain open to giving consideration to amending these bills to take into account the submissions made by Red Cross. It is something that we are looking at but would need a little more time to fully consider. Secondly, it is our view that the specific scenario put by Red Cross would also, or might, be an offence under another provision of the bill, and that is the provision that creates offences of other sexual violence. So if there were a concern that a particular course of conduct fell outside the parameters of the bill, it is our view that that would not be the case, that it would in fact be caught by another provision, anyway.

Mr WILKIE—Mr Skillen, you talk about a time frame. Clearly we are trying to get to the point where we can make a recommendation. What sort of time frame are you looking at for review?

Ms Blackburn—Are you asking whether we will come back to you with a view on the point you have just made?

Mr WILKIE—Yes. We are looking at reviewing the Red Cross submission. Can you come back to this committee envisaging that?

Ms Blackburn—We are quite happy to essentially take it on notice and provide a view back to the committee on the Red Cross submission and the issues you have just raised and to do that as quickly as we can.

Mr BARTLETT—I have a couple of questions about the structure of the chambers. It seems, at first glance, that there is sufficient protection there to prevent politically motivated decisions but I am just not sure of that. I asked a question of Mr Greenwell this morning about the pretrial chamber. Does that require a unanimous or a majority decision of the three judges about whether or not a case has to be answered?

Mr Skillen—We have in fact had the opportunity to look at that since you asked the question this morning. We have to say that the statute and indeed the rules of procedure are silent on that issue—that is, the specific issue of whether a decision of the pretrial chamber in relation to an issue raised under article 15 of the statute has to be a unanimous decision. Both the statute and the rules are silent on that issue.

Mr BARTLETT—I find that rather surprising, I must add. What about article 39.2(b)(iii) of the statute, which says:

The functions of the Pretrial Chamber shall be carried out either by three judges of the Pretrial Division or by a single judge of that division ...

Under what circumstances could that decision be made by a single judge?

Mr Skillen—It says:

... by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence.

I have to say that, at this point, I am unable to answer which provisions of the rules of procedure and evidence govern the circumstances in which a single judge could sit and adjudicate. I really think we would have to take that on notice.

Mr BARTLETT—Could you take that on notice? Similarly, could you take on notice a question about the three judges that comprise the trial chamber? Is that a unanimous or a majority decision—also the appeals chamber, which I think is four judges plus the president?

Mr Skillen—We can answer that one, if you will give me just a moment. The answer appears elsewhere in the statute where it deals with the conduct of the trial. Article 74.3 of the Rome statute, which applies to the conduct of the functions by the trial chamber, provides that:

The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

Mr BARTLETT—So two judges could decide in the trial chamber; we are not sure about the pretrial chamber. And the five judges sitting in the appeals chamber?

Mr Skillen—I think that just for this particular moment in time we may need to take that on notice. It may be possible for us to provide you with an answer later on this morning.

Mr BARTLETT—Thank you.

Mr Skillen—I think we have just found the answer. Article 83, paragraph 4, says:

The judgment of the appeals chamber shall be taken by a majority of the judges and shall be delivered in open court.

Mr BARTLETT—It is possible, it would seem in a worst-case scenario in terms of minimal protection against political decisions, that a decision to act could be made by one judge possibly in the pretrial chamber, then a conviction made in the trial chamber by a majority of two judges and an appeal rejected by a majority of three out of five in the appeals chamber.

Ms Blackburn—Yes.

Mr Skillen—My colleague has just pointed out that it does appear that the answer to your original question about the conduct of the pretrial chamber under article 15 is in fact found in article 57 of the statute, specifically paragraph 2(a) which provides that orders or rulings of the chamber issued under a number of articles, including that one, must be concurred with by a majority of its judges, so a minimum of two. In all other cases it is a single judge.

CHAIR—Is it anticipated that there will be procedural changes or that further rules of procedure will come about as a result of the meeting of the assembly?

Mr Skillen—The preparatory commission has drafted extensive rules of procedure and evidence and they have been adopted by that committee. Those rules as adopted by the committee will be put to the assembly of states parties for adoption. It is the expectation at the moment that the assembly at its first meeting in September will adopt those rules.

CHAIR—In other words, you anticipate the rules of evidence, the rules of procedure, will be adopted at the first assembly meeting. So in other words if you are not there you are not part of the adoption of the—

Mr Skillen—That is correct.

CHAIR—I am just making Senator Schacht's point for him.

Senator SCHACHT—That is right.

Mr Skillen—Yes, that is correct.

Senator SCHACHT—Ms Blackburn, in your opening remarks you mentioned that the advice from Foreign Affairs—and this question goes either to you or to Foreign Affairs— is that it is anticipated now that by September there will be over 60 countries ratifying in one form or another. The 60 had to be reached and you will reach critical mass with the 60. In their information before the committee here on 31 August last year 37 parties had ratified. We got a document today from you looking at another seven or eight—I know that there is a gap in between—which by my count brings it up to about 46 between the two documents. I presume between August last year and this unclassified circular today other countries have indicated. I am not going to go through the long list, but the United Kingdom still has not ratified—is that right?

