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JOINT STANDING COMMITTEE ON TREATIES

Reference: Statute for an International Criminal Court

TUESDAY, 13 FEBRUARY 2001

SYDNEY

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JOINT COMMITTEE ON TREATIES

Tuesday, 13 February 2001

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

Senators and members in attendance: Senators Cooney, Mason and Schacht and Mr Adams, Mr Bartlett, Mr Byrne, Mr Wilkie and Mr Andrew Thomson

Terms of reference for the inquiry:

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

WITNESSES

BECKETT, Mrs June, (Private Capacity)....74

BRADY, Ms Helen Julia (Private capacity)....64

DOWD, the Hon. Justice John, AO, President, Australian Section, International Commission of Jurists....99

EASTMAN, Ms Kate, Immediate Past President and Committee Member, Australian Lawyers for Human Rights Inc.....14

GAME, Mr Tim, Bar Council Representative, New South Wales Bar Association....31

GREENWELL, Mr John Henry, Member, Government Liaison, Amnesty International....1

HOGAN, Mr Des, Campaign Coordinator, Amnesty International....1

KIMBERLEY, Mr Gareth John (Private capacity)....109

McDONALD, Miss Nicole (Private Capacity)....57

PHILLIPS, Ms Gaye, Chief Executive, UNICEF Australia....48

RE, Mr David Michael, New South Wales Bar Association....31

ROSENTHAL, Ms Indira, Counsel, International Justice Program, Human Rights Watch....24

STONE, Mr John Owen (Private capacity)....87

WARD, Mr Christopher, Legal Team, Amnesty International....1

Committee met at 9.03 a.m.

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

HOGAN, Mr Des, Campaign Coordinator, Amnesty International

WARD, Mr Christopher, Legal Team, Amnesty International

CHAIR—I declare open this meeting, which is part of a review of Australia's signing of the statute of the International Criminal Court. The committee is going to hear evidence from a number of individuals and some non-government organisations who have various concerns. I understand there are also some members of the public and the fourth estate in the gallery; they are welcome. Before I ask the representatives from Amnesty International to give evidence, there is a supplementary submission which we have to formally adopt.

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

That the supplementary submission from Amnesty International be received as evidence to the inquiry into the statute for an International Criminal Court and authorised for publication.

CHAIR—Although we do not require evidence on oath today, these are legal proceedings of the parliament, as if they were taking place in the House of Representatives or the Senate, so they warrant the same respect and the giving of any false evidence would be a very serious matter. I invite one of you to make an opening statement, then we will go to cross-examination.

Mr Greenwell—I only wish to make two points, Mr Chairman. The first is to inform the committee that, on Thursday last, the Argentine became the 28th state to ratify the statute. The second relates to the supplemental statement. The point of that statement was to urge Australia, when enacting the offences under the statute, to confer universal jurisdiction. In the supplemental statement reference was made to the fact that New Zealand, when giving statutory effect upon ratification, had done that. I wish to bring to the attention of the committee that Canada also, when it enacted the provisions of the statute upon ratification, conferred universal jurisdiction. I refer to the Canada's Crimes Against Humanity and War Crimes Act 2000 and, in particular, section 6, which is the provision that confers universal jurisdiction. Thank you.

CHAIR—Mr Hogan or Mr Ward, would you like to add something?

Mr Ward—No, not at this stage.

Mr Hogan—As we are a bit pressed for time, we are happy to be in your hands.

CHAIR—Okay. We will get straight into it.

Mr ADAMS—Concern has been expressed by some people about Australia giving up its sovereignty by signing this statute. What would your argument be to that?

Mr Greenwell—First, I think it is a misconception to refer to the giving up of sovereignty. The entering into an agreement of this nature is an exercise of sovereignty. Substantively, one has to bear in mind the important principle of complementarity, which has already been drawn

to the attention of the committee and which you are familiar with: it is an essential, in fact a prior, principle to the whole statute that national courts are the first to deal with the crimes specified in the statute.

Mr ADAMS—So it is only when the national court cannot apply that that would come into play?

Mr Greenwell—Yes, if it is unable or unwilling—it may be, of course, able to do so but the purpose of the proceedings is to shield some high-ranking official. In that event, the court can take over, in effect.

Mr ADAMS—What about the appointment of the justices? In the past there has been some criticism of justices in some of the international tribunals as not being up to it, not having the competency that they should have or that people expect. How would the justice be chosen?

Mr Greenwell—It occurs ultimately by a two-thirds majority of the assembly of states, but it goes through the following process. There are 18 justices and the initial nominations are made by the ratifying states. The condition of appointment is that a justice has experience either in criminal law or in international law. A statement, upon nomination by the government, must set out in detail the qualifications of the judge in question. The assembly may have an advisory committee to, in effect, vet those applications. It is only then that it goes to the assembly. Not more than one national of any country can be appointed as a judge. There are also the provisions about requiring independence and morale probity in regard to any appointment.

Mr ADAMS—In regard to the court sitters, is it three judges in the one, or one individual judge?

Mr Greenwell—In the case of a trial chamber—that is, the actual trial—it would always be three; in the case of a pre-trial chamber, it would generally be three. In some circumstances, which escape me, one judge would sit.

Mr ADAMS—How does the court gather evidence? It does not have a police force submitting evidence to the prosecutor. How is the evidence gathered and presented before the court?

Mr Greenwell—The prosecutor can appoint investigators. He or she will have an investigating team. Then there is a dependence upon the cooperation of ratifying states, which is provided for in the statute. Under those provisions the prosecutor can seek the assistance of any state to help obtain evidence to provide records and the like. There is a list of matters set out in, I think, article 91. That is the basic way in which evidence would be obtained.

Mr Ward—It is anticipated that diplomatic channels would also be used to transmit requests of that type.

Mr Greenwell—An important point is that, firstly, there is a specific provision in the statute—article 86—which requires nation states to cooperate. Secondly, the provisions for cooperation that are included in the statute are to be re-enacted as part of domestic legislation. So if Australia ratifies, Australian law will have these provisions for cooperation.

Senator MASON—Mr Greenwell, am I right in the assumption that if Australia ratifies this treaty, our national law and international law will agree on issues such as what genocide is and what crimes against humanity are—that national law is congruent with international law?

Mr Greenwell—That is a fair statement. I would prefer to put it in another way: that the offences that are in the statute will become part of Australian domestic law. What follows—and this is what you might be saying—is that, in so far as they are not currently part of Australian law, they will become part of Australian law.

Mr Ward—I think that is right. I would like to add, though, that the internationally accepted definition of genocide—by way of example—as an international crime is substantially more restrictive than has sometimes been argued in domestic court proceedings, both here and overseas.

Senator MASON—I was going to get to that.

Mr Ward—I would like to stress that in no case of which I am aware has an allegation of genocide before a domestic court in those places—obviously, Australia does not have legislation at this stage in relation to genocide—proceeded beyond a simply procedural level. I should also add that the definition of genocide in international law requires an intention to destroy in whole or in part a group. On top of that restriction in the definition there is the principle of non-retrospectivity in the statute, which would prevent any retrospective application of genocide.

Senator MASON—It concerns your CA—Mr Ward has just touched on this and Mr Adams touched on it before. The spectre is of an international tribunal imposing itself on unwilling Australian citizens for having done things that were part of government policy—things that, in retrospective, have come to be seen as genocide or even crimes against humanity. The example I am thinking of is one that, Mr Ward, you perhaps have raised by implication before. There has been a lot of discussion—by conservative commentators, I might say—in academic circles and in great magazines like *Quadrant*—that I know Mr Byrne subscribes to—that Australian government policies with respect to indigenous Australians late last century, and maybe even until 1970, amounted to genocide. You said that there is a retrospectivity clause, so that does not apply.

Mr Ward—Yes.

Senator MASON—Let us just say that that was not there. Would there be a possibility, for argument's sake, that this artifice, this statute could apply to Australia—because our courts were unwilling to put public servants or whomever in jail for implementing government policy?

Mr Ward—My personal view as a legal expert in this field is that the answer to that is no, particularly in relation to the fairly precise definition of the crime of genocide that is anticipated as a result of the work of the Preparatory Commission. The crime of genocide is broken into a number of component possibilities, none of which would be satisfied—

Senator MASON—Robert Manne—I hope I am not libelling him—says that it was the policy of Australian governments to synthesise the Aboriginal population with the rest of white Australia and that in effect it was genocidal. That is what he argued.

Mr Ward—I accept that. The qualification that you added is 'in effect'. I think that one must place a level of trust in the highly qualified jurists who will comprise the proposed International Criminal Court. They are unlikely to be swayed by such political considerations.

Senator MASON—All right. We Queenslanders do not trust these international tribunals.

Mr Ward—I will respond to that statement because it does raise a critical point—

Senator MASON—A suspicion anyway.

Mr Ward—The proposed International Criminal Court is to be a court of the highest legal standing and to that extent can perhaps be contrasted with other United Nations treaty review committees. It is also important to stress that there can, within that category, be a distinction in the level of what I would call quasi-judicialness of the various United Nations committees. Not all, if any, purport to be judicial in character; whereas this is to be essentially and totally a court applying law as set out in the statute. It is more analogous to the European Court of Human Rights than any other United Nations body.

Mr BYRNE—Under the statute, if a ratifying state does not prosecute someone domestically, what time frame applies before they can be taken to the international criminal court?

Mr Greenwell—The principle is whether they are unable or unwilling to prosecute. It is a matter for the court to determine. I cannot answer how long it would take in precise terms. Obviously, if you had a state in collapse—as after an internal conflict such as in East Timor—the court might be able to come quite readily to the position.

Mr BYRNE—So even though they might want to pursue it domestically, what you are saying is that, because they are in a state of collapse, the decision might be made for them externally.

Mr Greenwell—The decision might be made that they are unable to prosecute.

Mr BYRNE—What if they wanted to prosecute, but one of the reasons for the delay was, as you say, the state of the country?

Mr Greenwell—Then it would be a question whether ultimately they were unable. Obviously, because of the principle of complementarity, that country would be given considerable latitude in order to prosecute. There are provisions for consultation between the state concerned and the court and the prosecutor. The court is not going to be gung-ho; it will have plenty to deal with and it will prefer the national court to deal with it.

Mr Hogan—I think the court would be very slow. If you look at Somalia or Afghanistan, you can clearly see states where they would not be in a position, either unable or unwilling, to

prosecute or to investigate; but in other circumstances, like East Timor, where you have a provisional body like UNTAET, they would be very slow not to allow the local country to prosecute.

Mr BYRNE—My understanding is that there is no retrospectivity to this, that prosecutions can happen after the treaty comes into effect. Is that correct?

Mr Hogan—Yes.

Mr BYRNE—What does that mean for countries ratifying this prior to other countries? Are they more susceptible to prosecution because they have signed it prior to another country?

Mr Ward—First of all, countries are not liable to prosecution, individuals are.

Mr BYRNE—I am aware of that distinction.

Mr Ward—When a country has ratified, its citizens will be liable—if you want to use that word—following the statute's entry into force, which takes place on the 60th ratification, so there will be a substantial groundswell. I should also add, though, that it is the position of Amnesty that this is not a treaty or a statute that is reciprocal in nature—that is, the obligations do not depend in any way upon reciprocity, other than by virtue of the interaction between the secretariat of the court and individual states.

Mr BYRNE—My understanding is that, with non-ratifying countries, the only way that individuals who may have been accused of atrocities can be sent to the International Criminal Court is by the Security Council. Is that correct?

Mr Ward—That is correct; or with the consent, on an ad hoc basis, of that state.

Mr Greenwell—Or if you are a national of a ratifying country on the territory of a non-ratifying country.

Mr BYRNE—There is a some conjecture that one of the criteria for proceeding to prosecution is 'aggression' and that has not been clearly defined in the statute. What would Amnesty International's interpretation be of aggression?

Mr Ward—That is something that, as you said, has yet to be resolved in the negotiations that will take place. Obviously, if Australia wishes to participate in those negotiations it should ratify. Nevertheless, the crime of aggression is to be defined in accordance with the principles of the charter of the United Nations, which has a restrictive definition of aggression. The concept of aggression is generally taken to mean the taking of territory by force. It is inconceivable that aggression would be defined to include peacekeeping or humanitarian operations.

Mr BYRNE—Given that, why has there been some level of ambiguity about it? If it is as simple as you say it is, why has this been left unstipulated in the statute that has been put before us?

Mr Ward—I really could not say.

Mr Hogan—The negotiations were quite intense in late 1998. I would imagine this is one of the areas where the states who will ratify—that is, 60 states who will predominantly see themselves as best practice states and will begin it—will themselves negotiate what exactly is meant by aggression. I think that, as Christopher says, you are looking at something very akin to the UN charter.

CHAIR—Or a blank cheque.

Senator COONEY—It is a concept that we must agree with, but I am just worried about the execution of the concept. I will take East Timor as an example. As I understand Amnesty's position, they say that, no matter where the crime is committed, countries should take it up. What happens when Jakarta says, 'Right oh, Australian troops in East Timor have committed atrocities and we want Australia, as a signatory to this, to extradite them to wherever'?

Mr Greenwell—Firstly, we have to assume for the purposes of your question that Indonesia and Australia are both ratifying states.

Senator COONEY—Yes.

Mr Greenwell—In that event, the first question, if Jakarta brought that to the attention of Australia, would be for Australian authorities to decide whether they were going to prosecute Australian troops for the alleged war crimes under the Defence Force Discipline Act or under Australian domestic criminal law.

Senator COONEY—Or under this statute which is to be taken into domestic law.

Mr Greenwell—Yes, that is true. But, with regard to the war crimes, most war crimes—what we are presently talking about—are at present part of Australian law, because the Geneva Conventions Act 1957 takes into account all the grave breaches. So it would be a question for Australia whether it prosecuted. Let us follow it through. Let us assume that Australia decided not to prosecute and Indonesia was very unhappy about this. It could bring that to the attention of the prosecutor of the International Criminal Court.

Senator COONEY—And provide the evidence, which would, no doubt, be evidence from people in the Indonesian army whose evidence you would have to take seriously?

Mr Greenwell—I think that latter point might be begging the question. But I agree: the evidence the Indonesians had would be brought to the attention of the court.

Senator COONEY—You say that it is begging the question. That is your problem, isn't it? If you say that evidence from Australia, the United States and all the good countries is true and that evidence from Indonesia, Burma and all those sorts of places is not true by definition that gets you into a difficult position.

Mr Greenwell—That is not what I am saying; I am saying that the question has to be raised in this way. Why it is begging the question is that that evidence would presumably have been put before the Australian authorities when they were considering the Indonesian request to prosecute. We have to assume that the Australian authorities have said that the evidence is

insufficient. I am only saying that. The next step would be for the Indonesian authorities to refer that evidence to the prosecutor.

Senator COONEY—Not the Australian evidence?

Mr Greenwell—No, the Indonesian evidence put before the Australian authorities. That same evidence would be put before the prosecutor in The Hague. He would have to consider it. Under article 17 he starts from the basic proposition: because the Australian authorities have decided not to prosecute, the International Criminal Court would have no jurisdiction. That is his starting position. The only way in which the Indonesians could get the International Criminal Court into the position was by showing that Australia was unwilling to prosecute on a bona fide basis—the term is 'genuinely unwilling'. You do not get the International Criminal Court into it until it has been demonstrated that Australia not only refused to prosecute these war crimes but also was not genuine in its decision not to prosecute.

CHAIR—Mr Greenwell, I do not think you are being quite frank with us about this. The provision is subclause 1(a) of article 17. It seems to suggest, as it reads:

... unless the State is unwilling or unable genuinely ...

So the 'genuinely', this issue of bona fides if you like, seems to qualify an inability to prosecute, not an unwillingness. As Senator Cooney says, if the Indonesians allege that Australia is just unwilling to prosecute one of their own soldiers, having been accused by the Indonesians, then all they have to show for admissibility is an unwillingness. There is no qualification on that.

Mr Greenwell—If we refer to subclause 2 of article 17, you will find:

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognised by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

Perhaps (c) might be relevant. It says:

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

That after all is not only there, in article 17, but is really the point at which the statute is directed to; it is looking to national courts in the first instance to implement this. So all it is saying is that if the national courts are not going to do it or if they are purporting to do it—if they are not being genuine—then the ICC will take over.

CHAIR—There you go, pretty simple.

Senator COONEY—But you have got a judgment being made by a prosecutor who, depending where he is from, has a greater or lesser regard for that country. You might say that if you are from Australia or the United States you are all right, but I am sure the Burmese courts

are not doing this as they should. There is a risk there for tremendous capriciousness. The other problem you have got is that, if the civil courts do not do it and it is going to be hard to get before the ICC, what is the point of having it, if it is going to be very difficult?

Mr Ward—The answer to the first part of your question is that the statute as a whole pays primary regard to complementarity with and deference to national courts. Although there is, as you pointed out, a discretion in the prosecutor in this instance, that discretion is to be reviewed by the pre-trial chamber of the court as the case proceeds.

Senator COONEY—Three judges.

Mr Ward—That is right.

Senator COONEY—Chosen from where?

Mr Ward—Chosen from the nominees put forward by the state parties and voted in—

Senator COONEY—And who can have a second term.

Mr Ward—Yes, that is correct, I think.

Senator COONEY—And who need votes to get to a second term. Is that right?

Mr Ward—I think that is correct.

CHAIR—It is a matter of preselection.

Mr Ward—The only possible response to that line is that there is simply no other way of selecting jurists to serve on an international tribunal. If that form of process were not the case, you would end up with 183-odd judges sitting on a court at one time.

Senator COONEY—That is what concerned me. The execution of all this is a bit of a problem. You are forced into these sorts of situations because there is nothing else you can do.

Mr Ward—The only thing I would say in response is that the experience of European states under the European Convention on Human Rights has been the opposite. They have been granted a fairly wide margin of appreciation as to how domestic jurisdictions deal with the convention and convention rights. I would be certain that the members of this court would take a similarly deferential view.

Senator COONEY—But that is exactly one of the issues I am raising with you. The example you give is of the European court and the union. What you are really saying is that the Europeans are going to run this and they are good guys. Why did you not say the courts in South Africa, Angola or Burma—

Mr Ward—For the simple reason that they do not have an international tribunal—the European Court of Human Rights.

Senator COONEY—Exactly so. What you are really saying is that, even though this is to cover around the world, the people who are going to do the judging are going to be European.