Ms Blackburn—The United Kingdom has ratified, Senator. The information I have suggests—

Senator SCHACHT—Sorry, I am just misreading a document, I suspect. Yes, 30 November, I am sorry. By my count then with that—we know the United States has not—does that mean the overwhelming majority of countries that are either in NATO or in the European Union have now ratified? By my count it looks like it has.

Ms Gorely—I would not be able to say the overwhelming majority, but certainly a representative spread of those countries either have ratified or are in the process of doing so.

Senator SCHACHT—And a majority of the OECD countries have ratified?

Ms Gorely—Again, I have not done the calculations. In fact, I think the ratifications are quite broadly spread over various regions, countries and international groupings.

Senator SCHACHT—What I am trying to get to is that in the organisations that Senator Mason in particular is most interested to identify, the ones with a democratic tradition—NATO, the European Union, OECD—a majority of all of the countries in those organisations have now ratified?

Ms Gorely—That is correct.

Senator SCHACHT—A couple of countries do not appear. We know about the United Kingdom and the United States. I notice in the list that Japan has not even signed. Is that correct?

Ms Gorely—Yes.

Senator SCHACHT—Is there any particular reason why the Japanese have not? Have they given any public reason? I cannot imagine why they would not. Is it just that Japanese bureaucracy is unusually slow on this occasion? Does anyone have any idea?

Mr Scott—I think it is fair to say that Japan is traditionally very conservative when it comes to signing up to international criminal legal instruments.

Senator SCHACHT—Because of their historical record, I presume.

Mr Scott—I think it is more to do with the manner in which their constitution is drafted. Several European countries, for instance, have needed to amend their constitutions in order to ratify the International Criminal Court statute. We do not have formal information from the Japanese as to why they have not signed or why they are not proceeding—if they are in fact not proceeding—to accede to the statute. That information is available through other sources and could be provided to the committee.

Senator SCHACHT—I notice Greece has signed but has not ratified. Portugal has signed but not ratified. Australia in now a very small minority—

CHAIR—I am sorry, hasn't Portugal signed?

Senator SCHACHT—Portugal, on the new list, has signed?

CHAIR—Yes. It has ratified.

Senator SCHACHT—Okay, so it gets even stronger: Australia is therefore in an increasingly small minority of OECD and western European countries. We are in the western European group in the United Nations—is that correct?

Ms Gorely—That is correct.

Senator SCHACHT—And an overwhelming majority of the western European group in the United Nations has now ratified—is that correct?

Ms Gorely—That is correct.

Senator SCHACHT—Has Foreign Affairs received any queries from our fellow members of the western European group about why Australia has not ratified?

Ms Gorely—I think it is fair to say there is a reasonable level of interest amongst other countries about the actions that all countries are taking towards ratification of the statute. In that context, our representatives overseas and, indeed, here in Canberra have been asked where Australia's ratification process is at.

Senator SCHACHT—I hope you have not told them this committee with Senator Mason, or somewhere—that would be pretty horrifying, actually.

CHAIR—I am sure they understand that we held an election last November.

Senator SCHACHT—This has been going on longer than that. I appreciate your comment, Madam Chair; you are most helpful. Ms Gorely, do you represent Australia in these discussions on the statute?

Ms Gorely—Me personally?

Senator SCHACHT—Yes.

Ms Gorely—No. The department's senior legal adviser, Mr Richard Rowe, who is currently in New York at the preparatory commission meetings, represents Australia in the negotiations.

Senator SCHACHT—He is the regular attender at those meetings?

Ms Gorely—Yes.

Senator SCHACHT—Has he reported back about the queries he is getting and why Australia has not ratified?

Ms Gorely—He has indicated that countries are interested in where Australia is at with the ratification process. He has pointed out to them that we are in the process of considering the issue, that the issue of ratification is currently before this committee, that that is an important element of our domestic process, including the passing of legislation, and that Australia, like

other countries, has domestic processes that we need to comply with before we take treaty action.

CHAIR—I am sorry to interrupt, Senator Schacht, but could you clarify the position with the United Kingdom? I am looking at all these different lists.

Senator SCHACHT—It has got 30 November as a date here.

CHAIR—That was signature. There are two columns, it seems.

Mr BARTLETT—That was signature, not ratification.

Senator SCHACHT—It was, yes—1998. It does not seem to be on the last one I got just then.

Ms Gorely—If you look at the top of the next page you will see that the UK and Northern Ireland ratified.

Senator SCHACHT—I am sorry: 4 October 2001—it goes over the page, because of the long name, and says 'and Northern Ireland'. The revenge of the IRA!

CHAIR—So we take it that 4 October 2001 is the date that the United Kingdom and Northern Ireland ratified?

Ms Gorely—That is correct.

Senator SCHACHT—We should also note, on that page, that Yugoslavia has ratified. I presume that is the government post Slobodan Milosovic?

Ms Gorely—Yes.

CHAIR—In September 2001.