Mr Ward—In fact I am saying precisely the opposite. The statute itself requires a geographic spread of judges. There is no doubt that it will be representative, although the judges will be serving in an individual capacity. What I am saying, though, is that decisions of the prosecutor may be reviewed by the court. The decisions will be taken, because the statute requires them to be, with great deference towards the decisions of domestic prosecutors as to whether or not to continue criminal proceedings in a domestic legal system.

Senator COONEY—Can prosecutors be wrong?

Mr Ward—Of course prosecutors can wrong.

Senator COONEY—Can judges be wrong?

Mr Ward—They can. That is why there is a system of review in domestic law.

Mr Greenwell—The difficulty you are positing arises only if Indonesia refuses to accept the Australian authorities' position. If the prosecutor is not bona fide in his assessment—which is really what you are saying—and if the three judges on the pre-trial chamber are also—

Senator COONEY—I am implying that they are not necessarily competent for this. That is why I said to Mr Ward: can judges and prosecutors be wrong? And they can, as you know. Every time they held against you they were wrong.

Mr Greenwell—In effect, then, the prosecutor is incompetent and the pre-court trial chamber of three judges is incompetent. Yet we do have, after all, the analogy of the ad hoc tribunals. There has been no suggestion that the prosecutors that are appointed—not dissimilarly from what is proposed here—are either incompetent or that the court has been incompetent.

Senator COONEY—I do not think you are taking my point. Your whole argument is Eurocentric, because all the examples you are giving are Eurocentric. You have not given one example because you say there are none there.

Mr Hogan—One of the problems, though, is that the European Convention on Human Rights does confer a court and there is no other region in the world that does that.

Senator COONEY—Exactly.

Mr Hogan—But the other thing is that the closest you have is the International Court of Justice in The Hague, the ad hoc tribunals or the UN committees.

Mr Greenwell—The ad hoc tribunal is not so Euro as you say. It certainly was confined in its jurisdiction, if you like, to Bosnia, but the appointments are made by the General Assembly. In other words, it is the General Assembly of the United Nations that makes the appointments, and they can make appointments from any part of the world.

Mr Ward—And the International Criminal Tribunal for Rwanda is not Eurocentric.

Senator COONEY—Are you happy with, say, the justice system in China or even in the United States where you have two million people locked up?

Mr Ward—With respect, the question is not relevant to the issue before us.

Senator COONEY—It is relevant and I will tell you why. What you are saying is that the system is going to be perfect—that people are going to be perfect, that the prosecutor is going to be perfect and that the judges are going to be perfect. And as soon as I say, 'What about the United States where there are two million people in gaol? What about China?' You say it is not relevant. I would have thought that that is saying that you are not going to have any judges or prosecutors from the United States or China. And, if you are not going to have them from around the world, how can you talk about a universal court?

Mr Ward—Because the distinction needs to be drawn between judges drawn from a place and the legal systems in those countries under which they operate. The domestic laws in the United States—as a result of which two million people are, as you say, in gaol—are not applicable to the International Criminal Court.

Senator COONEY—I think that is almost being precious, because the judges, whether they are from China, America or anywhere else, will go there with a culture that has been developed in China, Burma and what have you. Surely that is self-evident.

CHAIR—Otherwise we may as well have them appearing here, trying cases in Sydney.

Mr WILKIE—In your submission you touched on reasons we should have a permanent body rather than ad hoc committees. Would you like to expand on that, because one would have thought that, when there is a specific issue coming up and you set up an ad hoc committee, you can actually choose impartial people from around the globe who can deal with that issue in that impartial way. Why is it so important to have a permanent body?

Mr Greenwell—I think there are a number of reasons. The first is that to have a standing body gives much greater deterrence. One of the great problems has been in the period of the 1990s particularly—the culture of impunity, lack of international accountability. People have behaved in the most atrocious way and have assumed that they can get away with it. An ad hoc tribunal, even when it is appointed, is appointed very much after the event. If the Milosevics know in advance that there is a standing court and the possibility of curial intervention they will be much more readily deterred.

The second reason is that it is a somewhat selective thing when ad hoc tribunals are established. We know that they were eventually established in Bosnia and Rwanda, but that came after a lot of pressure, and indeed one might say it was largely because the atrocities got on the television screens of certain countries that they were established. No, you do not find any ad hoc tribunal being established in certain other countries where perhaps the events were not so prominent.

In effect, you have under this statute the best of both worlds because the Security Council can refer a matter to the International Criminal Court and, when that occurs, the International Criminal Court will be operating as an ad hoc tribunal. The final point I would make concerns the nature of the Security Council. If you were to rely on ad hoc tribunals, the appointment is subject to the veto and therefore subject to international political and diplomatic considerations which are irrelevant to the prosecution of crimes against humanity.

Mr BARTLETT—At the risk of labouring the point, I want to return to this issue of the perceived threat to national sovereignty. You place a lot of store in complementarity. Returning to a question Senator Cooney asked, when it really comes to the crunch and a party is unwilling, for reasons that they might perceive to be in their national interest, to allow the prosecution to take place, is it true that the ICC can override the wishes of that democratically elected government?

Mr Ward—The answer to that initially must be no, because there is a national security exception expressly contained within the statute which grants primary discretion to the state. Certainly the court has a power to review that discretion, but it must do so only if it is of the view that the state has, essentially with mala fides, exercised that discretion.

Mr BARTLETT—It is possible that, almost by definition, it might have that view. If there still is a disagreement, if the national state is firmly of the view that its own security is at risk, for whatever reason, and the ICC is in strong disagreement, whose will prevails in that?

Mr Ward—The ICC’s will would prevail.

Mr BARTLETT—So the national sovereignty is undermined if there is ultimately disagreement?

Mr Ward—National sovereignty would not be undermined because of the trust that is being reposed in the court. It would only be when an eminent body of jurists reached that decision.

Mr BARTLETT—If, by signing up to this treaty on the basis of that trust, that national sovereignty is still going to be overridden by a decision of the ICC if there is an irresolvable disagreement as to the bona fides or otherwise of the interpretation of national sovereignty.

Mr Greenwell—It is not the bona fides as to the interpretation. It is not just a matter of unwillingness to prosecute. I come back to 17(2)(a). It is where the purpose is to shield the person concerned from criminal responsibility. This might help—I hope it does. Let us take what is being proposed in East Timor at the moment: the establishment of a commission for the consideration of the atrocities that have taken place there. It is a very interesting idea. What they propose is to prosecute those who have been guilty of serious offences. But, with regard to others, they are not going to prosecute them because they hope to bring the victims and the offenders together—provided that the offenders confess and admit their crimes—to try to bring about a rapprochement. There may be compensation. Let us assume the question comes before the ICC. There is a refusal to prosecute in those circumstances. The ICC would not, on any view, hold that was a lack of genuineness. They would simply say in those circumstances—they have got a direction here—there is an independent or impartial proceeding with the intent of bringing the person concerned to justice. It is going to have quite enough on its plate. There is

no reason it would not give effect to a commission of that nature or a decision not to prosecute of that character.

Mr BARTLETT—With respect, a lot of the supposed security of a nation's sovereignty is dependent on examples of what seems to happen or on phrases. I have written down here that you gentlemen have put to us this morning 'a level of trust generally taken to mean unlikely that there is still no absolute protection for national security'.

I will quickly move on to another question. I understand that article 12 says that a case can only be brought against a party who is a signatory to this treaty or against a party in whose country an action occurred. The intention of the treaty is to prosecute human rights abuses, genocide, crimes of aggression and so on, but if the abuses happen in one country—say a Third World military dictatorship—against another country, and neither is a signatory to this treaty, then nothing can happen.

Mr Greenwell—It is largely because of that that we suggest in our supplemental statement that national courts confer universal jurisdiction on their courts; to that extent you can obviate that gap.

Mr BARTLETT—But that is not the case in the treaty as it stands at the moment, is it?

Mr Hogan—At the time of negotiations, we were concerned that there was scope for impunity because of the fact that there would not be blanket coverage like that. In states that do not sign or ratify—unless, as John mentioned earlier, some of the exceptions apply, such as security council intervention et cetera—there will not be. That is why we are asking countries like Australia—

Mr BARTLETT—But, as it stands at the moment, they are exempt. Examples quoted are Yugoslavia, Rwanda and so on, and if one of those countries is not party to the ICC then they are immune from prosecution anyway. The countries that generally have democratic traditions—such as Australia and those in Europe—who are parties to it are the ones that are subject to prosecution; so in a way you are leaving out those that are more likely to offend and including those who are least likely to offend.

Mr Hogan—That is one argument you can make. However, those crimes that would be committed—for example, the crimes against humanity committed by Russian forces in Chechnya—are still crimes against humanity or war crimes and, in an external situation like East Timor, under international law that does not change. Amnesty International advocates that when 60 states ratify the court will come into existence and, over time, more and more states will sign on.

CHAIR—Thank you. We have a lot of witnesses to get through today so we are trying to limit it to a half an hour each, but yours was a particularly interesting testimony and that is why we have gone for 45 minutes.

[9.48 a.m.]

EASTMAN, Ms Kate, Immediate Past President and Committee Member, Australian Lawyers for Human Rights Inc.

CHAIR—Welcome. Although we do not require evidence on oath, these are legal proceedings of parliament and therefore any false or misleading evidence is a very serious matter. Please make a statement and then we will question you.

Ms Eastman—Australian Lawyers for Human Rights thank you for the opportunity to give evidence before this inquiry. I note the time, so I do not propose to make any long comments in opening but will just highlight two aspects of why our organisation considers Australia's ratification of the statute so important. Our view is that it will only enhance sovereignty. If Australia takes a position of not ratifying this statute, the statute may still apply to Australia.

CHAIR—Are you telling us that if we do not sign this that it will still apply to us?

Ms Eastman—It may in this way—

CHAIR—Are there any others out there that might have the same effect?

Ms Eastman—Not that I am aware of. It applies in this way and this is why we think it is particularly important. As came out in the exchange between those from Amnesty who have given evidence this morning and I think questions by the committee, the statute operates in this way: the court will have jurisdiction where crimes have been committed in a territory of a state that is a party to the statute; that is fairly clear. For example, France has currently signed and ratified the statute, so if crimes—and it is only those crimes that are dealt with in the particular statute—are committed in France then France will have jurisdiction but the International Criminal Court would also have jurisdiction.

The other area where it will have an impact on Australia, even if Australia does not ratify the treaty, is if an Australian commits a crime, as defined by the statue, in a territory of a state that is ratified—and we could use France as an example—then the court will have jurisdiction. Australia, though, will have very limited jurisdiction and perhaps no jurisdiction to be able to deal with their own citizen. But if Australia has ratified and implemented the appropriate domestic legislation, Australian courts would have jurisdiction to deal with an Australian who is engaged in war crimes, even though those war crimes might have been committed outside Australia.

In previous hearings of this committee I think your attention was drawn to Australian legislation that operates in a similar sort of way in relation to child sex tourism. But even though those sorts of crimes and acts are not committed in Australia, the Australian courts can exercise jurisdiction over Australians because of that citizenship and the connection based on nationality. We think this is an important aspect of why Australia should ratify the treaty. If Australia ratifies and implements appropriate domestic legislation, it gives Australian courts and Australian authorities much more control over what Australian citizens do. We see that as a

particularly important aspect, and it is a reason why we say that Australia's ratification will enhance Australia's sovereignty rather than detract from it.

The second reason why we say Australia should ratify—and ideally within the first 60 states—is that Australia will then be in a position to have an active role in the composition of the court, the workings of the court and the administration of the court. Those first 60 states will be very influential in what the court will be doing, what it will look like and the election of judges. If that is of concern to Australia, then the best way Australia can meet that concern is to participate actively as a state that has ratified within the first 60 states.

I do not think there is much more that I can add. We have prepared a written submission which sets out in a short and succinct manner why we see Australia's participation with this court as being important. We say also that it is consistent with Australia's participation in other international fora, such as the International Court of Justice, where Australia has worked very well with the court in dealing with international law disputes—where of course states have disputes with each other, while this court will deal with individuals.

Mr ADAMS—We seem to be dealing with the loss of sovereignty for individual states. Could you give us an outline of the philosophical basis behind this concept of why it has been proposed to have a court of this sort?

Ms Eastman—There are two issues: first, what it means for the sovereignty of states and, second, the reasons why the international community have thought it important to create a permanent international criminal court which can deal with individuals as opposed to states.

Dealing first with the issue of sovereignty, I suppose it is always important to come back and consider what 'sovereignty' actually means. We often use the word but we rarely think about what it means and what its implications are for a state. Essentially, we see sovereignty as the ability for a state to determine its own affairs—that those matters within its own internal and domestic jurisdiction are matters for a state itself to deal with. In terms of human rights, a state itself is best placed to deal with its own human rights concerns.

The second aspect of sovereignty—using Australia as an example—is that Australia is able to participate effectively and on an equal footing in the international community. Sovereignty is recognised at an international level by each member of the United Nations having its own vote, so all states are treated equally, regardless of their size, population or power within the world.

It then comes to looking at those issues against the background of why the international community thought it important to create an international criminal court. There has been much written on it and there are scholars who have great expertise—far greater than I would ever profess to have—in the philosophical underpinnings for the international community to deal with war criminals, but essentially I think it hails from the Second World War and looking at the work of the Tokyo tribunal. Australia was actively involved in that tribunal and also in Nuremberg. In a sense, the world needed a way to deal with individuals who were involved in these atrocities of human rights and war crimes.

It is all very well to have in statute books and in international treaties details of what international crimes and human rights are, but unless those provisions have some teeth, in the

sense that there can be enforcement mechanisms so that we are able to do something about genocide and crimes against humanity, they can be very ineffective. So I think the International Criminal Court is the natural progression or development to make sure that human rights abuses and, in this particular case, international crimes can be effectively dealt with. There is a lot of debate about whether or not an ad hoc tribunal is the more appropriate way to do that, and there are good arguments for and against, but I think the international community has reached the point where a permanent international body looks as if it is going to be the most effective way of dealing with war crimes and crimes against humanity. I see that as addressing the issues that you have raised.

Mr ADAMS—There are now, I understand, enormous amounts of money in illegal drugs in the world and there are pretty large cartels of criminals operating in that field, but we still have not set anything up—other than Interpol, which just gathers and stores information. We are talking about setting up an international court for war crimes, but we are not talking about setting up an international court or something to deal with that area of drugs. What is the difference between one and the other? They are still pretty ghastly crimes.

Ms Eastman—The issue of drug traffickers was raised in the discussions and negotiations in the formation of the court, as was whether or not drug trafficking should be considered to be part of the crimes against humanity. It is interesting to note that, when these discussions got under way, Trinidad was of the view that drug trafficking should be included and it saw it as particularly important. But, because of the nature of international negotiations and working towards consensus, drug trafficking was not included. There have been other initiatives though dealing with drug trafficking, and I am aware that there are other conventions that look at dealing with drug trafficking and promoting international cooperation. It has been dealt with separately, rather than being classed as an international crime and coming within the jurisdiction of the court. So it is a matter that the world is looking at, but in a slightly different forum to the International Criminal Court.

Mr ADAMS—We have been operating courts, but they have been ad hoc courts. We had the Nuremberg trials and we had the Tokyo trials post war, and the consideration of working through that. I do not know what happened in the 1960s, but in the 1980s basically we had ad hoc courts dealing with Africa and the Balkan States. Has this arisen to say that setting up courts specifically to deal with specific conflicts is not the way to go, that there is a need to have a permanent body?

Ms Eastman—Our view is that a permanent body is likely to be a more effective way of dealing with these sorts of matters. Each time you create an ad hoc tribunal, you have to, in a sense, reinvent the wheel. You have to start with a new institution, new judges and new court administration to look at the particular terms of reference—if we can call it that—for the particular court. There is some value in the international community having consistency in dealing with war criminals, and a permanent court that deals with these matters on a permanent basis is likely to develop a good body of law and good procedures. Also, the international community can perhaps manage the expense better—because these ad hoc tribunals are very expensive to the world community—through the establishment of a permanent international criminal court.

Mr ADAMS—Thank you.

CHAIR—Have you ever come across a bureaucracy that was not expensive?

Ms Eastman—No, but it is interesting that there is this debate at the moment, because the—

CHAIR—You can double the price if there are a few lawyers involved.

Ms Eastman—The interesting debate at the moment concerns the International Court of Justice, which has been established in The Hague for a very long time and has a very tiny budget compared to the budget of the Yugoslav tribunal. This is an issue that those concerned with costs often bring to the attention of the United Nations in terms of the budget. The ad hoc tribunals have this tendency of growing and the international court uses itself as a model but often complains that it needs more funding. There is always a risk in establishing any institution that you also establish a bureaucracy.

Senator SCHACHT—Do you know what the cost to that tribunal would be of keeping those charged under detention? The investigation requirement must surely be a lot more expensive than for the International Court of Justice to deal with some matter of international law?

Ms Eastman—That is true, and in the staffing and the nature of the work.

Senator SCHACHT—How much do the judges—

Ms Eastman—That I cannot answer.

Senator MASON—Were you here for the presentation by Amnesty International?

Ms Eastman—Yes, I was.

Senator MASON—I have noted three major issues that we have discussed—and my colleagues have asked questions relating to these—firstly, that the crimes the treaty will gauge as crimes against humanity are very broadly cast.

Ms Eastman—Yes, that is right.

Senator MASON—I do not want to discuss that now because there are too many issues—the issue of sovereignty, for example, that all my colleagues have raised; the theoretical possibility that the International Criminal Court will be able to arrest, try and imprison Australian citizens for crimes committed on Australian soil. This is just to summarise a big argument. Next there is the issue of referrals and jurisdiction, but once again I will leave that.

I will ask a simple question and leave the difficult questions to my colleagues. It concerns the intellectual assumption underlying all this—and the chairman touched on this before—and the test for unwilling and unable in national domestic courts. One thing that worries me, and I think it probably worries my colleagues as well, is the assumption underpinning all this—and the UN does this all the time; maybe it has to do this and maybe that is the answer—that the criminal courts of all nations are fundamentally equal; that the justice system of Cambodia is as good as the justice system of, say, Australia. That is something I find difficult to come to terms with. I

am not sure it is sufficiently well catered for under the unwilling or unable test. That is what worries me. That might sound Eurocentric, to use Senator Cooney's terms, but it worries me. There is this underlying assumption—maybe it has to be the assumption for diplomatic reasons—and I do not like it.

Ms Eastman—I can understand that. It comes back to saying, 'What is this court actually going to do that is different from what courts are doing every day in prosecuting and dealing with general domestic criminal law?' The International Criminal Court is not about dealing with the regular domestic crimes; it is only going to deal with international crimes and those spelt out within the particular statute. So the issue of whether or not a court in another jurisdiction is unwilling or unable is not measured against its general domestic criminal legal system. It is whether it is unwilling or unable to deal with these particular international crimes.

Senator MASON—And the test is international and objective rather than national and subjective?

Ms Eastman—Yes. You have used the example of the courts of Cambodia. I do not have a great deal of knowledge about the domestic workings of Cambodian criminal law, but the test is not going to be a comparative test. I could give you an example using Burma if you wish.

Senator MASON—It does not matter.

Ms Eastman—The point is that in some sense it is irrelevant. We could choose any state for a hypothetical example because the test is not going to be, 'How does the Cambodian or Burmese court deal with somebody charged with homicide?' The test is going to be how those courts deal with the prosecution of war criminals as defined by the statute. If the domestic legislation does not have in place definitions of crime that are consistent with the International Criminal Court, you may well question whether or not the domestic court is able to properly deal with a particular crime.

Senator MASON—Ms Eastman, we do not even have a proper definition domestically of genocide. Why would Cambodia?

Ms Eastman—Exactly. This is why the next stage on from ratification to ensure that Australia's position is safeguarded and enhanced is that we have domestic legislation that reflects the terms of the statute. If that is in place, then it will be very difficult for anybody to say that Australia is unable or genuinely unwilling to deal with these sorts of matters. What the International Criminal Court statute is doing is not looking at a sense of around the world and comparing different systems of domestic criminal justice—

Senator MASON—I understand that, Ms Eastman. But even with the capacity of foreign domestic courts to enforce international law, what worries me is that they will not all do it to the same degree and to the same level of exactitude. The capacity for the UN or anyone else to influence that concerns me greatly. We have moved from moral relativism to judicial or justice relativism and I am just not satisfied that the UN is capable of overseeing that, and that is probably this underlying assumption right through this statute that concerns me. There is no answer to that. In a sense, to have an effective ICC you have to accept differing standards of national enforcement of international standards, and I do not like it.

Ms Eastman—I do not know that you wish me to address that.

Mr BYRNE—With respect, could this legislation cover atrocities committed in a civil conflict in a country?

Ms Eastman—Yes.

Mr BYRNE—You will have to excuse me—this is a pretty hypothetical scenario. Let us say that Western Australia, as I understand they have the constitutional right to do, opts out of the Australian Commonwealth—I think there is an opt-out clause in the Constitution for Western Australia. On a hypothetical basis then, there is a civil war that exists between Western Australia and, say, the other states. The other states send in troops and there just happens to be a massacre around Kalgoorlie or something like that. Because of domestic political considerations it is all resolved. The Australian government has ratified the treaty but it does not decide to prosecute. The individuals involved then theoretically could be had up before the ICC for committing war crimes. Is that correct?

Ms Eastman—Yes. But there are a number of different steps along the way on your scenario that were probably missed out.

Mr BYRNE—Would you like to explain those steps along the way?

Ms Eastman—One, assuming that the effect of Western Australia leaving is in a sense to create a new state so you have got an international conflict, that brings a particular dimension rather than it being wholly internal. But you are also making assumptions about what Australian law and Western Australian—or whatever it now calls itself—law would define as a war crime; what it would define as criminal activity within its normal domestic codes.

Mr BYRNE—What if it had signed up as ratified?

Ms Eastman—This is assuming both states, including the new Western Australian state, have also ratified and they then have domestic legislation that reflects the terms of the statute in terms of those particular crimes—

Mr BYRNE—But presuming it did—and according to what you have just said and in previous evidence, it does—let us presume that has happened.

Ms Eastman—Then the next stage is to know a great deal, and perhaps I am speaking as a lawyer from this perspective, about what actually happened and whether or not the massacre, which we have called 'massacre' generally, really comes within the very strict definitions of these crimes.

Mr BYRNE—Let us presume it does.

Ms Eastman—And then we say, 'What is the consequence of that? Should there be prosecution within the Australian domestic legal system or the new Western Australian domestic legal system for the actions that have occurred?'

Mr BYRNE—And presume that it does.

Ms Eastman—And we stop there. If Australia or Western Australia takes action to prosecute those who were involved in those war crimes, and those trials are effective trials, fair trials, and they have resulted either in acquittals or in sentences, then that is the end of the matter.

Mr BYRNE—But if it doesn't?

Ms Eastman—If it doesn't, the question is: why hasn't there been action? First of all, it may come back to the lawyers' perspective that there is not sufficient evidence to prosecute and that you are unlikely to get a conviction.

Mr BYRNE—But other countries, as I understand from the evidence that has been presented here, can actually take some action. It has been explained to me here this morning that they do refer it to the special prosecutor for prosecution.

Ms Eastman—You come back to the question of how the International Criminal Court even became involved in these sorts of matters. I think the committee is aware of the different ways in which matters can be referred to the court by a state or by the Security Council on an ad hoc basis. If, say, another state was concerned that the insurrections within the Australian continent were a threat to international peace and security, the Security Council of the United Nations might well be interested in that concern in terms of the threat to peace and security within the region generally and might then refer to the court. I do not profess to have the technical expertise to take you through all the machinations that would be under way before the prosecutor initiated the investigation and then took it through in terms of saying, 'Well, Australia and Western Australia have done nothing. They have been unwilling or unable to prosecute. Any actions that have been taken domestically are wholly ineffective and really do not address what has been a gross atrocity of human rights and a war crime.' Then that process would be under way.

Mr BYRNE—If they had some level of rapprochement afterwards and had a meeting and decided to love each other again, from what you have just told me, the international court could still proceed with the prosecution of those individuals involved in the massacre.

Ms Eastman—Yes, subject to it going through a whole range of steps.

Mr BYRNE—I understand all the steps you have mentioned.

CHAIR—I should just tell members that the deputy chair and I agreed to SBS filming a few minutes of file footage for their news tonight. If anyone objects to it, they may leave the room for a few minutes.

Senator COONEY—I would like to ask you about the second last paragraph in your submission. It says:

> Australian Lawyers for Human Rights believes that the ICC will be an important development in those parts of South East Asia and the Asia Pacific region where there are no effective international human rights mechanisms. Australia's leading role in restoring peace in East Timor has been a significant foreign policy initiative. Such a role, if required in the future, would only be assisted by the existence of an effective international criminal court.

Is your association proposing that Australia, which has been accused of being a sheriff for the United States in this part of the world, should become the sheriff for the United Nations in this part of the world?

Ms Eastman—We are saying exactly the opposite: Australia should not be, or be perceived as being, the sheriff—that is, subservient—for the United States in terms of peace and security within this region. Australia must play a leading role—and it can play a very important role—in encouraging countries within this region to observe and protect human rights, but it does not have to be the sheriff to do so. The International Criminal Court's existence will in a sense ensure that there are international mechanisms that work within this region. We put that paragraph in our submission because—and as you have heard this morning—there is an effective human rights system working within Europe. There is also a system working within the inter-American region and also within Africa. Australia and South-East Asia stand out as one of the regions of the world that does not have any mechanisms as a region to deal with human rights.

Senator COONEY—Yes, but the region you talk about here is South-East Asia and the Asia-Pacific.

Ms Eastman—Yes.

Senator COONEY—Did you also mean to put in Australia?

Ms Eastman—Australia sees itself as part of South-East Asia, Australasia and the Pacific. This is where we are located. We are not part of Europe, we are not part of the inter-American system and we are not part of the African system.

Senator COONEY—Would you like to correct that paragraph for the record. Not now, but could you perhaps rephrase it?

Ms Eastman—In what respect?

Senator COONEY—I would have thought that, instead of talking about Australia's leading role in restoring peace in East Timor, which was a military action, following on from the need to see that these things that you talk about are done in South-East Asia and the Asia-Pacific, it would be better to say, 'Australian Lawyers for Human Rights believe that Australia, as an equal partner in South-East Asia, would be pleased to join with other countries in that region in furthering the philosophy behind the establishment of the ICC.'

Ms Eastman—I mean no disrespect, but I think our statement in that paragraph is clear and that is our understanding, from our organisation's perspective, of why we see the ICC as being important for this particular region, having regard to the way Australia views its human rights commitments.

Senator COONEY—Just following on from there, to clarify what you are saying, you talked about a lot of this coming out of the Second World War and Nuremberg and what have you. Given the way you have put that paragraph about South-East Asia, could I ask you whether any

procedure was ever taken against people who took part in the bombing of Dresden during the Second World War?

Ms Eastman—Not that I am aware of. I am not an historian. I am sorry; I cannot assist you.

Senator COONEY—Isn't that your problem in that a lot of this retaliation is all going to be a matter of definition and who perceives it?

Ms Eastman—Whenever you set up a court that is vested to administer particular laws, there will always be questions about definition.

Senator COONEY—But you have got a court here that is elected and whose members can be re-elected. That is a different situation to what you have in Australia, isn't it, where you have tenure and a pension scheme?

Ms Eastman—That is true and a similar system in terms of election of judges for the International Court of Justice works in the same sort of way.

Senator COONEY—They deal with civil matters, don't they?

Ms Eastman—No, they deal with disputes between states, and this is where this court will be different in terms of dealing with individuals. States cannot be brought before this court, nor can corporations or organisations in that sense.

Senator COONEY—A person who carries out the business of the state can be prosecuted, but the state itself can never be?

Ms Eastman—The idea of this court is to establish individual criminal responsibility for war criminals. States are in a different circumstance. States may be responsible in international law for their involvement in wars, and we have a vast array of international humanitarian law dealing with that. If it were appropriate, those sorts of matters could be brought before the International Court of Justice, or through other UN mechanisms, say, if they were breaches of human rights treaties. But that is not what this court is about. It is looking at individual criminal responsibility of people who generally get away with international crimes. Because they are not states, they cannot be brought before—

Senator SCHACHT—This is not retrospective, but if the court is established and a case of war crimes is brought in a situation such as the one that existed in Latin America during the eighties, where the Reagan administration funded Contra activity that committed a whole series of atrocities—murdering an archbishop in El Salvador on the steps of the cathedral is clearly an atrocity—the persons responsible from that country could be arrested. The person goes to the court, is questioned about their activity and says, 'I was funded by the American CIA', or by the Russians. Can those countries then take an exemption to say, 'We refuse to provide any evidence,' even though, in any reasonable court, that evidence would be germane to the circumstances? Particularly, does any country have the right to refuse to give evidence when a witness to defend themselves says, 'I was paid to do this by so and so'?

Ms Eastman—It is a slightly difficult question. It depends on ratification status and what domestic legislation or domestic measures are in place in terms of cooperation with the court. There are a number of provisions in the statute that deal with cooperation with the court as far as evidence is concerned. I do not think there is a provision where a state can say, 'We're just not going to cooperate.' But there are detailed provisions dealing with how and when states should participate in terms of evidence.

Senator SCHACHT—Suppose a state that has ratified it refuses to give evidence. They were not directly involved in actually committing the atrocity, but they were supporters of the group that committed it and provided the funds, the weapons, et cetera. They refuse to give evidence. What is the penalty on the country that has ratified this treaty and refuses to give evidence and provide information to the court at the court's request?

Ms Eastman—I am not sure what particular steps would be taken in those circumstances. I think they are going to be dealt with in the rules, but I do not have my fingers on the precise provisions.

Senator SCHACHT—What penalties would you give Russia or the United States?

Ms Eastman—Like any international law, it is always very difficult to enforce by its very nature. We come back to that notion of sovereignty and of the equality of states. There are very limited punitive measures in international law to deal with states. Of course, the Security Council does have certain powers to deal with those types of issues.

Senator SCHACHT—A lot of these countries will not ratify it—or even if they do, they will ignore it. Take Burma, which has not a great record on human rights in the last 30 years. There is a civil war with various ethnic minorities and there have been countless atrocities, probably on both sides. How does the International Criminal Court say, 'Now we have got this evidence, how do we arrest the general, the colonel, the brigadier or the captain from such and such unit, where there is plenty of evidence from eyewitness accounts?' How do you go into Burma to arrest them?

Ms Eastman—Unless Burma has ratified the statute so that it gives the court jurisdiction to deal with acts occurring within the territory of Burma, then the International Criminal Court will have no jurisdiction to deal with those sorts of matters. If Burma has ratified the terms of the convention and put in place whatever domestic measures are required under the court, there is a vast array of detail about cooperation with the court in terms of immunity of court officials, inspections and then particular arrangements in relation to extradition.

CHAIR—Many thanks. We will go to the next witness which is a lady from Human Rights Watch.

[10.23 a.m.]

ROSENTHAL, Ms Indira, Counsel, International Justice Program, Human Rights Watch

CHAIR—Welcome. There is no requirement to give evidence on oath, but these are legal proceedings of parliament and they warrant the same respect as if they were taking place in the House of Representatives or the Senate, so the giving of any false or misleading evidence is a very serious matter. Could you make a very brief statement if you want to add something to your submission? Then we will go to questions.

Ms Rosenthal—I would just in an opening statement like to talk a little about the work that Human Rights Watch has been doing and is doing on the ICC.

CHAIR—Do not worry about the Human Rights Watch. We are interested in this statute, not in your activities. We want to know what your organisation's view is on how this applies to Australia and whether or not we should take binding treaty action. That is the limit of our brief.

Ms Rosenthal—I thought it was not so much about what Human Rights Watch is doing; rather, I wanted to situate it in an international context in terms of where things are up to—if that is of interest to the committee. Otherwise I can move on.

CHAIR—Go ahead.

Ms Rosenthal—Human Rights Watch has made the establishment of the International Criminal Court a priority and we have quite a team working on this at the moment. Our work consists largely of talking with members of governments, officials from governments, parliamentarians and others in almost every region of the world. From this work we have quite a good sense of how the International Criminal Court is perceived and the action that has been taken to ratify it or the processes that have been taken in countries to proceed towards ratification and implementation.

There is clearly a groundswell of support for the establishment of the International Criminal Court. If you look down the list of signatories—which I do not have with me, unfortunately—you will see that the countries that have signed are quite diverse. In fact, every geographical region is well represented. The rush to sign the treaty in the last days of last year, before the 31 December deadline, confirmed the breadth of interest in the court. In the last two weeks before that deadline, approximately 20 countries signed the Rome statute, which was in excess, of course, of the 120 countries that voted to adopt the treaty in 1998.

As you know, 28 countries have ratified the statute; as we heard from Amnesty International this morning, Argentina is the most recent country to ratify. From this region, for your interest, Fiji, New Zealand and the Marshall Islands have ratified the treaty. Australia, Samoa, the Solomons, Bangladesh, Thailand, Cambodia and the Republic of Korea have signed. I may have missed some of the signatories but I think that is basically it.

It is our assessment that mid-2002 is now a realistic assessment of when the 60 ratifications needed for entry into force will be reached. Six months ago, I would have said mid-2002 was the optimistic assessment, but I think that, the way things are going now, it is looking increasingly realistic.

I will give an example of the level of commitment to the court around the world and the lengths to which countries are going so that they can join the treaty. A number of countries have decided that they must amend their national constitutions before they can ratify the ICC. Obviously, that is not an issue for Australia. For example, France has does this and so has Germany, and others are considering it. I think that this demonstrates a really deep level of commitment, given that constitutional amendments invariably require complex and lengthy processes and are often politically fraught.

Also, the level of commitment is obvious from many statements that are made in international fora at regional meetings, before the United Nations, et cetera. I refer to one statement made at the last legal committee, the sixth committee of the UN General Assembly, on behalf of Pacific Island forum states, about the importance of the court:

> The early entry into force of the statute and the court's establishment is now clearly an irresistible and accelerating trend that reflects growing commitment by states and the international community as a whole to end the impunity associated with genocide, crimes against humanity and war crimes in the 20th century. For the countries of the South Pacific, the entry into force of the statute will be a historic step that will benefit the peoples of our region and those of the whole world.

Australia was included in that list of countries for whom that statement was made. This is a fair reflection of the views that are widely held by a diverse range of countries. I know from my own conversations with governments in different parts of the world that this is the case. The momentum towards the establishment of the court is strong and it is growing.

To elaborate a little on our submission in terms of Australia's interests, as our submission says, one of the most important potentials for the International Criminal Court is to assist in helping to build lasting peace and security in those places where these kinds of atrocities are committed. There are many examples where past abuses are given as justification for committing new abuses—too many examples. The Great Lakes region of Africa is a current one. So by investigating and prosecuting cases of these crimes, where countries are unable or unwilling to pursue them, the International Criminal Court has the potential to play an important role in promoting peace and security. Given the impact that instability in one region can have across the globe, it is in every state's national interest that the International Criminal Court be established as soon as possible.

Clearly, the principles underpinning the ICC—the pursuit of justice, the importance of the rule of law and the protection of human rights—are principles that Australians unequivocally support. It is clear from Australia's actions that Australia also believes that pursuing these principles is consistent with its national values and interests, and Australia demonstrates this in many ways in the international sphere. Examples of this—some of which have already been referred to this morning—include: Australia is a regular contributor of peacekeeping troops; it provides funding for judicial assistance and training in the Asia-Pacific region; it helps to build judicial and other national institutions, such as human rights bodies; it supports the ad hoc tribunals for Yugoslavia and Rwanda; and it has played a key role in trying to bring effective

and impartial justice to the people of Cambodia. It recently intervened in East Timor to end the serious violations that occurred there and to restore security and the rule of law. Australia has supported justice for the people of East Timor both because it is consistent with the values that Australia supports and also in recognition of the critical role that justice will ultimately play in bringing justice, peace, security and prosperity to the people of East Timor.

Mr ADAMS—We have to remember that we settled East Timor with a gun; we did not do it by law.

Mr WILKIE—You mentioned a whole raft of countries that have already signed. From your perspective, how good is this treaty going to be internationally if we cannot get China and the US to sign it?

Ms Rosenthal—The US has in fact signed, although not ratified, which I would say is not insignificant. There is no question that the court would be improved if there was universal support for it. Nonetheless, it can be effective. If you look at the range of countries that have already ratified, together with the list of signatory states and the list of countries that I know of that are well advanced in their progress towards ratification, it is clear that state parties will represent a broad range of geographic regions and countries. It is also clear that there is a very high level of commitment to make the court effective and to make it operate impartially and fulfil the very real expectations that countries have of it playing an effective role in international justice.

Mr BARTLETT—Do you have a list of all those that have ratified?

Ms Rosenthal—I have it in front of me.

Mr BARTLETT—Would you mind reading that out for us?