Senator SCHACHT—In normal process it is going to be a very tight run thing to get this legislation through parliament by 1 November unless some arrangements are reached in the Senate. Some people might see some blood on the floor to get there, but it might be achievable. Would that still be too late for us to effectively put up a nomination, firstly, for a judge and, secondly and equally important, prosecutors?

Ms Gorely—The statute would need to have entered into force for us in order for us to put up a nomination for a judge.

Senator SCHACHT—Can we indicate in some sense to—what do you call it, the Council of States?

Ms Gorely—Assembly of States Parties.

Senator SCHACHT—that, subject to this committee's report, the legislation is now proceeding before a committee, will be debated and we anticipate that we will achieve it, so we can therefore tentatively put forward information that we will be nominating post 1 November?

Ms Gorely—If the government decided that they wanted to nominate a judge, there would be nothing to stop them indicating that. The question of how seriously the candidacy would be taken would arise if Australia was not in fact a party to the statute at the time.

Ms Blackburn—There is also the point that we would expect the assembly will set a process for nominations and then for elections that would have a timetable. If Australia was not a state party and the statute was not in force for Australia by the time the date of nominations closed, then we would have no right to nominate.

Senator SCHACHT—On the balloting, if 60 or 70 countries have ratified, do they all get one vote for one batch or is there a quota per group, such as the western European group, the African group and so on? Those of us coming out of this place are always interested in the actual process of election and the counting method.

Ms Blackburn—I can give you an initial answer to that, then I am sure my colleagues can provide further detail. Article 36 defines quite detailed procedures for qualifications, nomination and election of judges. I think we referred earlier to article 36.3 which sets out the qualifications for the candidates. Article 36.4 then sets out the basic procedures for nomination of the candidates and article 36.4(b) says that you may put forward only one candidate—who may not necessarily be a national of your own state party, I hasten to add. There is also the provision there for the advisory committee. I think Mr Greenwell referred to the two lists of candidates which is set out in sub 5. Then sub 6 provides for the secret ballot.

Senator SCHACHT—Is it a first-past-the-post system, proportional representation or preferential? Is one elected and then, after that person is elected, do we all vote again to elect the second, then all vote again to elect the third and all vote again to elect the fourth in sequential ballots? Whichever system you use can affect very much the lobbying arrangements of who gets elected.

Ms Blackburn—Indeed.

Ms Gorely—Article 36.6(a) provides that:

... the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

and 6(b) provides that:

In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures ...

Senator SCHACHT—That means that to get nine to be elected on the first ballot, Australia will fill in a ballot paper with nine crosses or ticks against nine judges; is that right?

Mr Scott—That is the usual procedure.

Senator SCHACHT—It is a multiple: I see. That is quite different from doing it sequentially.

Ms Gorely—Yes.

Senator SCHACHT—This is the standard procedure of the UN ballot, is it?

Ms Gorely—Yes.

Mr Scott—Yes.

Senator SCHACHT—If no-one gets the two-thirds, you then have a subsequent ballot, and those are elected are taken out. For those who remain who do not have two-thirds, you do it again until you have someone getting two-thirds.

Ms Gorely—That is right.

CHAIR—Every appointee would have a two-thirds.

Senator SCHACHT—Two-thirds. The real issue here—if you are talking about taking on board some of the questions raised about the election of the judges with qualification—is about the ability of countries to create bloc votes. I am not sure. I will have to think about whether this system encourages or discourages it, if you have got one ballot to lock off. If we all agree for Australia to vote for nine judges and the United Kingdom agrees to vote for the same nine as we have but a group of African or Asian countries also agree, as a bloc, to vote for two or three of theirs to get the two-thirds majority, it will be interesting to see how it turns out. What I am concerned about—and what I think this committee is concerned about—is the ability of countries to elect, for political reasons, people to the bench without what we would consider the requisite independent legal skill. I would ask—

CHAIR—I would be interested in whether Foreign Affairs has a response to that—

Senator SCHACHT—Yes, that is what I am going to ask.

CHAIR—because presumably they have considered how the voting may well pan out.

Ms Gorely—Firstly I would point out that there are a number of safeguards in article 36 itself. The candidates have to list their qualifications in a very formal way.

Senator SCHACHT—So what, if it is in a ballot—to put it bluntly?

Ms Gorely—Article 8 provides that the principal legal systems of the world need to be represented. There has to be equitable geographical distribution and a fair gender balance.

Senator SCHACHT—Put it around the other way. You have to have a two-thirds majority, and that means a group of countries listed in the 60-plus who have ratified but do not have—as Senator Mason would describe it—a great history of democratic process or even legal process in

their own countries. You could end up with no-one getting a two-thirds majority, because no-one has got—if you put a deal together—the two-thirds majority. You say that, if that happens, nobody gets two-thirds. What if you then have another ballot, and still no-one gets two-thirds? When do you actually say, 'Stop, we are going to draw from the hat or do something else'? Or do people keep getting knocked off, or do they withdraw? What are the processes?

If it is a two-thirds majority, that means a small group of countries—34 per cent—have got a blackball on any nomination, if they stick together. If 34 per cent vote differently, no-one is going to get two-thirds. Then they would start trading and saying, 'We will agree to six of yours from the West, if we get three of ours up.' This would be from Sierra Leone—which is one I noticed, and I will be interested to see who nominates from Sierra Leone—or from Mali or somewhere: 'We want three of those.' And then someone else might say, 'That bloke they have put up from Mali: actually, ten years ago his family owned slaves in Mali. Is he really the sort of person we should have on the international court?'

Mr Scott—The system is analogous in some respects. Probably the best analogy we can draw is the election of judges to the International Court of Justice. That has similar qualification requirements but a slightly different statutory procedure; however, it is still an election. We have found that that electoral process has not yielded politically motivated results or unqualified judges to that particular bench. In relation to the manner in which the various criteria are going to be ensured in the election, that will obviously be the role of the first assembly of states parties in drawing up the procedure. If the normal United Nations procedures are anything to go by, the concept of equitable geographic distribution will probably be represented by a number of judges per geographic group numbers and, similarly, by some kind of system between the other elected officials.

Senator SCHACHT—If Africa is a geographic area, when I look down the list of those who have ratified, I think only South Africa—and I may be doing a disservice to some countries—has any pretence of stability in a democratic system and judicial process.

Mr Scott—That may operate as a disincentive for the other African nations that have ratified. If they do not believe their judges can meet the very strict criteria, that would probably act as a disincentive for them to put a nomination forward. Basically, each state will have to circulate its particular candidates and go through a pretty rigorous international process of having the merits of their candidates reviewed. Very few countries would submit themselves to that kind of scrutiny lightly.

Senator SCHACHT—I could also put it positively: the western European countries, the OECD, and NATO countries—including Australia and New Zealand—can also use a blocking vote by the two-thirds majority, but that really means that no-one has a two-thirds majority either way and then the compromise starts. People say, 'We have to get something together,' and you might end up with seven good judges and two that are pretty hairy. That is when even I would get slightly concerned. If those two ended up on a panel of three—

Mr BARTLETT—Of which only a majority is needed to decide.

Senator SCHACHT—Yes. I would like Foreign Affairs to comment on the World Court. I do not think the World Court deals with issues that are as sensitive as this issue about war

crimes and individual citizens being charged and taken away to an individual court somewhere else in the world where their liberty is at threat if they are found guilty. In my view, if they are found guilty they are guilty. Isn't it the case that the World Court is for disputes between countries?

Mr Scott—That is correct.

Senator SCHACHT—You do not end up putting President Nixon in jail or John Howard in jail; you just find a country guilty. I think that is the difference when individual liberty is at stake.

CHAIR—Senator Schacht, what are you asking for?

Senator SCHACHT—I am asking about this process. I want to know if Foreign Affairs have any comment about the delay that we have had here in Australia and the impact that that has had on our standing and now on our opportunity to be a fair dinkum candidate for both prosecutors and judges, even if we get there by 1 November.

CHAIR—I believe they have answered that. Are you asking for a further statement?

Senator SCHACHT—I would like that. Secondly, I would like Foreign Affairs to comment on the voting system and the ability of just over a third of the ratifying countries to blackball anybody either way. What happens if nobody gets two-thirds in the voting system?

CHAIR—Could you take that on notice.

Mr Scott—Yes.

CHAIR—Senator Schacht, I would like to move on.

Senator MASON—I congratulate you on those questions, Senator Schacht.

Senator SCHACHT—I knew you would.

Senator MASON—I do; I am quite serious.

Senator SCHACHT—I fully support the court, but these are questions that have to be asked.

Senator MASON—Ms Blackburn, it is good to see you again. You know my view is that, principally, the issues before us are political and not legal. I continue to believe that the fetter on democratic nations, on the conduct of their foreign affairs and defence policy, will be greater than the fetter on authoritarian nations, principally because of (1) our legal system and (2) the democratic traditions of openness and accountability in our nation. That is, in one sentence, the problem. Does everyone understand that?

Mr Greenwell from Amnesty International said that those eminent people who opposed the statute in the United States—whether it was Brzesinski, Scowcroft or Kissinger—were not

lawyers and, therefore, somehow they did not really understand. My view would be that generals, national security advisers and secretaries of state understand more than lawyers about the conduct of foreign affairs and defence.

Senator Schacht raised a very good question, and I think Mr Bartlett asked this question before about the appointment of judges. People often say that it is the worst-case scenario, that it will not work out like that and that, in fact, there will be some compromise. I was speaking to Mr Adams outside before about this. Let me just give you what it was like 25 years ago and I want you to assure me that in 25 years from now it will not be a problem.

CHAIR—You would like them to get out a crystal ball?