Ms Rosenthal—There are 28 countries as of today. I am happy to pass this up; it is just an informal list of the countries that have ratified. Do you want me to read them out first?

Senator COONEY—No.

Mr BARTLETT—Following Mr Wilkie's question, how many of those who have ratified are countries with military regimes or countries where human rights abuses, genocide and crimes against humanity are more likely? If there are not many of those, how effective is this statute if only the 'good guys' sign up and not the 'bad guys'?

Ms Rosenthal—I think it is probably a fairly dangerous business to get into determining who is the good guy and who is the bad guy.

Mr BARTLETT—Yes, but you know what I mean.

Ms Rosenthal—I do know what you mean. There is quite a spread of countries. There are quite a number from Africa, Western Europe—obviously—and also Latin America. That is the basic spread. There is Fiji, as the Pacific island, and New Zealand.

Senator SCHACHT—Have Sierra Leone and Liberia sign?

Ms Rosenthal—Sierra Leone has ratified.

Mr BARTLETT—What about the Congo?

Ms Rosenthal—The Congo has signed, I believe, but not ratified.

Mr BARTLETT—Just a few more questions. The statute is only to apply to individuals and not to states?

Ms Rosenthal—That is correct.

Mr BARTLETT—Can it apply to individuals acting on behalf of states; say, a head of government of a democratically elected country such as Australia? If Australia were accused of a crime against humanity, could the head of government be brought to the court?

Ms Rosenthal—The statute provides that, assuming all the other tests are met, the court has jurisdiction over any natural person. So, in theory, a head of state could be prosecuted for these crimes, assuming all the other threshold tests are met.

Mr BARTLETT—Even if the crimes were allegedly perpetrated by the country and not by that particular head of state or government?

Ms Rosenthal—The point about the International Criminal Court is, as I understand it and as Ms Eastman said, aimed at individual criminal responsibility. It is not there to judge the actions of states. It is really, in our world, a political matter for other states to intervene in some way. There are various measures for that.

Mr BARTLETT—I have a final question. Our previous witness suggested that we ought to ratify the treaty and then work on getting definitions of genocide and crimes of aggression that suit Australia's purposes. That would seem to me to be back to front; that we ought not be ratifying until we are completely happy that the definitions of those crimes fit Australia's understanding of Australia's legal system. Could you comment on that, please?

Ms Rosenthal—It is my understanding that in fact it is Australia's practice to implement before ratification, so I assume that the process would be that, prior to an executive action of ratifying, parliament would be given legislation to consider and pass prior to ratification. I would say, though, as an aside that implementing the crimes in the Rome statute—more or less as I think Amnesty said this morning, we already have some of them in our legislation; grave breaches of the Geneva convention, for example—is essential and is not necessarily dependent on whether or not Australia ratifies. It is the view of Human Rights Watch that Australia should have legislation to prosecute people for the crime of genocide independently of any obligation it undertakes in relation to the ICC.

CHAIR—I should point out that the Commonwealth of Australia has no jurisdiction over criminal matters. Are you aware of that?

Ms Rosenthal—Yes.

CHAIR—So unless we ratify a treaty—in a sense, grab that jurisdiction off our states—we could not possibly pass an act of parliament to do it. It is just a technical thing.

Senator MASON—I have one quick question, Ms Rosenthal. In his last couple of nights in the White House, President Clinton, as well as pardoning all his mates, signed this treaty. What chance do you think there is that the US Senate will ratify it?

Ms Rosenthal—I think that in the near future there is next to no chance that the US Senate will ratify. In fact, I do not believe that it will be sent to the Senate for ratification in the near future, to be frank.

Mr BYRNE—Is there anything other than domestic political considerations as to why they would not sign it? Are there any concerns that the US has articulated in the process leading up to signing the ratification? Have they had any cause for concern?

Ms Rosenthal—The US concerns are well known, I think.

Mr BYRNE—They are not well known to me; that is why I am asking you.

Ms Rosenthal—Sorry, I did not mean to imply that. Essentially, they have concerns with the jurisdictional regime of the court, and in particular they fear that the US's special 'role', for want of a better word, in the world—intervening in different conflicts, for example—puts them at a greater risk than any other nation of their nationals being subject to an unfounded prosecution by the court. We heard this this morning, and I will just repeat it. I think that is a genuine concern that is easily answered in the terms of the statute itself: there are many checks and balances in the statute before an investigation, let alone a prosecution, can begin. There are no certainties in this world, but I would say it is extremely unlikely that an unfounded politically motivated prosecution or referral of a US national would go beyond the very first steps. I do not think it would survive.

Mr BYRNE—What about if China or another country ratified it? I was just reading through the articles here. When a prosecution has commenced, is it the case that the Security Council can pass a resolution to suspend that prosecution for 12 months?

Ms Rosenthal—I believe so.

Mr BYRNE—I am not sure whether they are renewable. So if it became a political hot potato for a particular group, then what they could do anyway is just continue to suspend the prosecution 12 months at a time. That is the way I read the statute.

Ms Rosenthal—I would have to look at the provision again.

Mr BYRNE—Would you be able to take that on notice?

Ms Rosenthal—Absolutely.

Senator COONEY—Thanks very much for the presentation. It was an excellent one and very lucid. The idea behind it is good, but there are problems with the mechanism—for example, judges being elected for three years and coming from countries that seem to have a very harsh attitude. In China and the United States executions are carried out. Though the concept of this court is a magnificent one, what about the actual mechanism? This is the point that Mr Bartlett was bringing up before—let us get the thing a bit defined rather than going ahead and hoping for the best. When I am talking about the judges, three-year elections and all those sorts of things, and the countries that are going to have a say, it is that sort of thing that I am worried about. What is the culture that is going to be brought to this court? What are the crimes that are going to be committed? A lot of it is being insubordinate. If you look at some of the definitions, it is all pretty vague, yet the consequences for somebody who is brought before it are horrific.

Ms Rosenthal—On the question of culture, the first assembly of states parties—which will comprise the first 60 countries that are ratified—will play quite a part in establishing the culture at least for the first years of the court. They will be the ones to nominate and elect the judges and the prosecutor and to set the court's budget and those sorts of matters. I would say to Australia: get in there, ratify and help shape the culture of the court that you think would be effective and impartial.

Senator COONEY—That just seems to me to be the real problem in all of this. You and others are saying, 'Get in there and do it.' But surely if you are going to have a court that is fair and a court that is going to do justice, we should not be talking now about getting in there and forming the court. Whether we sign the treaty now or 20 years down the line, if you are going to have a fair court, there should not be this talk about going in and making the court what we want it to be. A court—if it is going to be fair, if it is going to administer justice—should stand on its own integrity.

Ms Rosenthal—I agree. Of course, I am perhaps being a bit flippant.

Senator COONEY—I understand what you mean.

Ms Rosenthal—I would refer you again to the provisions of the statute and the Rles of Procedure and Evidence which have elaborate codes, for want of a better description, of how the court will operate, including fairness and things that we would associate with a fair trial—impartiality and the rights of the accused persons and suspects. It is the most elaborate list that I have seen in any international instrument, and there are the highest possible due process guarantees. There are provisions relating to the type of person that can be nominated to be a judge on the court and provisions relating to the position for removing judges if they do not live up to expectations, if they are not impartial and if they do not exercise their official functions properly.

Senator COONEY—Who is going to judge whether the judges are impartial?

Ms Rosenthal—The assembly of states parties ultimately is the body. It is the states, at that somewhat removed position, which ultimately will determine those sorts of questions.

Senator COONEY—Thanks very much.

Senator SCHACHT—In relation to the appointment of judges for three years, on one of my visits to China I met three members of the supreme court of China and discovered that none of them had had any legal training, even under the Chinese system. They were all appointed from a politburo of the Communist Party through long and distinguished service to the Communist Party. If one of those members ended up on this bench, would that be a problem? What if China used its weight to say, 'We deserve to have at least one person on the tribunal'?

Ms Rosenthal—I think Ms Eastman set out the qualifications that each nominee has to demonstrate.

Senator SCHACHT—So there are generic rules of skill?

Ms Rosenthal—There are, yes. In addition to persons being of high moral character, et cetera, they must also be expert either in international law or criminal law, particularly with experience in procedural criminal law as a person of the bench. They also must be eligible for the highest judicial office in their own country.

Senator SCHACHT—In China, they are eligible.

Ms Rosenthal—That does not always help. There are a series of criteria that have to be met for any person to be nominated.

Senator SCHACHT—And if you are not a member of the Communist Party, you are not eligible.

CHAIR—For the information of committee members, it is article 36 that sets out the qualifications for nomination and election of judges. So you can refer to that. Thanks for your evidence. We will now move to the New South Wales Bar Association.

[10.48 a.m.]

GAME, Mr Tim, Bar Council Representative, New South Wales Bar Association

RE, Mr David Michael, New South Wales Bar Association

CHAIR—Formally, I have to advise you that these are legal proceedings of parliament. It is as if they were taking place in the House of Representatives or the Senate, hence the giving of any false or misleading evidence is a very serious matter. Would you like to add orally to the submission and then we will have a cross-examination.

Mr Game—I would like to make a very brief statement in support of our submission, which is that the bar association supports the ratification of the Rome statute. We support it principally on the basis that we see the codification of international crimes as being a good thing, and we see the bringing together of the enforcement—which is what these provisions basically do in an established court—as being an important development in international law. We see problems in the long term with the continuation of the use of ad hoc tribunals. A number of witnesses have spoken as to why there are problems with ad hoc tribunals as a continuing, long-term process, but particularly we see them as a problem in terms of deterrence, their expense, their limited jurisdiction and the requirement for security council approval in respect of any particular tribunal. Beyond those preliminary opening remarks, I do not have anything further to say at this point.

CHAIR—Does Mr Re want to add anything or would you wait for questions?

Mr Re—I will wait for questions.

Mr ADAMS—In your submission, you give support to the proposition that Australia should ratify this treaty, and should be up-front about it. What is in it for the legal profession of Australia to do this up front?

Mr Game—Nothing that I am aware of. From a lawyer's point of view, in reading these provisions, I would say that the crimes are relatively well defined. The procedures and protections are good. The principles of admissibility are different from our principles of admissibility, but one has to bear in mind that they involve civil countries that have very different ideas about admissibility of evidence. But, as a court, as crimes which define jurisdiction, as a procedural structure and as a structure involving determinations about admissibility of evidence, we see this as potentially a good court with good procedures and good rules of evidence.

Mr ADAMS—My colleague Senator Mason has real problems with the fact that, with respect to the legal profession and those who sit on benches—Senator Schacht raised some issues about this a minute ago—it is not an equal system around the world, even though this country says we have got a legal system in place. For example, the justices in South Africa had no problem with supporting the laws of apartheid—things which are unfair and unjust. How do

we set up an international body which accepts all legal systems and all law enforcers—judges and the legal profession all over the world—as being equal? How do we deal with that?

Mr Game—I think that is an important question. I think Mr Re would like to comment on that.

Mr Re—I want to go to the statute. Something was raised, I think when Ms Eastman was giving evidence, about the various standards of justice throughout the world. It is dealt with in section 3 of the finalised draft text of the *Rules and procedure of evidence,* at page 31. That is information provided under articles 17 and 18, where it says:

> ... information that the State referred to in article 17 ... may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the State has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted.

There is that inbuilt protection within the rules of the court itself. But, of course, it is an international forum, so there has to be give and take. Obviously, standards are not the same throughout the world, but it is recognised there. You just have to recognise that, ultimately, in an international forum, there will be a compromise in bringing all these countries together to draft this document.

CHAIR—What about the jurisdiction over individual Australian citizens?

Mr Re—Yes, but the principle of complementarity, as I think you know, overrides that.

CHAIR—Give and take?

Mr Re—Give and take in the situation of 180 countries drafting a statute—there has to be a lot of compromise. But in terms of jurisdiction over Australians, that is only as a last resort. Under the principles of complementarity, if Australia is unable, genuinely unwilling, et cetera, it would be very unlikely that any Australian would come before the court.

Mr Game—I suppose that if one takes a simple example, civil countries have a very different idea about investigation and interrogation. That is something that one comes up against in the War Crimes Tribunal. It is not unusual, for example, to pull a suspect in two or three times for interrogation. That is something that simply does not occur in our common law system. But that is what happens in ad hoc tribunals. It is inevitable that there has to be some give and take from common law countries or else we simply will not have a meeting ground with the civil countries in terms of how these crimes are investigated and prosecuted. The actual procedural protections that one finds are far stronger and better defined than we have in our common law system.

Mr ADAMS—Would you like to elaborate on that principle? It is an important point.

Mr Game—Yes, certainly. We have presumption of innocence—that is article 66—and we have the obligation to prove guilt beyond reasonable doubt in our system—that is article 66(3). Regarding the right to be tried without undue delay, we have no right to a speedy trial in our system. Regarding the right to legal assistance if the accused has insufficient means to pay for legal representation, we have a version of that in Dietrich.

Senator COONEY—You know all there is to know about criminal law—

Mr Game—Not exactly.

Senator COONEY—but I thought there was a capacity for the judge to dismiss a case on the ground that it had not been brought before the court within a time that was fair.

Mr Game—No. We do not have any right to a speedy trial. The case of Jago is a case that stands for that proposition. If a trial is an abuse of process, in the sense that either no trial could be fair or any trial would be necessarily oppressive—there are those two separate legs to abuse of process—then a trial can be stayed. But there is definitely no right to stay a trial on the basis of undue delay. Indeed, we commonly have trials in New South Wales these days for offences that took place 15 or 20 years ago in relation to sexual assaults. It is not unusual at all in New South Wales for a crime to be heard ad hoc.

Senator COONEY—That is because they had not discovered it until then.

Mr Game—That is exactly right—and because of recent developments that brought these types of offences to light.

Senator COONEY—Are you saying that, if you can commit a war crime and not be discovered, you will not be prosecuted, because of it not being a speedy trial?

Mr Game—It depends what 'without undue delay' means. Of course, this legislation is prospective, so it will not have any retrospective application. I would like to mention a couple of other protection procedures: the right to legal assistance if the accused has insufficient means to pay for legal representation, the right of silence and the right to make an unsworn statement There are also strong duties of pre-trial disclosure by the prosecution. That is a pretty formidable set of protections that have been put in place.

Mr ADAMS—There is nothing there to make sure that lawyers get the case to court, as Senator Cooney said. I have constituents that have got cases that are still outstanding after nine years.

Mr Game—In our courts?

Mr ADAMS—In our court structure. Maybe we should look at hurrying that up a bit or getting something in our statutes that starts to put a bit more pressure on lawyers.

Senator MASON—Mr Re, you mentioned that Australian citizens may—because of the principle of complementarity—rarely come before the proposed ICC. But what about, for example, an Australian mercenary fighting in Angola? It is quite possible then, isn't it?

Mr Re—It is possible, but you have to go through a number of steps. The first is that Australia has the first right to prosecute. If an Australian mercenary has committed atrocities in Angola, and we have legislation which allows us to prosecute them—

Senator SCHACHT—We have mercenary laws already.

Senator MASON—Yes, I know.

Mr Re—why wouldn't we prosecute them? Why would we hand them over to the ICC if we could do it ourselves?

Senator MASON—That is part of the principle. The other issue is still with respect to differing standards of justice. In effect, what you are going to have here, irrespective of the citizenship of various people—whether they come from Angola, Argentina, Benin, Bolivia or Brazil—is that different standards will be applied in the enforcement of international law. At one level you say—and I understand—that it is the price we pay for this. I have worked in Cambodia; I know what it is like.

The problem—and Mr Adams touched on it—is that it is not just a matter of law. It is not. You can have these standards, but the standards are sufficiently flexible to enable every country that has ratified—Angola, Argentina, Benin and Bolivia and those that are considering: Bangladesh, Bosnia-Herzegovina, Burkina Faso, Burundi, et cetera—to argue that they have the capacity to effectively enforce these international laws. I can tell you now that, for reasons of diplomacy and of keeping the whole show together, the test of unwilling and unable will not all of a sudden be considered to overrule the capacity of these nations to decide the matter themselves. In other words, the principle of complementarity will not be overridden by unwilling and unable in the capacity of all these nations.

Mr Re—If your concern is that an Australian could be tried in Angola, that could happen anyway.

Senator MASON—No, forget the Australian citizen. Just anyone—any citizen of the world. The fact is that there will be very different standards for different people.

Mr Re—Yes, but that is the situation throughout the world at the moment. The ICC statute is designed to have a consistent set of standards in one permanent International Criminal Court—a forum to try them. It is designed to overcome the problem you are talking about.

Senator MASON—But, Mr Re, it will not. We will have different standards in all these different nations.

Mr Re—In terms of the prosecution if a country decides to prosecute itself?

Senator MASON—Yes.

Mr Re—You already do.

Senator MASON—That is right. But this is not going to overcome that, is it?

Mr Re—Not unless it goes to the ICC or the prosecutor exercises his or her own powers or the Security Council refers it there. State parties will be able to continue to prosecute them-

selves, but that, of course, is subject to whether they are unwilling or unable. It just goes round in circles.

Senator MASON—It does.

Mr Game—This may not be an answer to your question, but curially the court itself will define norms as to what ‘unwilling’ and ‘unable’ mean. And they will not be relative norms; they will defined in absolute terms, presumably. I know this is not a complete answer to your question. An attempt will be made to achieve equality, which is, I think, what you are after, but it is impossible—

Senator MASON—International and objective standards.

Mr Game—Yes.

Senator MASON—We have been down this road before. The problem consists of two points, and Mr Byrne just pointed this out. The problem is that local people who have allegedly committed war crimes, for example, could be found to be not guilty in their own courts because the standards that are applicable are less stringent than would apply in, say, Australia or some other country. That is the problem. I do not accept that the attempts to make this an objective standard are good enough, because it is not just a legal problem; it is a diplomatic one. That is the problem. There is no way the ICC or the world community is going to say—on the second page of your own submission, look at the countries—Bangladesh, Bosnia-Herzegovina, Burkino Faso, Burundi, Cambodia, Colombia, Comoros, Estonia, Gambia, Guyana et cetera have the same standards. They do not.

Mr Re—That is so far. If you look at the list of countries in the process of ratification, it would indicate that most of the European countries—

Mr Game—The non-trial in the party state is not unexaminable, and that is the critical thing. It is examinable by the International Criminal Court. I know it is not an absolute answer. But it is examinable and it is examinable on appeal. In so far as one can guard against that, these provisions attempt to guard against that result in the best possible way that they can—the show trial, for example.