Senator MASON—That is the issue, Chair. Twenty-five years ago Daniel Patrick Moynihan wrote a book called *A Dangerous Place* which is about when he was the ambassador for the United States to the United Nations in 1974. He said that the West could muster about 13 votes in the General Assembly. In the meantime, we have had somewhat of a renaissance of democracy, but I do not know what the world is going to be like in 25 years time. What I do know is: core Western countries with Western values do not have a majority and never will have, and there will be a large penumbra and a large number of fluctuating nations. My concern is that—and in a sense this is where the drafting becomes political—(1) judges may be appointed who do not reflect our principles of justice and (2) that there is the possibility of bias within the court. Someone mentioned the International Court of Justice and that, somehow, it was not political. I hate to inform you that it is; it is all political at one level. Can you assure me that in 25 years time there will not be dilemmas with respect to those problems?

Ms Blackburn—No, we cannot, Senator.

CHAIR—Is there any general comment you would like to make in response to Senator Mason's comment?

Ms Blackburn—No.

Senator MASON—Can I ask you a question then, are you surprised to hear that the West had 13 votes in the General Assembly in 1974?

Ms Gorely—No, but I would point out that—

Senator MASON—You are not surprised to hear that? You are not surprised to learn that?

Mr ADAMS—I am not going to tolerate this, Chair. We have witnesses before us who need to be treated with some respect.

Senator MASON—It is a fair question, Dick.

Mr ADAMS—It is up to you to make that decision, but I do not think it is a fair question and I do not think it is relevant.

CHAIR—It does not add anything, I agree.

Senator MASON—Well, were you aware that in 1974 that was the case?

Ms Gorely—No, I was not aware in 1974, I was only nine years old.

Senator MASON—But you see the problem?

CHAIR—Senator Mason, as I said earlier, you are asking them to crystal ball gaze and I do not know whether it is of use—

Ms Gorely—Can I point out that it is not as simplistic as saying that the West had 13 votes in 1974. For a start, the concept of 'the West' is not a static one. The EU, for example, is expanding rapidly to include a whole range of countries that we would never have considered to be part of that sort of mindset in 1974.

Senator MASON—Absolutely.

Ms Gorely—I mean the West European and Others Group works closely with all the other regional groupings in the UN. It is a process of consensus rather than—

Senator MASON—You are right. As Mr Adams pointed out before, the Cold War has finished and the world is changing.

Mr ADAMS—But some countries are much more welcoming than others.

Senator MASON—Sure, Dick, but what I am saying is that the divide could be in other places. The divide could be based on religion, regions or trade. There could be 100 other different divides. My point is that—and the Chair said this—we cannot crystal ball gaze. That is why we have to enter into systems such as this with temerity and scepticism.

Ms Blackburn—Senator, I hesitate to prolong this but, having admitted that I cannot crystal ball gaze, I always think it is worth noting that the decisions that are made have to be made in light of the world as we know it now. Bearing in mind the convention, the Australian government always retains the right to no longer participate in international institutions or arrangements which it decides no longer serve its national purpose. Indeed the Australian government, as I recollect, has recently announced its decisions in terms of change to the jurisdiction it accepts from one of the very significant international institutions. So the comment I would put on the record is that the decision has to be made in terms of the world as we know it now. The world may change. The Australian government retains the power to respond to those changes in the way it sees fit, depending on how those changes pan out.

Senator MASON—So that is why, Ms Blackburn, you would agree with me that ultimately it is an issue of political judgment about where our national interest lies with respect to the fetters on the conduct of defence and foreign affairs.

Ms Blackburn—Indeed.

Senator TCHEN—I thank Ms Blackburn for bringing the issue back to this point, because a question I would like to ask is about the mechanics of the sequence of events that might happen now that the International Criminal Court is about to reach the magic number of 60 ratifications. Can you confirm that there are, in fact, 55 ratifications deposited already? According to this telegram from Mr Rowe, there are likely to be six more before tomorrow. Is that correct?

Ms Blackburn—My understanding is that there are 56 current ratifications.

Senator TCHEN—Fifty-six?

Ms Blackburn—That is correct.

Ms Gorely—And as outlined in this document, six have indicated that they will deposit their instruments of ratification tomorrow.

Senator TCHEN—So by tomorrow the establishment of the International Criminal Court will become a fact?

Ms Gorely—Yes.

Ms Blackburn—From tomorrow the number of ratifications received enables the statute to come into force. The provisions that set up the timing mean that the court will come into force on 1 July.

Senator TCHEN—So the court will come into force on 1 July this year?

Ms Blackburn—Yes.

Senator TCHEN—And any states which ratified before 1 November will participate in the actual formation of the International Criminal Court?

Ms Blackburn—The timetable, which I set out in my opening statement, is speculative to the extent that none of the times have been set. They are based on the best information we have available from our missions. As I indicated, if the statute comes into force on 1 July, then the first meeting of the assembly of states parties is expected in September.

CHAIR—That is the earliest it is likely to be?

Ms Blackburn—As we understand it.

Senator TCHEN—When will the states meet to actually establish the court?

Ms Blackburn—There are a number of steps, as you would appreciate, to be gone through.

Senator TCHEN—What I am getting at is: when would a court be anticipated to be capable of functioning?

Ms Blackburn—The court would start functioning after it has rules and procedures on evidence, which we understand will be considered at the first meeting of the assembly; after it has a budget, which we also understand will be an issue at the first meeting; and after it has judges, which have been elected in accordance with the procedures specified in the statute. Our information at this stage is that it is likely to be considered at the second meeting scheduled for January. I might head over to my colleagues from DFAT to see whether they have any further information about when we might have an election of judges.

Senator TCHEN—So the election of judges would be likely to be 1 January and that is when the court, all else being equal, will actually be established and capable of functioning.

Ms Blackburn—The court would not be capable of functioning until the judges had been elected, until the prosecutors had been appointed and until the registrars and other officials were available and able to carry out the functions under the statute.

CHAIR—And it is physically set up.

Ms Blackburn—Indeed. And that is obviously going to take a period of time.

Ms Gorely—We do not have a firm indication of when we will actually have a court up and running—

Ms Blackburn—A functioning court—

Ms Gorely—in the Hague.

Senator TCHEN—Can you give us an indicative date?

Ms Gorely—The election of judges is expected to take place in January. There will be a range of other matters that will need to be looked at. I think we will have a better idea by the end of the preparatory commission meeting in New York over this next fortnight as to what the realistic time frame is for having it up and running. I cannot really give you a guesstimate at this point in time.

Senator TCHEN—Not even a ballpark estimate—six months, a year?

Ms Gorely—I think certainly a year is more realistic than six months—possibly longer.

Senator TCHEN—So it is more likely to be 1 January 2004 before we actually have the International Criminal Court in action.

Ms Blackburn—It could occur during 2003.

Senator TCHEN—During 2003.

Ms Blackburn—It could.

Senator TCHEN—But no earlier—it is unlikely to be earlier than 2003.

Ms Gorely—It would not be earlier.

Ms Blackburn—It will not occur before 2003; it could occur during 2003.

Senator TCHEN—Ms Blackburn and perhaps the representatives from the foreign affairs department, I am going to ask you to describe to us the likely mechanics of the sequences that could follow from the different possible conclusions that this committee might come up with. There are three possible scenarios: one is that this committee will recommend to the parliament, 'No, we don't want to be part of it.' The second possibility is that we will recommend to the parliament, 'Maybe, let's wait and see.' The third one is that the committee might say to the parliament, 'Yes, we recommend ratification and also the passing of this legislation.' Can you tell me what Australia could do as far as the International Criminal Court is concerned should this committee recommend 'no'?

Ms Blackburn—If this committee recommends that Australia does not ratify the statute it will be a matter for the government to consider that recommendation and for the government to decide whether or not it nonetheless wishes to proceed with ratification. The government cannot ratify the statute until the two bills in this or a similar form have been passed by the parliament.

Senator TCHEN—Supposing the committee recommends, 'Let's wait and see—let's wait until the court is established and see how it functions before we decide.'

Ms Blackburn—Again, the government would consider that recommendation. It may decide to accept it; it may decide to proceed with ratification. Again, ratification cannot occur until the legislation is passed by the parliament.

Senator TCHEN—In that case, you have pretty well answered the third scenario, which is that this committee recommends 'yes', because then the bill proceeds and Australia can then ratify the treaty. You said the government would not make it a practice to ratify a treaty unless it has the parliament's approval. Is that correct? That is what you said earlier.

Ms Blackburn—No. What I said earlier is that the Australian government has no ability to enter into international obligations which it is unable to fulfil. In terms of these two pieces of legislation, our view is that Australia is unable to fulfil its international obligations until it has domestic laws which implement those obligations and that would be achieved through the passage of these two bills.

Senator TCHEN—By the timetable you have mentioned, these bills must be passed by both houses of parliament before July. Is that correct?

Ms Blackburn—If these two bills were passed in the next sitting of parliament—the budget sitting, which is a very short sitting—by both houses then the instrument of ratification could be deposited in July and the statute would come into force for Australia on 1 September.

Senator TCHEN—Is there any legal barrier to the government actually lodging the instrument of ratification even though these bills have not been passed by both houses?

Ms Blackburn—The position has always been taken that you do not ratify a statute then, because as soon as we ratify this and it comes into force for Australia we are bound to comply with it. In the absence of domestic legislation conferring the powers, duties, responsibilities and obligations of these bills, we would be unable to comply with those obligations. So the view has always been taken that we do not accept the international obligation until we have in place the domestic infrastructure—legal, executive or otherwise—that enables us to meet those international obligations.

Senator TCHEN—Yes, Ms Blackburn, but you just told us there is no likelihood of any such obligation arising before 1 January 2003.

Ms Blackburn—That is, obligations in terms of the International Criminal Court.

Senator TCHEN—That is right, because you have just told us there is no likelihood that the criminal court would be established and functioning before 1 January 2003.

Ms Blackburn—Yes, I understand.

Senator TCHEN—Maybe we can anticipate the passing of those bills. If the passing of the bills is delayed only by parliamentary mechanics, then there is no reason why the government cannot ratify this treaty, from a legal point of view.