Senator MASON—There are two points to make, then, as Mr Byrne just pointed out. First, there could be a loss of sovereignty, I suppose. You call it whichever way you go—that is a loss of sovereignty. Secondly, I do not accept that it is simply a legal problem. Those criteria that are mentioned in the statute you call ‘objective’ and ‘internationally prescribed’. For this convention to work, the vast majority of those 60 countries will not be Western democratic nations. The standards applicable will not be standards that we would apply.

Mr Game—No, but you have to—

Senator MASON—I have made the point, Mr Game.

Mr BYRNE—What statute were you about to look up?

Mr Game—I was about to look up the provision that deals with ultra voire vires; in effect, that deals with the situation where the person has been brought to trial and acquitted. But the circumstance that the trial was a show trial is, as I said, not unexaminable, and that is the point. It is a sham trial.

Senator MASON—What is that? It is very loose, Mr Chairman.

Mr ADAMS—Can we deal with this matter because it is a very important point. The guy that was in the Shell Oil Company in one of the African countries—

Senator SCHACHT—Nigeria.

Mr ADAMS—and where the writer got executed. They gave him a show trial and then they took him out with six others and shot him.

Senator SCHACHT—Actually, they hung him.

Mr ADAMS—Are we saying that if this court were an international court, a case could be taken in that area? How could it have prevented that occurring?

Mr Re—It has got to be within the crimes against humanity, genocide, or a war crime.

Senator COONEY—My suggestion is to read article 20.

Mr Re—If it is not any of those three, the court does not have jurisdiction.

Senator SCHACHT—You would consider that in general as a human rights abuse, not as a genocide or a crime against humanity?

Mr Game—Yes, that is the double jeopardy provision. Article 20 is the double jeopardy provision that I was referring to before.

Mr Re—The show trial of one Nigerian would not, of itself, fit within that, or it should not. But it depends on the overall circumstances.

Mr BYRNE—The point that Senator Mason makes is a good point. Senator Mason is saying that you have different standards of justice that apply in different countries regardless of whether or not they are signatories or they ratify the agreement. Consequently, they could go through a process that we might not accept where that person has, in fact, been acquitted of a war crime when, on the international standards that you have mentioned, they may not have been.

Mr Game—That is true.

Mr BYRNE—That is the point that Senator Mason, I think, was making fairly consistently.

Mr Game—That is true. But, as I said, the statute does its best to avoid the consequences of that and we would say that that is not an argument for not ratifying.

Mr BYRNE—But it is a substantial flaw; would you acknowledge that?

Mr Game—It is always going to be a flaw if you have a principle of complementarity. If you recognise the sovereignty of states and if you recognise their right to prosecute nationals for offences committed on their territory, then you have got a problem.

Mr BYRNE—What are you proposing with respect to us then? For example, which court would try war crimes in this country? If we incorporate this legislation into our legislation and we make it complementary, which court tries it?

Mr Game—It would depend. At the moment, the only legislation that we have relates to war crimes committed in Europe during the Second World War by formerly foreign nationals who are in effect Australian nationals now, such as Polyukhovich. That trial was heard in the Supreme Court of South Australia but it was under a Commonwealth piece of legislation. The state court had jurisdiction under section 69 of the Judiciary Act. The head of power was the external affairs power. So that is how it fits in in terms of local prosecution. The complementary legislation would be, in my understanding, obviously substantially broader than legislation of that kind. But it would be federal legislation. It would be prosecuted in state courts by the same mechanism under section 69 of the Judiciary Act. That is how it would work, I believe.

Mr BYRNE—What would happen with respect to a person? Would they have a right of appeal therefore to the High Court if they had an adverse decision?

Mr Game—Yes, under chapter 3 of the Constitution, they would then have their appeal rights in the state court if they were tried in a state court. That would have to be exhausted and then they would have their rights under the Judiciary Act to appeal to the High Court, or there could be a removal to the High Court of a question of law as there was in Polyukhovich.

Mr BYRNE—Would the incorporation of some of these standards alter any other Australian law or the interpretation of that law?

Mr Game—No. The procedural rules would be precisely the same as sit there, ready as it were, to take up a federal prosecution, which is what occurred in the unusual circumstances of the Polyukhovich trial.

Mr Re—And a similar analogy is the overseas children’s sex crime legislation. They fit into the Australian criminal judicial system in exactly the same way.

Mr ADAMS—Do the states lose anything?

Mr Game—No. Nobody loses anything. The state-federal relationship sits as precisely as it sits currently under our constitutional arrangements.

Mr BYRNE—Does the incorporation of this sort of law then affect any other law? For example, if we set this court up, does it have an impact on any state or federal law?

Mr Game—Not at all.

Mr BYRNE—So it is isolated within itself and does not then impact on—

Mr Game—So long as there is a head of power to pass the law in the first place, then there are neither constitutional nor practical problems in the enforcement of the law domestically speaking.

Mr BYRNE—Just coming back to some of the countries that Senator Mason just mentioned, they do not necessarily have to incorporate all of it. Whilst you are urging us to incorporate the particular sorts of conventions, so that there is some sort of standardised system of procedural justice, are you saying that that may not happen in some of these countries, and thus consequently there will potentially be several different standards applying in several different countries?

Mr Game—The answer, as far as I understand, is yes, but that is an inevitable consequence of recognising the sovereignty of Tajikistan, for example. As I have said before, you can have recourse to the International Criminal Court against either an unwillingness to properly investigate or prosecute, and it covers both investigation and prosecution as I read the provisions. So you could strike the country if it investigated properly and then just refuse to prosecute—you could strike on either, as it were.

CHAIR—What is proposed in the legislation that the Attorney-General has foreshadowed and, in fact, formally referred to us for inquiry together with this treaty, seems to be the Commonwealth seeking to invest jurisdiction or judicial power in a court that is outside Australia— once you get past the complementarity test that court would have jurisdiction in these criminal matters over Australian citizens. Are you sure the Commonwealth has the power to do that?

Mr Game—I think that that question would be better answered by someone from the Commonwealth Attorney-General's Department, but I would have thought that under the external affairs power it would be highly likely that that would survive a constitutional challenge.

CHAIR—In section 71 of the Constitution, it says:

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.

Do you think that phrase 'such other federal courts' is either limited to courts created within in Australia or, in a sense, is unlimited such that it could create a court to deal with any matter of a judicial nature in any country beyond Australia's borders? Do you think that is a correct reading of that phrase?

Mr Game—That provision has been interpreted—and I am not sure what the answer to this question is—as covering other courts, such as state courts, which it invests with federal jurisdiction or territory courts; for example, courts in the ACT or courts in the Northern Territory—

CHAIR—I am talking about overseas courts.

Mr Game—Yes, I know—and I have not thought about this particular question before. It may be that the answer is that chapter III has no place at all because we are not concerned with the judicial power of the Commonwealth—we are not exercising the judicial power of the Commonwealth. So the vesting of power in the international court would rest outside the judicial power of the Commonwealth, so the correct answer may be that there is actually no chapter III problem at all.

CHAIR—That is true.

Mr Game—But I have to say that I really have not thought about this question before.

CHAIR—The New South Wales Bar Association has not thought about the basic constitutional question of whether or not this government has the power to do this. To be blunt, should we take anything you say in this submission seriously if you have not even considered the most basic question of all: does the government have the power to do this?

Mr Game—I do not quite know how to answer that question. We make a submission as to why the statute should be ratified. Presumably, you have advice from Attorney-General's as to the constitutionality of the clause that is sought to be followed.

CHAIR—We don't; that is the problem.

Mr Game—I would be more than willing to provide you with a submission that addresses the question of constitutionality.

CHAIR—I appreciate that.

Mr Game—We are more than happy to do so.

CHAIR—We would urge you to do so because when we are provided with advice from the Attorney-General's Department about the statute, the fact that these basic things were left out or assumed does not really build a lot of confidence in the advice we get from those officials. So we would appreciate help from the profession.

Mr Game—My instinct is to say that there is no chapter 3 problem, but that is obviously not an answer for a joint parliamentary committee.

CHAIR—True.

Senator COONEY—Can I ask you about the effect of the treaty on the domestic law because, as you have said, this will give jurisdiction to the local courts to look at matters that

are generally set out in the statute for the International Criminal Court. I was wondering whether the New South Wales Bar Association had any comments on the proposed amendments to the National Crime Authority legislation. I refer specifically to one point. Article 55(1)(a) of the International Criminal Court statute says that a person shall not be compelled to incriminate himself or herself or to confess guilt. With the amendments proposed to the National Crime Authority, which may well investigate these sorts of alleged crimes in Australia, that right to silence is going to be taken away and an indemnity given for the—

Mr Game—I thought it was derivative use that was going to be cut out.

Senator COONEY—Derivative use is going to be removed, yes. The use indemnity will—

Mr Game—There will still be a protection in respect of the answers given to particular questions but derivative use will go as a protection. I think that is what is happening with the proposed NCA legislation.

Senator COONEY—That is right, and in that legislation no appeal will be allowed to either the federal or the state courts to protect people about—

Mr Game—Yes, but that is in the context of a form of questioning where the person is compelled to answer questions.

Senator COONEY—That is right.

Mr Game—So a derivative use problem is not going to arise from article 55(1)(a).

Senator COONEY—No, what I am getting at is that 55(1)(a) gives protection, doesn't it?

Mr Game—Yes.

Senator COONEY—The amendments are going to take away that protection to some degree. Surely, that must follow.

Mr Game—If it is an investigation under this statute, then it has to be in accordance with this statute. So the answer to the question is that—I am stating the obvious—you would have to apply article 55(1)(a) to any investigation carried out by Australian investigative authorities in relation to an offence that is the subject of investigation under this statute.

Senator COONEY—Say the Australian authorities carried out the investigations under the amended NCA Act—that is if it is amended; everybody seems to be interested in it at this stage—and the procedures that the NCA use are local procedures, if that is allowed, and that evidence is obtained through that method. Is that evidence then useable before the International Criminal Court, if that case ends up in the International Criminal Court?

Mr Game—No, because the person can be compelled to answer the questions by the NCA.

Senator COONEY—So if the NCA used that process—

Mr Game—If they used those very particular investigative powers—

Senator COONEY—Then that evidence could not go to the International Criminal Court.

Mr Game—But that is a particular type of hearing which is analogous, for example, to a section 19 hearing by the ASIC.

Senator COONEY—Are you saying that the powers to be given to the NCA are very confined to particular crimes?

Mr Game—No, they are not confined to particular crimes, but the powers you are talking about with respect to amending the NCA Act, which I understand the purpose of which is to enable derivative use but exclude the incriminating answers concerned—

Senator COONEY—And stop any access to the courts in reference to the conduct of those proceedings.

Mr Game—Yes, that is correct. If a person was pulled in and questioned under those investigative powers, the answers that they gave to those questions could not be used in a prosecution against them.

Senator COONEY—In Australia?

Mr Game—Under this statute. In Australia it does not follow that that would necessarily be the case at all.

Senator COONEY—I do not think you are quite following what I am saying—the problem is that I am not putting it well. I thought that the idea was that Australia would prosecute crimes under this statute.

Mr Game—The complementary prosecution?

Senator COONEY—Yes.

Mr Game—That would not be an investigation under this statute, so this would have no role to play.

Senator COONEY—But then what do you say about this statute giving a big increase in power to the Commonwealth because they have to adopt these crimes into the local statute, into the domestic law, and then those crimes that swell the list of crimes that can be investigated under domestic law through the statute can then be investigated by the local authorities in a way which is contrary to the statute.

Mr Game—But this provision says nothing about how those crimes will be investigated domestically for domestic purposes.

Senator COONEY—But doesn't this statute enable the Commonwealth to use external affairs powers to get onto the statute book crimes such as murder and rape that they presently have not got?

Mr Game—Crimes committed extraterritorially, yes.

Senator COONEY—But doesn't it give the Commonwealth jurisdiction over a lot of crimes, the nature of which they have not got jurisdiction over now, such as murder and rape?

Mr Re—This statute does not.

Senator COONEY—If the statute does not do that, why are we talking about the matter of people being prosecuted by their own courts first and this only being a last resort?

Mr Re—The Commonwealth has to enact its own legislation to give it power to prosecute genocide in Australia, which it has not done. They can do this whether or not there is an international criminal court statute.

Senator COONEY—Can you just slow down, if you do not mind. If you are going to follow the statute through, you have to pass legislation locally. That is what it is all about.

Mr Game—Yes, that is true.

Senator COONEY—Doesn't this particular statute, if Australia signs it, oblige Australia to put a lot more crimes on the federal list than are presently there? Surely that must follow.

Mr Re—Genocide, crimes against humanity and war crimes: they are the three in the statute. Aggression is not defined yet. That is the only jurisdiction the court has.

Senator COONEY—Compelling prisoners of war, wilful killing, for example—have you looked at article 8?

Mr Re—Yes, but it is in the context of a crime against humanity. It is not a domestic situation.

Senator COONEY—For the purposes of this statute, 'war crime' means 'grave breaches' surely, otherwise you seem to be saying that there is no basis for what everybody has been telling us so far that there has got to be an exercise of local jurisdiction first. Every time I say to you, 'If that is going to happen, doesn't this increase the number of crimes that the Commonwealth will have jurisdiction over?' you say, 'No, it doesn't.' How are you going to make that process work?

Mr Game—I am sorry if it is not quite clear. Obviously, if the Commonwealth enacts legislation giving it jurisdiction over those three particular crimes, it will increase the amount of Commonwealth legislation, but the Commonwealth does not have to do that. Australia, if it wanted to, could simply enact legislation referring everything to the ICC.

Senator COONEY—Exactly. That is the very point that I am trying to make. So people have been coming along and saying to us, 'The ICC is very much in the background. It is a thing that we are never really going to go to, because a place like Australia will look after its own.' As soon as I say, 'Doesn't this increase the power of the Commonwealth to enact crime?' you say, 'No, it really does not because it has to go off to the ICC.' That is what you are putting.

Mr Re—No, it does not increase the Commonwealth's power. The Commonwealth has power under the Constitution anyway; it is just a matter of passing legislation. This is basically just one means, or one vehicle, from which to get ideas to pass legislation.

Senator COONEY—I will go through it slowly. First of all, there is an issue of there being a war crime. That is what it is all about. Everybody is urging us, including yourself, to sign this, saying,'It is very, very urgent. Sign it quickly because this is very important.' I then say to you, 'What is the importance of this?' You say, 'The ICC is going to deal with people.' Then I say, 'We're a bit worried about that,' and you say, 'Don't worry about that because Australia—or some other country—is going to have the first go, and it is only when they do not prosecute that we will go to the ICC.' We will then say, 'That's all right,' and then we say, 'We'll have to change the legislation to accommodate that situation,' and you say, 'No, it's not really doing that. In any event, if you are worried you can go straight to the ICC.'

You seem to keep skipping: every time an issue is raised you skip on to the next one. You go from the ICC back to local jurisdiction then, as soon as there is any problem with the local jurisdiction, you go back to the ICC and, as soon as you say that the Commonwealth will have to pass legislation, it is already there. You are leaving the impression, I must confess, that you do not really know exactly what you want to say about it all.

CHAIR—It is a very complicated business.

Senator COONEY—Yes, it is. Could you give us a further submission on that?

Mr Re—I am not quite sure I understand exactly what you are getting at.

Mr ADAMS—Someone else might like to put it. You are saying that this will not affect Australian domestic law, other than the enactment of some laws; and I think Senator Cooney is saying that it will.

Mr Re—As I understand it, Senator Cooney is saying that Australia may or may not pass complementary legislation which will give the Commonwealth power to prosecute these matters in Australia. Of course that of itself increases the number of crimes on the statute book in Australia, but crimes are enacted all the time by state and federal—

Mr ADAMS—But the head of power will come from this external treaty.

Mr Re—Yes.

Mr Game—Provided that there is a head of power, then all of the existing state and federal structure falls into place as it is. If crimes can be prosecuted, as they are under the existing system, then they can be investigated as they are under their existing system. The fact that there

is a provision concerning how investigation is to be carried out under the statute is apt to confuse, in a sense, because it has nothing to do with how we would investigate and prosecute those particular crimes under our complementary provisions.

Senator COONEY—That is the point I was trying to get to at the start: that evidence will not be admissible before the International Criminal Court, if it then ends up there, after we have gathered the evidence here.

Mr Game—No, that does not follow at all. If the evidence was adduced at an NCA hearing, at which a person was compelled to answer questions, then it would not be admissible under the international statute—the answer to that is yes, it is correct. That is true.

Senator COONEY—That is what I was asking.

Mr BARTLETT—You make quite a strong argument in your submission that we ought to be one of the first 60 countries to ratify because that will give us the right to vote for judges and prosecutors. Those terms are only three years, aren't they?

Mr Game—That is correct.

Mr Re—The terms are nine years, ultimately; three for the first term. It is in article 36.

Mr BARTLETT—Is it subject to another vote after three years?

Senator SCHACHT—After three, does everybody get another six-year term if they are re-elected?

Mr Re—Once you get there it is non-renewable.

Senator COONEY—Yes it is. You have to be elected and then you can stand again.

Mr ADAMS—So you have to be re-elected then after three years?

Mr BARTLETT—My point is that your prime argument for Australia being one of the first 60 signatories is that we will have the chance to vote for prosecutors and judges—that election having to recur after three years. It would seem to me that that is a reasonably minimal benefit, given that if our vote had much influence out of the 60 anyway, it really has only a marginal influence, and then it is subject to change after three years in any case and there are a whole lot more signatories after that. Given that there are some serious questions about definitions of crimes against humanity, genocide and so on—which one of our other witnesses said would be resolved after the ICC is established—it would seem to me that the danger of Australia rushing in to be one of the first signatories for a rather arguable benefit is outweighed by the risks of signing up to something where the definitions are still not terribly clear. Wouldn't there be a case to be put to say that we would be better off waiting until the definitions are very clearly defined before we race in to be one of those 60 signatories for a somewhat arguable benefit?

Mr Re—No, if Australia is one of the first 60, we get to influence the court. We influence its make-up; we influence the definition of the elements of crime; and we participate in putting people on the court, such as judges as lawyers. As you know, we have one distinguished Australian judge on the appeals chamber in the Yugoslav tribunal.

Mr BARTLETT—But we would have only one vote out of 60 for that.

Mr Re—That is right, but look at the other countries there. You will find Britain, Germany, France and most of the European countries there as well as South Africa and Argentina. You will find we are basically amongst like-minded countries.

Mr BARTLETT—Not the US?

Mr Re—The US will not be in the first 60, no. It would not appear that—

Mr BARTLETT—There are a number of countries there that I do not know I would call like-minded.

Mr Re—Canada is certainly there; New Zealand is there.

Mr BARTLETT—There are some who are like-minded, and a lot that I—

Mr Re—Korea is about to ratify. Many of our major trading allies and countries we have military treaties with are in this court. We will be there with them.

Mr BARTLETT—That still does not really answer the question. How much influence do we have as one of 60? Even if it is much, how much influence will it be after three years when there are, say, 90 or 100 members? Is that really a significant benefit compared to the risk of ratifying something when the definitions of the crimes involved are not totally clear?

Mr Re—The definitions are very specifically set out in the treaty and the statute and the elements paper. It is codifying international law, it is the most comprehensive definition of these crimes that has ever been put together. You are not going to get it much tighter than that when you have so many countries trying to reach some sort of compromise in an international negotiating session. That is just the reality of this sort of forum. It is not going to get any better—whether it is the first 60 or the next 60 or the 60 after it—that is just the nature of the beast. It is better for us to be in there where we can influence it from the beginning and put people working there and on the bench.

Mr BARTLETT—If, in fact, we could have any influence. Then, if we are in there and we have not had much influence, we have to accept the definitions and the requirements of the treaty anyway.

Mr Re—If you have Australian judges—

Mr BARTLETT—If.

Mr Re—There have been Australian judges in the Yugoslav and Rwandan tribunals and the Tokyo tribunal. There is no reason why distinguished Australian judges, former High Court judges or Supreme Court judges, would not be elected. The prosecutor, for example, of the ICTY is a Canadian Supreme Court judge. The people who are put on these tribunals are of the highest international calibre. I note your example before, Senator Schacht, but there is within the statute the definitions for the qualifications of judges, and they do have to be up there.

Senator SCHACHT—But in China you do not get to be a judge without being a member of the Communist Party—full stop. The criteria are quite different from ours. They may have a good system, but I am not going to argue that point here. I have to say that I was somewhat astonished to meet these people and discover that they were very good representatives of the proletariat and the working class, but I am not sure they had much knowledge of legal process at all. We, as a human rights delegation, discussed human rights with them. Even Alice Tay, who was on the delegation—and I have to say that Alice is no shrinking violet—was somewhat astounded by their lack of knowledge on legal process. One of those could end up, if they ratify, being on the tribunal.

Mr Re—Unlikely.

Senator SCHACHT—So, why would China ratify if they do not get a guernsey as the biggest and most populous country in the world?

Mr ADAMS—They would not ratify, unless they got someone on the court.

Senator SCHACHT—I have to say that I am raising these questions as a devil's advocate. My own view on the broader issues of this is quite sympathetic. But I am not going to blind myself to some shortcomings. I could argue that the Chief Justice of America in the 1960s was involved in trying to stop blacks and poor people voting in Arizona in an absolutely rorted arrangement. He is the Chief Justice of America. I think he is crook too. Earlier last decade on the Senate legal committee, we did a study of the high cost of justice in Australia. The bar association gave submissions that any change to the system was unwarranted, to open it all up to a bit more competition and to get the cost down. One of the issues was the argument between the present adversarial system of law in Australia vis-a-vis an inquisitorial system that western Europe other than Great Britain has. Is this court going to be run more on the Anglo-Saxon adversarial system or on the western European inquisitorial system?

Mr Game—It combines aspects of both systems.

Senator SCHACHT—I hope not the worst of both, because then we would really draw the short straw.

Mr Game—Some of those fundamental protections that I read out to you before come from our common law system. In respect of investigative processes, I understand that they far more closely resemble civil law countries as to how they investigate crime.

Senator SCHACHT—Could you draw attention in your further submission between the balance of where the inquisitorial benefits are available in the system and the so-called benefits of common law as a device to jack up prices to consumers in the legal system in Australia.

Mr Game—Could we also provide you with a short advice on the chapter 3 question raised by the chairman?

Senator MASON—Senator Schacht's question includes the rules of evidence procedure as well, doesn't it?

Mr Game—Yes.

Senator COONEY—There are elected judges; anybody who serves for less than three years is eligible for re-election. In article 36(9)(a), (b) and (c) and 36(10), if you are elected for nine years, you are not eligible for re-election. But if you are elected or appointed for three years, you are eligible for re-election.

CHAIR—Many thanks for your evidence this morning. It is good to have some clear testimony. As we have an hour to go until the lunch break, we will call the next witness.

[11.40 a.m.]

PHILLIPS, Ms Gaye, Chief Executive, UNICEF Australia

CHAIR—I formally advise you that we do not require evidence under oath. These are legal proceedings of parliament and warrant the same respect as if they were taking place in the House or the Senate. The giving of false or misleading evidence is a very serious matter. Would you like to make some introductory remarks around the submission and then we will have questions?

Ms Phillips—Thank you and good morning. First of all, I want to congratulate the government on quite correctly examining very closely our entry into this international treaty. It is really important that, as a government and as a community, we understand the provisions very carefully, that we spend the appropriate amount of time investigating and exploring all the options and that the community understands.

Mr ADAMS—This is not a government committee; this is a parliamentary committee.

Ms Phillips—Understood, sorry. I am just congratulating you on conducting this inquiry by the parliamentary committee. Mr Downer, in his speech in 1998 to an audience in Canberra, asked a really provocative question about how Pol Pot and his regime went unpunished despite the international outcry against the terrible crimes committed. He gave the response to his question himself. He said: 'Because the international community did not have the means available to investigate and prosecute, to see justice done and to see potential perpetrators of crimes deterred in the future.' It is very important, in the opinion of UNICEF Australia, that this ICC be ratified, because it corrects the inability or unwillingness of national criminal systems to prosecute and punish perpetrators. It offers a permanent and effective way to prosecute crimes. In Mr Downer's own words, 'It provides a rigorous international spotlight.'

Our recommendations, in summary, are quite clear in our submission. It is a fairly straightforward submission; it is not complex. Basically, we suggest that we do ratify the statute as a matter of urgency. We use the word 'urgency' more because of the impact such crimes have on women and children, who are demonstrably and clearly affected. The word 'urgency' is used because it is compelling that, as an international community, and as Australia is part of that international community, we do our very best to eradicate this devastation and atrocity, or to at least see some justice brought to bear on those perpetrators.

It is certainly clear that 60 ratifications are needed for this to enter into force. It is our view that Australia would be well placed to be in that first 60, because I believe that we can be an influential part of that assembly of states parties. I say that because, although I listened to the previous evidence and questioning, I do think individuals make a difference. I am quite happy if you think that means I am a Pollyanna, but I think history bears that out. I think Australian individuals have made a considerable difference over many years in the international system. I think Sir Ninian Stephen makes an enormous difference to the Rwanda tribunal. I think there are a great many other Australians who, through their interactions and diplomacy, continue to punch greater than their weight in the international community. I think that is a good phrase. I

think it is apt in Australia and I think we should not underestimate our strengths. It is a pity that we decry them so often.

We also wish the Australian government, in its ratification of this treaty, to reject the opt-out clause—124. We want them to do this not only because this clause is really not one that in any way is in the spirit of the legislation—to bring justice to perpetrators of crime—but also because it means that Australia is leading the way in discouraging others to opt in to that particular clause. We would also like the government, in their diplomatic efforts, once this is ratified and brought in to international law, to discourage any variation of that seven-years clause in terms of lobbying diplomatically to ensure that that time frame for accepting the jurisdiction of the ICC not be extended, so as to prevent the possibility of current perpetrators of atrocities against children and women never being brought to justice. That, in summary, is our submission.

CHAIR—It is a very interesting point about this clause.

Mr ADAMS—The United Nations General Assembly is having a special session on children in 2001—this year.

Ms Phillips—That is right, in September.

Mr ADAMS—You indicate that ratification would be great. Would you like to elaborate on that?

Ms Phillips—I think the special session is one of those rare opportunities in our lifetimes to once again put children first on our priority list and to again raise the agenda that women and children are the most essential parts of a civilised society and that we need to protect their vulnerability. The special session is unique in that Kofi Annan has called this as a general assembly meeting in order to continue the work of the 1990 world summit which, of course, was not at that time part of the general assembly. So this really positions the rights of women and children firmly in the centre of the international stage as a priority. The special session is an opportunity for governments to showcase their achievements for children under the Convention on the Rights of the Child and to show where, in their own analysis, they want to do more for women and children. The opportunity certainly would be welcome if the Australian government is part of that group of countries who, in protecting their women and children, are also keen to protect them against crimes during war, against genocide and so on. These are times when children are particularly at risk, particularly vulnerable, and there is a great litany of true and very disturbing cases, so it is an opportunity.

Mr ADAMS—Can you give us a little bit of that case history and tell us where, if we had a court, it could have been brought before the court?

Ms Phillips—Certainly the Rwanda tribunal and the former Yugoslavia tribunal showed that there was a strong interest in the international community in doing something to address the crimes against children and women during those atrocious wars, so there is a clear intention—

Mr ADAMS—Ethnic cleansing—

Ms Phillips—Ethnic cleansing, the rape of the women in order to destroy the soul or the spirit of the community and decompose a society in which women and children are its heart. There is also a war at the moment in Sierra Leone with a huge exodus of refugees into Guinea. There is continual abuse of those refugees in those refugee makeshift camps. The abuses in Sierra Leone are absolutely chilling. We are fairly familiar with the number of abuses of small children, babies—in fact, younger than three months of age—and much older children and women whose hands were cut off as a signal to others to not contradict the warlords. That kind of atrocity is leaving the country with a great many maimed and disabled children who then are not nearly as able to take their country forward as we hoped. There are stories we could tell. We have an Australian aid worker in Sierra Leone. He was also in Burundi, and he is about to work in Guinea. He is one of the guys who do the front line. He has stories of trying to reintegrate young kids—seven-, eight- and nine-year-olds—into a sense of esteem by taking them out on fishing boats. He personally takes them out just to have time to talk with them and to show them that they can still engage in some kind of activity. He said Freetown is a chilling city to be in, because of the constant bumping into women and children without limbs. Per head of population, it has got the largest number of maimed people in the world.

Senator SCHACHT—Is Sudan another case where UNICEF sees abuse of children?

Ms Phillips—Sudan is a particularly evil case. I am happy to use that word in this instance, again because of the use of children as child soldiers, as sex slaves for armies and as porters. There are, as you know, many child soldiers in the world.

Mr ADAMS—Is there slavery there too?

Ms Phillips—There is a whole range of commercial activities that benefit from an unstable war zone. In fact, even to the extent that any—

Senator SCHACHT—Are the variations of the slave trade that now exist in Southern Sudan, imposed by the fundamentalist Muslim Arab north against the Christian black south, crimes against humanity? Would you define what is going on as a crime against humanity?

Ms Phillips—In my definition, it is a crime against humanity whenever any unlawful abduction, rape, coercion or exploitation is taking place, whether in the context of an active war or in the context of people who exploit an unstable political or economic situation. Yes, that is a crime against humanity.

Senator SCHACHT—Is female circumcision a crime against humanity?

Ms Phillips—UNICEF holds that female circumcision is a crime against humanity.

Senator MASON—I do not want to get into the legal issues; I want to pick up from where Mr Adams and Senator Schacht left off in respect of crimes against children. Crimes against humanity include forced sterilisation. War crimes include, among other things, conscripting children. Genocide includes, among other things, forcibly transferring children of a particular national, ethnic, racial or religious group. At the moment, is that happening in Africa, or in Sierra Leone, or in other places? Conscripting children is an example of a war crime. On

television at night you see kids that look only about nine or 10 carrying AK47s. Is this common at the moment?

Ms Phillips—It is very hard to get the numbers of child soldiers because it is clearly an illegal activity under the Convention on the Rights of the Child so no-one is promoting their child soldiers unless they are extremely arrogant—and in some cases they are.

Senator MASON—It is a war crime.

Ms Phillips—Indeed. We think there are about 300,000 child soldiers. They can be much younger than seven or eight—they can be five or six—because they are very small, they do not eat much and they are very obedient. The new weaponry, AK47s, can be loaded in less than 10 seconds and they are very light weight. Children learn fast and they enjoy playing with those kinds of things. They are much better soldiers than adults and they do not complain because they are easily terrified.

Senator MASON—And enforced sterilisation?

Ms Phillips—In the context of war, it is really about a more subtle way of destroying a community, its values and its cultures. If you attack what we hold dear—families, mums and their ability to bring children into the world, which is part of our ongoing heritage and identity—and you destroy the ability for women to reproduce, you are in fact waging war in a much more subtle and insidious form. This will more quickly, as our studies have shown, break the spirit and the soul of your resisting army than anything else. That is why it is being used in these latter years.

Senator MASON—The same could be said of forcibly transferring children from an area.

Ms Phillips—Exactly right—if you remove your children you remove your affection, you centre of attention, and that is an enormous distraction for any army.

Senator MASON—Just one last point on conscripting children: you mentioned Pol Pot before, and one of the things he did in his genocidal reign in Cambodia was that most of his executioners were only 14 or 15 years old, for the reasons you mentioned: they do what they are told, they do not complain and they are what he used to call ‘blank cheques’—you can write the script on them and they are much easier to change. By the time somebody gets to my age you cannot change them.

Ms Phillips—Exactly. They are not nearly as malleable. We can see that sometimes. You can easily distress your own child by having a slightly harsher voice than they are normally used to from a loving parent, and how quickly their face will reflect your anger or your own fear of your own feelings. That is without any intention to hurt or do any harm. If you have an intention that is strategic and militaristic, then you can do a great deal of damage very rapidly by hurting and destroying the souls and the minds of very young citizens.

Mr BYRNE—I cannot recall what country was considering ratification or has already ratified. You have mentioned in your submission that if we ratify it, the treaty acts as a disincentive for some of these countries and people to perpetrate these human rights abuses.

Some of these countries have already ratified the treaty or are in the process and these human rights abuses are still occurring. Do you think therefore that that is going to be a sufficient incentive or is there something else that is going to have to happen to prevent these human rights abuses occurring?

Ms Phillips—I just think that when it comes to human rights there is no quick fix, no one thing that fits all or any quick solution. It is really an evolving process. As supporters of human rights we have obligations—and I am one of the people who do think Australia has a proud history of that, albeit sometimes we make mistakes or we do not do it to 100 per cent of what we could do. But it is part of the process of change and things like the International Criminal Court are not meant to be the final solution or the big fix. They are meant to be part of a conversation within the world that says, 'There are sanctions against behaviour that is so outrageous to the civilised man or woman that we want to put a big sign somewhere that says, "This kind of behaviour has to be stopped," and, if we cannot stop the behaviour, then we will do our very best to make sure that we do shine a spotlight on it and that you are brought to some kind of criminal proceeding.'

We are not calling on the world to retaliate in some kind of inhuman way and wage war against the perpetrators or lynch them. That would be a regression. This is a really good example of a world that is moving, from my point of view, in an encouraging way towards civilised behaviour by saying, 'We are now developing, albeit painfully and not always perfectly, a mechanism that will denounce and prosecute perpetrators of these really terrible crimes,' and in my case particularly against children and particularly against women, because it is just immorality. It is almost inconceivable for a civilised or humane person to believe that these crimes can take place, so sometimes we fail to believe the depth of them and the too often occurrence of them.

It is also very important that we keep a standard that maintains the belief that we can make changes even in the hearts and legislation of countries which are currently perpetrators of human rights. It is much better for those countries to be involved early and to be surrounded by countries who will diplomatically, softly, noisily, sometimes with rage or sometimes with gentle persuasion continue to act as some kind of evolving and changing catalyst that will slowly bring these perpetrators of human rights abuses back into a more civilised fold. Sometimes those perpetrators of the human right abuses are entire governments or countries. That is quite right. We should let those people in the door first. I would rather those people be inside hearing the discussions than outside not being a party to them. I would like them inside quickly surrounded by highly civilised countries so that, even if their force as a nation is great, as in the China example, your diplomatic and persuasive influence could be substantial. We have had considerable success even in China. It has been slow but there is change.

Senator COONEY—Thank you very much for your submission. Can you tell me the history of article 26, which is that the court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged committing of a crime? The reason I ask that is that you have got a children's court concept, which I understand, but people of 16 and 17 can do quite damaging things. Do you know the history of that provision?

Ms Phillips—I can give you my understanding of it, which I immediately say may not be complete and others may be able to shed much more light on. I can tell you my experience of

that particular provision. UNICEF supports the Convention on the Rights of the Child. The Convention on the Rights of the Child defines children as 0 to 18. UNICEF holds the position that children under 18 should not be involved in war, either as victims or as perpetrators, so they should not be child soldiers. This is UNICEF's policy. As I understand it, the Rwanda tribunal and the former Yugoslavia tribunals, particularly the Rwanda tribunal, was able to investigate and prosecute perpetrators of crime under the age of 18 because this particular legislation we are looking at now was not in place. UNICEF argued very strongly and was supported by many countries—Australia included on this one—that children should not be charged under war crimes legislation if they committed the act when they were under 18.

The reason for that, despite the fact that there are some very sophisticated 16- and 17-year olds, is that many of those 16- and 17-year olds began as very naive six- and seven-year-olds who were recruited as child soldiers at six or seven and rose to lofty command ranks by the time they were 16 or 17, and therefore were in a position to make really awful decisions about the abuse and annihilation of other people and their rights. But the process by which that 16- or 17-year-old became the perpetrator was not at that time line that is set at 16 or 17. The crime against that child was committed at four, five or six—or in fact even earlier, when the circumstances of their life, perhaps poverty or underdevelopment, gave rise to warring factions, war lords and the situation which then resulted in the instability of their country.

UNICEF argue that we are not looking at any one isolated incident; we are looking at a continuum of development—certainly, personal development with children, but social and economic development within a community. There are many causal links as to why children will commit really egregious crimes by the age of 16 or 17. UNICEF argued strongly—and we were pleased to see it reflected in this international convention—that we need to not hold children able to be prosecuted if they committed that crime under the age of 18. In our view, it would, yet again, punish that child for a crime that had been committed against that child many years before.