Ms Blackburn—I suspect the parliament would take quite a strong view of the executive binding Australia to implement something which is dependent upon the passage of legislation by parliament and thus pre-empting entirely the role of the parliament to pass those bills in whatever form the parliament decides to pass them. I could not envisage a circumstance in which an Australian government would take that action internationally when it cannot comply with all the obligations it is accepting, without the passage of legislation.

Senator TCHEN—Thank you, Ms Blackburn. I take it the department's strong position was taken after 1996, because before 1996 ratification of treaties did not require parliamentary consent.

Ms Gorely—I would like to clarify that. Ratification of a treaty does not require parliamentary consent. If there is legislation required to implement the treaty, as there is in this instance, then that legislation must be approved by the parliament in the normal manner. But it is not correct to say that parliamentary approval is required for the ratification of treaties. In 1996, the government introduced a range of reforms to the treaty making process—this committee being one of them—but it did not go that extra step and require parliamentary approval.

Senator TCHEN—I had two other quick questions.

CHAIR—Are they still on this topic, Senator Tchen? I had a clarifying question on this.

Senator TCHEN—Please go ahead.

CHAIR—Theoretically, though, the government could ratify a treaty, the legislation could pass subsequently and be retrospective to the date of ratification.

Ms Gorely—It is theoretically possible, but it would put us in a very difficult position.

CHAIR—I am not advocating the course; I am just asking theoretically.

Ms Blackburn—Theoretically, the Australian government could accept international obligations which it cannot comply with because it does not have in place domestic laws and then it could cross its fingers and hope the parliament passes them.

CHAIR—So then it would have retrospective application to the date of ratification?

Ms Blackburn—That would be a further question for the parliament as to whether the domestic laws have retrospective application or not.

CHAIR—Is there an international expectation? We are talking about it from the Australian government's perspective, and we would not ratify a treaty that required domestic legislative force until we had that in place, but is there an external international requirement that those ratifying must be in a position to fulfil their obligations? I cannot imagine that we would do it, but if another nation were to ratify and then say, 'Oh, we haven't got it through our domestic parliaments yet'—

Mr Scott—There is a fundamental principle in the law of treaties—both customary and in the Vienna Convention on the Law of Treaties—that absence of capacity of a country's domestic law is no excuse for the failure to perform its international obligations under the treaty. So whereas very few countries would second-guess or look behind the instrument of ratification that a country might put down, that country does so with the knowledge that it will have no excuse if it does not have its domestic house in order in relation to the implementation of that treaty.

CHAIR—So it does not challenge the capacity of the party to ratify the treaty, but, practically, it would be a problem for that party?

Mr Scott—Yes, it would, and it would obviously be a problem for the other parties who expect performance.

CHAIR—Sorry, Senator Tchen.

Senator TCHEN—Actually, that was my next question. Thank you very much.

CHAIR—I should not interrupt you, should I?

Senator TCHEN—No, that is fine. I think you asked it much better than I could have. Senator Schacht asked earlier—I think the question was to Ms Gorely—how many western European countries had ratified this treaty. Can I also ask you how many Asia-Pacific countries have signed and/or ratified this treaty? Is it a majority?

Ms Gorely—I would have to go through the list, but not a majority.

Senator TCHEN—If you are going through the same list, I can tell you that there are very few.

Ms Gorely—Yes, certainly not a majority.

Senator TCHEN—I thought that, if Senator Schacht was returning Australia to the fold of western European countries, thereby losing every single vote we might get from the sub-Saharan Africa block in the judging, we might find out about the Australian position in the Asia-Pacific as well. So, thank you; very few countries in the Asia-Pacific—including, in particular, China, India and Japan—have signed or ratified the treaty?

Mr Scott—Yes.

Senator TCHEN—Thank you.

CHAIR—Nobody else has indicated that they have any questions, so I am assuming that Kerry Bartlett's question will be the last.

Mr BARTLETT—Last four questions?

CHAIR—Do they all roll into each other? Read them quickly.

Mr BARTLETT—Firstly, if the ICC decided that a case were to be brought and issued a warrant for the arrest of a citizen in one of the member states and that member state refused to hand over that person for trial, what course of action would be available or would likely be taken by the ICC?

Mr Skillen—There are two courses of action open, depending on whether the case had been referred to the court by the Security Council or by another means. If the case had been referred by the Security Council, then a state's refusal to comply with the request for surrender by the court may be referred to the Security Council, in which event it would then become a matter for the Security Council to take whatever action it deemed appropriate in that case. If the case were referred to the court by one of the other two means—that is, by complaint by a state party or by the prosecutor acting on his or her own motion—then the appropriate course of action would be to refer the failure by the state party to comply with the request to the assembly of states parties, in which event the assembly would consider the matter and act in whatever way it thought fit.

Mr BARTLETT—What might that include? Is there any effective coercion?

Mr Skillen—No, there is no coercive power in the assembly.