I have seen some of the victims of those aged 10, 12, 16 or 17. Those victims are no less maimed, killed or affected psychologically by a 12-year-old as by a 35-year-old. But to get that 12-year-old to that point, there had to be a lot of coercion, a lot of strange mixtures of drugs and alcohol, a lot of deprivation of food and a lot of fear. And you had to traumatise that child dramatically up front—in most cases, by forcing that child to do something that would destroy its spirit; that is, kill its own parents, rape its own mother or kill its own sister. That is why children become those monsters. UNICEF, quite rightly, in my view, supports the notion that society must endeavour to build a civilisation globally that prevails against the creation of such killers and monsters. That is a long-term plan, and that is why we have our wonderful foreign aid and overseas assistance.

Senator COONEY—I can understand that. If I may say so, with respect, that is well put. What I was getting at was that, after 16 or 17, you are then 18, and that terrible history that has brought you to a point of being excused at 16 or 17 does not allow you any excuse the following day when you turn from 17 to 18.

Ms Phillips—Of course.

Senator COONEY—I suppose you would say you have got to draw the line somewhere.

Ms Phillips—There is an arbitrary line, isn't there, and society calls it 18. We do the same across all areas of law and behaviours.

Senator COONEY—That is the sort of issue that you might present at the time of sentencing, or in the way you deal with them, rather than when discussing the issue of guilt.

Ms Phillips—I would think so, which is why, by the way, I also think that Australia has a great role to play in this regard, because we do have such a wonderful criminal justice system. Of course, it is flawed. I am not saying that anyone is perfect here. I see the imperfections of this world more closely perhaps than some of you. I also acknowledge that our criminal justice system is not perfect, but it is a hell of a lot better than a lot of others. In terms of that sentencing and the ability to punish appropriate to the crime, given all the circumstances, I think Australia can play a very integral and influential part in the implementation of this convention. We are just at the beginning stage. We are going to be seeing, over some years and some generations, the benefits of this convention. Australia has got a long role to play in making sure that we get it better and better—and eventually, hopefully, get it right.

Mr WILKIE—I have not got any further questions. I realise we are running out of time. Thank you for your submission, it is very good.

Mr BARTLETT—We all certainly share your abhorrence of those atrocities, particularly against children, and I appreciate the passionate way that you expressed your feelings. Just to seek a clarification, does this statute allow the ICC to be involved in crimes of aggression, crimes against humanity, for purely internal conflicts? Or is it only when there is an extraterritoriality involved, where there is an international dimension to the conflict?

Ms Phillips—Well, as I understand it, there are several triggers for getting these kinds of matters put onto the international court's radar screen. The Security Council can put forward a case as can the state party itself and the independent prosecutor. So in some cases where there is, say, no existing state, as we have in Somalia—

Mr BARTLETT—But if there is an existing state and there is, for instance, a totally internal civil war without any international dimension, would the ICC be able to then prosecute people within that country?

Ms Phillips—It is my understanding that they can, because that would be the case for Rwanda and the former Yugoslavia and, in fact, in Cambodia where there are instances of ethnic cleansing and internal conflicts. As we know, these days there are more internal conflicts in the world. In fact, they are the larger total. There are no major global world wars. There are at least 55—maybe a few more—currently hot internal conflicts.

Mr BARTLETT—I must have misunderstood the answer to one of the earlier questions this morning. I thought, in response to one of the questions, one of the earlier witnesses said that it would only apply to Australia, for instance, if it involved an Australian outside of Australia's borders. Did I misunderstand that?

Mr ADAMS—I think the Security Council has the power to act internally. There was nothing there to act in the past. One of the arguments for the court is that, in the African situation, there was a need for having something permanent there.

Mr BARTLETT—We would all like to think the existence of an ICC would stop those crimes against humanity and crimes against children, particularly in some of the countries in which they occur. There are extreme circumstances—for instance, an internal civil war, a coup or, in desperation, the abandonment of morality and the extreme impulsiveness that occurs in that situation. Would the existence of an ICC or those sanctions in any way moderate the behaviour of the perpetrators who act on impulse, out of fear or whatever motivation, at a particular time? Are you aware of any cases? What is the evidence with the ICJ in terms of whether its existence significantly modifies, in extreme circumstances, the behaviour of internal or international conflict? I guess that is a difficult question to answer.

Ms Phillips—Yes, it is a tough one. It is a really good, compelling question. Whether the existence of any laws or punitive measures discourages crime is an argument that we have been having for a very long time. We have it domestically, internationally and in our households. We have all kinds of reasons why we think it does or does not.

In my view, in order to exhibit civilised behaviour, you have to have the notion of justice, and people have to be brought to a reckoning of their crime. In terms of whether that deters someone else from committing a similar crime in the future, at this stage we would say probably not, because we keep getting these terrible crimes and we keep throwing them up again.

At this stage we would have to say that the hit rate has not been great. But that is not an argument that says we do not continue to bring these people to some kind of sanction, because if we stop doing that then the other argument may apply. Because we do not know the answer to that one either, we may in fact have much worse situations.

Mr BARTLETT—What is the ultimate proposed sanction under the ICC for a convicted perpetrator?

Ms Phillips—We are talking about terms of imprisonment.

Senator COONEY—Life imprisonment.

Ms Phillips—Yes, that is right.

Senator SCHACHT—First of all, like the others I would like to congratulate you on the passion of what you have said and on bringing us the general picture of why we ought to be looking at this. When I raised the question of female circumcision you said that UNICEF see that as a crime against humanity. Does that mean that you would expect the ICC to be able to hear a case against an individual person who performs the act of female circumcision in a country where this practice is still committed and/or against the leaders of a country who allow that practice to continue?

Ms Phillips—I would have to say that I am not a lawyer and I have not looked at this in all of its absolute implications. My reading of it is that, yes, that can happen—and I qualify this by

saying it is my understanding of it from the books I have read. This is about individuals being brought to prosecution, so individuals who have committed and have been proven to have committed wars against humanity—that being one of the categories—can be brought to justice through this system.

Senator SCHACHT—So some half-educated midwife, or whatever you want to call them, of some tribe in north Kenya, could actually be brought before the tribunal?

Ms Phillips—It is possible.

Senator SCHACHT—If that person performs that practice?

Ms Phillips—Taken in isolation, that is certainly the case. But there are other parts of the legislation. Fairness and reasonableness and all of those words also apply. So, as you say, the half-educated person who may well themselves be a victim of their own traditions or development in this may not in fact be the perpetrator. The perpetrator may be the war lord or the chief who is trying to maintain a power threshold. Circumcision, as we know, is not about women being regarded as an inferior species; it is about maintenance of a power structure. The spirit of the legislation says to me that, while there may be an immediate perpetrator, a line can be drawn back to who is actually responsible. That is why you need a fair and reasonable criminal court with the right judges and the right prosecutors who can make those kinds of wise, Solomon-like decisions.

CHAIR—Thank you for the testimony this morning.

[12.13 p.m.]

McDONALD, Miss Nicole (Private Capacity)

CHAIR—Welcome. We will not require evidence under oath, but I have to advise you that these hearings are legal proceedings of parliament, so they warrant the same respect as if they were taking place there. The giving of false or misleading evidence is a serious matter. We do not have much time, but we are glad to have you. Would you like to go straight to questions, or do you want to quickly elaborate on your written submission? We have got that and we have read it.

Miss McDonald—I have prepared a brief statement that elaborates briefly on the submission.

CHAIR—Sure. Go ahead.

Miss McDonald—I believe that when looking at Australia's national interest in the context of the statute, it is relevant to acknowledge our role in the international community. Simply considering our interests in a domestic sense fails to acknowledge that international law is evolving as a branch of law and that it is a consideration with respect to our domestic laws. Australia is an active participant in global issues, for example, in our role as a peacekeeper. We also observe and promote human rights. For evidence of this one only has to listen to the evidence of the previous witness or consider the prominence of our domestic discrimination laws and even our own Human Rights and Equal Opportunity Commission that has been set up.

Australia performs that role with the support of the majority of its citizens. As a member of Australian society, which I think is fairly democratic, I enjoy a number of freedoms, some of which I take for granted. The Australian state, unlike some states in the world, experiences and enjoys relative peace and security. There have been occasions when basic human rights have been infringed, as was alluded to previously by the UNICEF witness. It would be naive of me or anyone else to suggest that such abuses and infringements will not occur in the future. Australia's ratification of the statute would be an act consistent with its role in the global community and its past stance on the promotion of human rights. I believe it would also signal Australian support for the promotion of peace and security because the ICC will focus on criminal accountability of individuals when no state is able or willing to do so.

The ICC would also act as a deterrent to perpetrators in international crime and the regimes that hide them. I note the complexity with that issue that was raised with the previous witness that perhaps there is no stringent evidence to say that it is a deterrent, but then the converse argument is that, by not acting, we would be giving a green light to these people to perpetrate crimes. The fact of sitting back and closing our eyes and ears would almost give them a green light, some would argue.

The statute is a result of complex negotiations by states and so seeks to strike a balance between preserving state sovereignty and creating an effective judicial body. The ICC will have the jurisdiction to deal with crimes of concern to the international community. It will be a permanent body with administration and support apparatus, unlike the somewhat reactionary

and ad hoc tribunals in Rwanda and the former Yugoslavia. In addition to its mere presence being a deterrent, if and when it does exercise its jurisdiction it will have the necessary apparatus established to investigate and prosecute rather than wait for UN resolutions such as with the previous military tribunals.

The court will be able to investigate officials in all ranks and its decisions will have the necessary degree of finality to provide effective justice. Balanced against this idea that we need to support an institution that is effective and authoritative, we will need to establish and also address our issues of state sovereignty—which is obviously your role here. The ICC's jurisdiction is complementary to domestic jurisdiction. The statute expects and obliges states to prosecute a perpetrator first through our domestic legal institutions and, if a state is unable or unwilling to prosecute, then the court will.

The statute in article 72 also acknowledges that there may be circumstances when national security issues may be raised by states. The ICC will not be taking jurisdiction away from the High Court under section 73 of the Constitution. In the event that the High Court or other court is called upon to hear a matter, it will be looking at a domestic statute that has codified those four international crimes. The issue of whether the court will be able to be used as a means to pursue politically motivated investigations is one that the statute strives to resolve. Inherent in any authority is the risk that it may be abused. Because of the heinous nature of the crimes the court will have jurisdiction over, the statute requires that the domestic court have a look at that first and, if it can, prosecutes. If not, the pretrial chamber conducts an investigation, but it will only do that once the full investigation has been completed and due process has been afforded.

Further, it allows for procedural fairness and allows an accused express legal rights concerning their defence. Under article 36, judges are to be representative of a geographical area, various legal systems and also both genders. Understandably, as a statute created by input from a wide variety of countries, it has a mixture of principles from different legal systems—an issue that has also been addressed this morning. However, the court is an institution that will provide legal rights consistent with Australia's legal system—and the Bar Association outlined those legal norms that we appreciate and have in our own legal system here. It is my view that the statute will provide the ICC with a means to affect universal justice, but not at the expense of sacrificing state sovereignty.

Mr ADAMS—Do you believe it might be better if we give up sovereignty to this international court? Do you think the world could move forward if we asked states to give up sovereignty on these matters that are dealt with in the statute?

Miss McDonald—No, I do not think so at all. I think the statute embodies the idea that sovereignty be retained in domestic legal institutions to actually have, in layman's terms, the first bite of the cherry. Part of the idea of sovereignty is to have your own legal institutions to enable states to prosecute or investigate such crimes first. I believe that is in the interest of the world community and, in addition, each state sovereignty. I do not think anything could be gained at this stage. I think it is a very good statute. Admittedly—and you all acknowledge this—it is a compromise. It is not the best solution, but it is the best that the committee had been able to come up with in Rome.

Mr ADAMS—What would be the best solution?

Miss McDonald—I think that is an answer I am unable to give you at this stage.

Mr WILKIE—Do you think the balance is fairly right?

Miss McDonald—I do. I think you would all acknowledge that there are compromises. It has been highlighted that you have a variety of legal systems. How can we guarantee that the legal system in China will grant an accused the same degree of juris prudence as the Australian legal system? You cannot guarantee it, but the converse to that is to interfere with state sovereignty and to give these international courts more jurisdiction and actually be invasive, so to speak.

Mr ADAMS—Aren’t we doing that? Aren’t we saying that the history of the world has gone past? We are now saying that we are going to set up something that will start to interfere with that. We are going to start to say that there are goodies and baddies at an international level.

Miss McDonald—No, I do not believe so at all. I cannot see that—

Mr ADAMS—If somebody is going to make a decision to intervene in a country’s affairs—

Miss McDonald—An intervention would only occur once that country has looked into and investigated any allegations. The country still retains its sovereignty in that respect.

Mr ADAMS—But it then fails under a bigger body. A world opinion says, ‘Your own jurisdiction has failed. We are now going to impose our view because we think we are right and you are wrong.’

Miss McDonald—I think article 17 and article 20 of the statute provide the basis on which the court can review and actually examine the process of investigation that a national court has conducted.

Mr ADAMS—Sure, but it is still going to be invasive of that country’s sovereignty by someone saying, ‘You have not done it properly,’ or, ‘Your legal system is not right. It does not give people justice, so we are going to intervene.’

Miss McDonald—I think that is rather a broad comment to be made on the basis of this statute and its provisions. They are fairly narrowly drawn in some respects, and I do not think you interpret the statute’s provisions as allowing an international criminal court the ability to get a microscope and look at a domestic court and say, ‘We are not happy. We are not satisfied that you have done an appropriate job.’ The standard is objective, yes, and there are international legal principles to be applied when looking at that situation. As was alluded to before, you will have a court that is construed of judicial members that will be of a high calibre.

Mr ADAMS—We are not too sure about that, are we?

Miss McDonald—Despite what Senator Schacht thinks about China, I think on that point that that is what comes—

Mr ADAMS—He had an American as well.

Senator SCHACHT—I gave both sides an even hit around the head.

Miss McDonald—I note what you say, but I do not see that the intention of the statute is to be construed and to be used in that way. There are mechanisms there that would ensure that the statute is not abused. It is not a tool for politically motivated investigations or prosecutions.

Mr ADAMS—You say that, but how do we know that it will not be used that way?

Miss McDonald—Because of the standard of judicial officers, their accountability, and also the nature of the parties that are responsible for the management and accountability of the court. Also, it is not in the court's own interest to pursue suspiciously motivated investigations. It does not add to their feasibility or credibility in the long term. So if their intention in the long term is to promote human rights, what is to be gained from interfering and from pursuing matters that are not in their jurisdiction and which it is not in the interests of the court to pursue?

Mr ADAMS—I think one of our House committees is being used in that way at the moment; that is in Australia.

Miss McDonald—The statute is not perfect but there are safeguards, as I say. I acknowledge that it is not perfect. From my reading, it does not appear to be perfect, but it is the best that we have got.

CHAIR—If, as you say, the court has, in a sense, a mission or a role to promote human rights values and such things, that does have the flavour of a political outfit rather than a strictly judicial one.

Miss McDonald—Yes.

CHAIR—If, as you assert, this court is going to bring with it this mission, you would not feel too comfortable, would you, about one of the domestic courts in Australia having a mission, instead of being a practical and traditional legal outfit? In a sense, some of the things that Dick has elucidated from you tend to back up some of the misgivings we have that there is a little more politics in this than law.

Miss McDonald—What I was referring to in my earlier answer was this idea of the conscious effort to avoid appearing to be a political tool, to appear to investigate politically motivated offences or allegations. The court is a judicial body. It is not an organ of the UN. It is not set up like the International Court of Justice. It is created by statute. It will be managed by the party states. It will have an independent function in that it is a judiciary. It is not a committee; it is not a human rights committee. It has a judicial function; it has appeal and review procedures. With respect to the calibre of judges that have to be picked, their impartiality is taken into account. The fact that two-thirds of the majority of states have to approve any nomination that is put forward would seem to indicate that that is a safeguard of some sort against creating a court that has political motivation, an agenda or interests other than pursuing the interests of the four international crimes that they are seeking to eliminate.

CHAIR—I appreciate that. There is a book launch happening downstairs at 12.30 p.m., so I would like to suspend the proceedings and then invite you back at 1.30 p.m. to expand a little more on your evidence, given that we want to hear a little bit more from you.

Proceedings suspended from 12.28 p.m. to 1.35 p.m.

Senator COONEY—Miss McDonald, thanks very much for your submission, which I thought was great. There is one issue I would like to ask you about. This is going to be a world court, and there has been a lot of discussion about the judges. They do not have to be judicially qualified, as I understand it, but they have to be experienced. The rules set out will hopefully make them independent and be the sorts of judges we want, but they come to those rules with a particular culture. Have you had any thoughts about whether or not they would be able to overcome the culture with which they come? Whether they come from South-East Asia, Europe, Africa or wherever you would like to imagine, are they able to come to the court without cultural baggage? May I comment, it seems that that would be very difficult to do. Or do we try to get a perfect court by drawing people only from Europe and similar countries? If we do that, it is hardly a universal court. Can you see the dilemma? Could you comment on that, please?

Miss McDonald—My reading of the statute is that the International Criminal Court, by its nature, is an international court. It is designed to be that, and article 36(8)(a) even obligates for the bench on the court that sits to be:

(i) The representation of the principal legal systems of the world;

(ii) Equitable geographical representation; and

(iii) A fair representation of female and male judges.

Therefore, it is going to be international by nature. There is also a requirement, though, that there be a fair representation and that there be not just a representation from Europe, from Asia and from Africa. Within that article, it states that you cannot have two judges sitting from the same state. So there is some guarantee that there will not be over-representation of a particular legal system or a particular state.

I agree that inherent in the nature of each state are cultural differences and ethical differences, and even legal systems are different. However, we have two tribunals at the moment—they are military tribunals—to look upon the judicial make-up of those courts. In my view, it has not attracted criticism. In fact, there has been resoundingly positive feedback on how well they have done their jobs. There are judges from a variety of countries. As has been stated, even our own country has had representation on two tribunals. So, while I acknowledge that there will be a certain culture attached to various judges sitting on the bench, that is inherent in any culture. An Australian judge will bring an Australian perspective to the bench. However, enshrined in the statute is the idea that these judges must, firstly, be suitably qualified and pass a nomination of two-thirds of the assembly of party states and, secondly—once they are on the bench—adhere to the legal principles that are laid down not only in the statute but in the *Rules and procedure of evidence*. So they are not going to be able to run their own shop, so to speak, according to their own cultural values and their own legal systems as they apply in their own countries.

Senator COONEY—They have to have experience either in criminal law or in international law.

Miss McDonald—That is correct.

Senator COONEY—But no formal qualifications are required of them. They do not have to have degrees or things like that.