Mr BARTLETT—They are slapped on the wrist: public naming, embarrassment—something like that?

Mr Skillen—The very act of referral of the matter to the assembly would attract some sort of public attention, but there are certainly no coercive powers in the assembly.

Mr BARTLETT—Thank you. My second question is to Ms Blackburn. You indicated that Australia could withdraw from any treaty to which it is a member. My understanding—and please correct me if I am wrong—is that, if that were to happen, a case could still be brought relating to an action that occurred during the time that we were a signatory. Is that correct?

Ms Blackburn—Yes, that is correct.

Mr BARTLETT—Thank you.

Mr WILKIE—So, it could be brought anyway?

Ms Blackburn—That is correct.

Mr WILKIE—You would not have had to have been a member state to have had an action taken?

Mr BARTLETT—Which raises the whole question: what is the purpose of the statute in any case? But that is another question. My third question is in regard to article 124, which provides transitional provisions whereby a country could become a party to the statute but for a period of seven years exempts itself from the jurisdiction. Those exemptions only apply, as I understand it, to article 8 rather than article 7. Do you have any idea why that would be limited to article 8 and not also include article 7?

Mr Skillen—The best way to answer that would be say that article 124 was inserted into the statute as a result of submissions made by a particular state that regarded that, in some way, as the measure it required in order for it to support the statute. What it means in effect is that a state which avails itself of the provisions of article 124 exempts its nationals from the court's jurisdiction in respect of war crimes for the period provided for in article 124, but it cannot do so in any circumstances for crimes against humanity or genocide.

Mr BARTLETT—Are you aware of whether any countries have indicated that they want to avail themselves of that provision?

Mr Skillen—I am aware that France has done so. My foreign affairs colleagues may be aware of whether there are any other countries.

Mr Scott—Only France, but we would need to check the full status list, which has the written declarations of the countries which have been excluded from this list that is being handed out now. To our knowledge France is the only one, but there may have been others.

Mr BARTLETT—One other question to our defence person: do you have any concerns that our ratification of this statute would in any way limit your capacity to carry out your duties in terms of Australians' security overseas, including peacekeeping?

Cdre Smith—That issue has been looked at in terms Australians acting both singly and in coalition overseas. In the peacekeeping context there would in effect be some advantages in some contexts of having the ICC available as a referral mechanism in the event of the collapse of the local legal system. We have operated in some peacekeeping capacities in countries where that is the case. As I mentioned earlier, in the assessment by the chiefs of staff committee the matters which were drawn to their attention were those that have been talked about for four or five years. They were mindful of some of the concerns that the committee has rehearsed well. They were satisfied with the position that had been reached with the careful assessment of the issues.

There is always, in entering into international obligations of this sort, bound to be issues that one needs to deal with. In terms of coalition and our participation in peacekeeping operations, those issues have not been seen to be ones that cannot be dealt with quite adequately in terms of current foreseeability. Each operation is carefully assessed in terms of the Australian government and its force's obligations concerning the laws of armed conflict. It is national policy that those laws apply today in all the operations on which our forces are deployed.

Senator MASON—Can you assure this committee that, if this country were invaded, Australian Defence Forces would comply with this treaty, holus-bolus?

Cdre Smith—If this country were invaded, do you anticipate the government's ability to run its legal system has been abrogated or collapsed?

Senator MASON—I do not know. Under any circumstances.

Cdre Smith—I think we can accept the parameters that may or may not be there; provided Australia can function as a government and its forces are duly constituted and under its clear and direct control and reach then it will continue to enforce the law in its forces.

Senator MASON—So you would not do whatever is necessary to defend the country?

Cdre Smith—We will always do whatever is necessary to defend the country.

Senator MASON—I only asked. I am just not sure if it is a good or bad answer—I do not know. I will leave it at that.

CHAIR—Or whether it was a good or bad question.

Senator MASON—Yes, but it is a fair question.

Ms Blackburn—Chair, with your indulgence, I just want to make one point of clarification to save me having to come back on the record. There was a question earlier about the age of people who are subject to the jurisdiction of this court. I referred to article 26 of the statute, which says that you need to be over 18. I think I then said our bills would reflect that. That was not a correct statement. The bills and the parts of the bills which will make these crimes crimes in Australian domestic law will then have applied to them the existing rules for the prosecution of people for criminal offences as to the age of responsibility and the courts in which those people would be dealt with.

CHAIR—Would that need to be a consequential amendment?

Ms Blackburn—No, that is the way the bills are presently drafted. My earlier answer was incorrect.

CHAIR—Thank you. Are there any other comments that the witnesses would like to make? If not, I will conclude the hearing. I thank the representatives from the Department of Foreign Affairs and Trade, the Attorney-General's Department and the Department of Defence for your time, and for staying a little longer that we had anticipated. We appreciate it; it has been very enlightening. There are a couple of matters that the witnesses have taken on notice. I ask that, if there is to be any response, it be as soon as possible, although I have no doubt that it would be. Thank you very much.

Committee adjourned at 12.26 p.m.