Miss McDonald—My understanding is that that would be a qualification needed, perhaps a prerequisite. They would have to have some esteemed standing in their community. You are talking about a state representative who is nominated in this international law context. It is not going to be someone who sits on the district court in the Downing Centre, as esteemed as they may be. They will have to have a track record and they will have to be proven to be able to adjudicate on matters of an international nature.

CHAIR—If these candidates pass these threshold tests, as vaguely as they are expressed, if they do misbehave in office, what is your view of the procedure or the mechanism for removing them? Are you satisfied with the mechanism for removing them?

Miss McDonald—There are mechanisms in the statute.

CHAIR—At article 46. Let me elucidate that. In the case of a judge, it requires a two-thirds majority of the state parties after there has been a recommendation made by two-thirds of the judges themselves. In your view, is that a fair balance between the security of tenure and protection of victims from vexatious prosecutions?

Miss McDonald—Certainly, I think the initial guarantee is that a state can nominate a judge to sit on the bench of this court. Even if the judge be from China or the US—quite a powerful state—the fact that all state parties have an equivalent vote in the matter would seem to ensure that a particular representation will not be for a particular region or follow a country's agenda to have a particular person elected and put on the bench.

CHAIR—When you make that assertion, are you speaking from experience in these matters? Have you served in the United Nations fora on Australian delegations?

Miss McDonald—I have read some of the negotiations that occurred in Rome on this subject.

CHAIR—We have a saying in politics, 'Do it in diamonds, do it with mink, but never ever do it in ink,' so a lot of what really goes on in these things is never recorded.

Miss McDonald—Certainly, but I think there is an intention underlined in the statute and the articles to achieve that aim. Understandably, there may be cases where a judge may have to remove himself or herself, or be asked to remove or disqualify himself from the matter, and there are provisions for a party to approach or the court to do that themselves and remove themselves from a particular matter. A more serious allegation as to their capacity to complete their term in office is an issue that is also covered, and it appears there are procedural fairness issues there and there is a due process that goes through for that to occur.

CHAIR—It is just that Senator Cooney was interested in the notion of, in a sense, entrenching a poorly qualified judge or prosecutor.

Miss McDonald—I think it would be fairly hard to hide, in the context of an international court, a judge that was not up to standard.

CHAIR—If there is any further evidence that you could bring to satisfy Senator Cooney's misgiving, then you are welcome to give it to us in writing after this. Thank you for your testimony.

[1.43 p.m.]
BRADY, Ms Helen Julia (Private capacity)

CHAIR—Welcome. Although we do not require evidence on oath, these are legal proceedings of parliament and they warrant the same respect as if they were taking place in the House of Representatives or the Senate, so the giving of false or misleading evidence is a very serious matter. Would you like to make an opening statement and then proceed to questions.

Ms Brady—Just by way of background for the committee, I am a solicitor at the Office of the Director of Public Prosecutions here in Sydney and, for the past three years—since May 1998—I have been a member of the Australian government's delegation to the negotiations for the International Criminal Court, so I have been very closely involved with the creation of the court as the New South Wales representative on this delegation. In this capacity, I participated in and attended the Rome Conference when the statute was finalised and adopted, all of the sessions of the Preparatory Commission, as well as intersessional meetings, so I have been closely involved in drafting and negotiating the statute, the Rules of Procedure and Evidence and some portions of the *Elements of crimes* paper.

We have already heard this morning from a variety of speakers about the benefits that the International Criminal Court will bring for both the wider international community and for Australia, with some practical benefits. I will not summarise those as I think they have been very well given, and I would like to say that I support them entirely.

I would like to focus on a somewhat different tangent. I have listened very carefully this morning to the questions that have been posed by the committee. I would briefly like to address, as much as I can, some of the questions that have been raised—and they are good questions—and briefly run through why Australia's sovereignty will really suffer no major incursion through joining this new tribunal; that is, in other words, why this ICC is a safe entity as far as Australia is concerned.

The first prong of the argument that you have to realise concerns the nature of the crimes before the International Criminal Court. As I speak, please feel free to stop me at any point. The court is only going to have jurisdiction over individuals who commit the most serious crimes of international concern. Genocide and crimes against humanity, by their very definitions, are extremely serious crimes. As a threshold, they require the occurrence of widespread or systematic crimes against a civilian population. The conduct has also got to be committed as part of a state or organisational plan or policy to commit such crimes, and committed with knowledge of that organisational or state plan or policy.

The exact elements that the prosecutor has to be able to establish for each of these are very clearly set out in the statute and they are further very clearly elaborated—each of the elements of each of the crimes—in the *Elements of crimes* paper, which has been one of the documents under negotiation for the past couple of years at the Preparatory Commission. Basically, without going into every single crime now—we do not have time—it is a very high threshold and it is very clear what has to be proved.

Senator SCHACHT—Does female circumcision, which Ms Phillips from UNICEF described today as a crime against humanity, fit the definition of the working groups you have been part of?

Ms Brady—I know that particular crime was referred to. I would have to go through this, but I think it is possible that it could go through as some form of sexual slavery or enforced sterilisation, or one of those types of crimes or other crimes that are along the same magnitude.

Senator SCHACHT—Is there any particular information you have from the work you have done that you could provide us with about—and I am totally opposed to female circumcision—whether it is possible to start prosecuting people and countries in the Horn of Africa, for example, where the practice is condoned as official policy?

Ms Brady—Yes. Firstly, for the crime, you would have to show that the state was actively promoting it. It would have to be part of this. It could not be a one-off person who just decided to set up a practice. I also think it should not be forgotten that the court is not going to go after—I think you raised the example—the lowly midwife somewhere in a local village.

Senator SCHACHT—I do not know what the correct term is but I refer to the local person in the village who conducts the operation.

Ms Brady—I do not think this court is going to have the time or the resources to get itself involved in a one-off situation like that. It would not go after that person. It would presumably seek the higher person, up the chain of responsibility—whether that is in a civilian or military situation.

Mr BARTLETT—Without the context of a war or an internal conflict, if a political leader, who was enforcing the cultural mores of that country, pursued that policy or any other policy considered by the ICC to be a crime against humanity, they could be prosecuted outside the context of conflict internally or internationally.

Ms Brady—That is correct, because crimes against humanity do not require a nexus with any armed conflict. That nexus has been broken. At the Nuremberg tribunals, the Nuremberg court did not require crimes against humanity to occur within the context of war.

Mr BARTLETT—So a practice that is totally consistent with the culture of a particular country could be deemed a crime against humanity if the ICC overwhelmingly considered it as such?

Ms Brady—Theoretically, that is possible, yes.

Senator MASON—What about cultural diversity and multiculturalism?

Ms Brady—I think we have to get back to looking specifically at the very serious nature of the crimes.

Senator MASON—I raise that metaphorically.

Senator SCHACHT—There is that argument—they should be able to do that under cultural relativism.

Senator MASON—You are quite right; that is exactly right.

Ms Brady—The crimes we are talking about are ones which are egregious. We are not talking about a minor little human rights violation. Clearly, there is a spectrum, as it were, of human rights violations and at some point along that spectrum they become crimes against humanity. They are set out in the statute and in the *Elements of crimes* paper. For a specific action, I would have to take you through article 7 and then the *Elements of crimes* paper to say, 'Yes, that action would actually fall within the definition of crimes against humanity.' It is a very high threshold to meet in every single case.

Mr BARTLETT—But it is still an issue of the view of the majority versus the view of a minority in one country, albeit it might be 99 to one. It is still a view of one country's cultural practices potentially against even the overwhelming opinion of the rest of the world.

Ms Brady—If they fell within the egregious types of crimes that are crimes against humanity, that do breach these international norms that all countries should live by, then yes.

Mr WILKIE—I am sorry that I missed your opening statement. What is your opinion about the sovereignty arrangements? Do you think there is a problem there?

Ms Brady—I do not, and I will get to that, if I could, after I deal with the crimes that fall within the court's jurisdiction, because the crimes are very important as the first prong of understanding that these are crimes that, quite frankly, an Australian is unlikely to ever commit. Crimes against humanity and genocide are extremely serious.

In terms of war crimes, the court is going to be mandated to have jurisdiction, in particular, when they are committed as part of a plan or a policy, or as part of a large-scale commission of crimes. Again, if you are looking at a soldier, say, who commits a one-off crime or which is unrelated to a larger plan or policy, it is highly unlikely that would capture either the attention or the resources of the International Criminal Court, by virtue of the fact that its jurisdiction is really limited to the most serious crimes of concern to the international community.

To get to your question about sovereignty and whether there are sufficient safeguards on that, I think there are a number of what you could call procedural safeguards which have to be gone through before the court or the prosecutor could even commence an investigation—before you even start or open an investigation. Most of these stem from the principle that has been spoken about this morning, which is complementarity.

I would like to look at the three ways in which matters can be referred to the court and then look at the safeguards which are in place before an investigation can be commenced, because they do differ for the three ways in which matters can come before the court. Firstly, there are referrals from the Security Council. This will require the Security Council to pass a resolution, under its powers which it already has under the UN Charter, and which it has already used to establish the international criminal tribunals for the former Yugoslavia and Rwanda. In this respect, having an ICC will, in effect, create a permanent way of replacing this very unwieldy

and somewhat piecemeal and ad hoc system that we presently have of creating these tribunals after the event—after a horrific event takes place. I refer to Rwanda, the former Yugoslavia, and there is one under consideration at the moment for Sierra Leone. The Security Council can also pass a resolution asking the prosecutor to back away from an investigation for 12 months. That is a renewable period. I think somebody here asked this morning whether or not that could be renewed. It is clearly a safeguard, a power, that vests in the Security Council.

The second way of bringing matters to the court's attention is if the prosecutor receives information from credible sources and then decides to bring an investigation on his or her own motion. Because of concerns that some states had that there could be some rogue prosecutor checking out the various countries in the world looking for things to prosecute, there are a number of safeguards to ensure that this 'rogue prosecutor' just could not exist in practice. Firstly, the prosecutor has to obtain an authorisation from the court itself, so there is an extra step of a judicial check on the prosecutor's action.

Senator COONEY—Is that the court that is actually going to hear the matter?

Ms Brady—No, it is not the court that is going to actually hear the matter. It is a pre-trial panel.

Senator COONEY—So there will be different judges?

Ms Brady—Yes, there will be different judges from the trial judges. The pre-trial chamber will be different from the trial chamber. Then the court has to give approval and has to determine whether there is a reasonable basis to believe that crimes within the court's jurisdiction have been committed and that the case does fall within the court's jurisdiction. After that—and this is the absolutely critical stage that should answer the concerns on sovereignty—this safeguard kicks in, not just for the prosecutor bringing matters on his or her own motion but also in the case of a referral by a state party, which is the third referral mechanism for matters to come the court's way.

So in this case, before even opening an investigation, the court has to inform all the countries that would ordinarily exercise jurisdiction. This would include the territorial state, the country of the person's nationality and probably the country which has the person, the custodial state. These are the obvious countries that would ordinarily exercise jurisdiction. If the country says to the court, 'We are handling it. We are investigating or prosecuting or we have done so,' then the court has no choice but to defer to that country unless the prosecutor makes an application which is then determined in a positive way by the court that the country is genuinely unable or unwilling to proceed, and there are appeal mechanisms from that particular decision.

If the court says, 'All right, Country, you are dealing with it so we will back out of here,' there is a further way in which this can be reviewed. Six months after that deferral or at any time when information comes to the prosecutor's attention that there has been a significant change in circumstances—for example, that the country has done absolutely nothing, even though it said it was going to act—the prosecutor can go to the court and re-ask for confirmation of that investigation, and that again is appealable. So you cannot have under this system a country that just says, 'Don't worry, we are taking care of it. Go away.' The claims that they make have to be substantiated.

CHAIR—That is a good and thorough answer. Any other questions?

Mr BYRNE—With respect to extradition, how would that operate after, for example, you proceeded to prosecution but the country did not want to hand the person over? What would be the mechanism for that person? The second part of that question is: would that trial occur in absentia?

Ms Brady—No, there is no provision for trials in absentia. Answering the question on extradition—or as it is called under the statute 'surrender'—a state party is obliged if a country is a party to the treaty, it has ratified, to cooperate with requests for surrender.

Mr BYRNE—What exactly does that mean? If they are obliged to and they do not, what happens?

Ms Brady—If they do not cooperate with the court in the way that the court has asked then the matter can be referred to the assembly of states parties—and this is where we got into discussion this morning about the sanction. In the statute itself it is not clear what sanctions are made.

Mr BYRNE—Is that to be worked through? Is there any contemplation of some sanction, or is it unresolvable at this point in time?

Ms Brady—I do not recall discussions on that point. I am not sure.

Senator COONEY—In relation to the history of the way people were prosecuted over the era, I am interested to hear what discussion took place at the conferences. I am getting at this: hopefully, the criminal law will pick up everybody who comes under suspicion or against whom some evidence exists. I know prosecutorial thinking is that you have to get some people, and that it is better to get some people than none. I can understand that, but it is better if everybody is picked up. If you look at the history of how the trials on matters arising out of wars come about, it always seems that charges are brought against the losers, as may have been mentioned this morning. You do not hear mention of the Dresden fire bombing, the rocketing of the Chinese Embassy in Belgrade, the shooting out of the skies of the Iranian passenger flight, nor other things like that. One of the problems I have with the approach—

Senator SCHACHT—Nor Coventry, Rotterdam or Belgrade—the German air force people responsible for those were never charged.

Senator COONEY—Senator Schacht raises the point that the people who perpetrated that were not charged; however, Goering, who was in charge of the Luftwaffe, was prosecuted.

Senator SCHACHT—But he lost the war.

Senator COONEY—That is exactly the point I am making, and with a little bit of luck—and if you can keep quiet—Ms Brady might be able to answer the question.

Senator SCHACHT—I am glad he lost, and I am glad he committed suicide.

Senator COONEY—Can you give us some thoughts about that—and ignore, if you would, Senator Schacht.

Ms Brady—I will try my best. I think your question actually shows why we need a permanent International Criminal Court. In the past there have been criticisms, for example, of Nuremberg being an application of victor's justice after the event. If you look at the tribunals that have been established to date, you might ask: why have these three in particular when just as awful things have happened in other countries? In some ways, given the way in which matters can be referred to the court and the fact that a multilateral negotiation process was agreed to after thousands of hours of discussion among basically all of the countries of the world—I think 165 participated—I think that this court goes a long way to answering those concerns of selectivity.

Senator COONEY—But does it? What happens if America is in the firing line? What are you going to do if the secretary of state visits Greece? Are you going to arrest the Secretary of State of the United States on the basis that the United States may have bombed an embassy there—which they say was unintentional? If you do not do that, why do you then arrest people from the losing side who say, 'We did not intend to do it.' Intention—it is a bit like murder—is what it is all about. The prosecutor can simply say, 'We think that one group of people—the winners—had good intent, and therefore we will not even prosecute them. The other people had a bad intent, and therefore we will.'

Senator SCHACHT—How do you commit rape without intending to commit rape?

Senator COONEY—You cannot.

Senator SCHACHT—That is right.

Ms Brady—Once again, I will go back to my original answer, but I add that if you look at the current tribunals—for example, the International Criminal Tribunal for Yugoslavia—they have the ability to prosecute people on all sides of the conflict; and that indeed happens there.

Senator COONEY—Could I just clarify that? You said that in Yugoslavia at the moment, on both sides of the conflict, we are contemplating prosecuting people from the American forces—I do not know whether it is NATO. Are we contemplating prosecuting them? Can I just get this on the record?

Ms Brady—With the NATO example, my understanding is that it was in front of the prosecutor from the ICTY to look at and that she declined to prosecute in that situation. Obviously, I cannot comment on what basis she declined to prosecute in that situation. But if you look at the Yugoslav tribunal, the defendants come from Serbia, Croatia and, in some instances, there are convictions against Bosnian Muslims. There all sides are reflected.

Senator COONEY—This is what local prosecutors are oftentimes accused of. Somebody who is small, powerless and has not got the resources is an easy mark. You can hit them, but the big and the powerful never seem to be prosecuted. On the evidence, that has always been the situation in wars. It is the losers that miss out. Can you remember anybody from up the ranks

being prosecuted on a winning side throughout history? There was William Calley, I think, in Vietnam.

Ms Brady—I was just going to say Calley.

Senator COONEY—But that is not really the issue.

Ms Brady—But isn't this precisely highlighting why there is a need now to have an independent system that is going to not just dispense victors' justice? Doesn't that actually support the argument for the ICC?

Senator COONEY—You cannot suddenly create a prosecutorial system ignoring a history or think that somehow, because you pass a statute, it will cure a history. You can have the best system in the world but, if you have not got the right spirit and the right people running it, it will not work. If you have not got the right people in charge, it will fall over. With great respect to you, I cannot imagine anybody from the United Kingdom, the United States—or China—or anybody coming from a power like that bowing their heads to this sort of court. Why should they?

Ms Brady—That is just the point: nationals of all countries could potentially come before the court. Then you have to look at what the safeguards are. I would suggest that the United Kingdom or the United States could adequately take care of the situation within their own court system. Maybe that is the answer to your question. Perhaps we will not see nationals from certain countries there, because they will deal it—as they are already bound to.

Senator COONEY—So this court is a court for a particular group of people?

Ms Brady—I would not go so far as to say that, either.

Mr ADAMS—Senator Schacht brought up a situation where, say, the Americans were involved in some action or had funded an organisation that had done things in a country to destabilise a government that they did not like if it were in their interest. Where do we go with that? What sort of sanctions? You say you have not dealt with the sanctions issue; it is a pretty big issue not to have dealt with if you have been negotiating for 2½ years.

Ms Brady—I think we have to talk about sanctions that can be applied when a state party does not cooperate with a request—in the situation that you raised, a request for information. In the example that you gave, we have a witness or someone from the government of a country concerned who has information. Does the person have to give over information to the court? There are provisions in the statute dealing with that very question—article 72: sensitive national security information. No, basically.

Mr ADAMS—They do not?

Ms Brady—The country has the right, after consultation with the court, to see whether something can be worked out and what information can be given. Essentially, the country has the last say on whether or not to give information that is sensitive to national security.

Mr ADAMS—Senator Cooney's words, 'This court will be a court for a certain amount of countries but not for others,' ring a bit true with what you have just said.

Ms Brady—I think the greatest legacy of the court will be hopefully that countries will actually deal with these sorts of crimes themselves in their domestic courts. That could well be the best thing to come out of this regime—if you want to call it a regime.

Mr ADAMS—I understand that.

Mr BYRNE—I have a quick hypothetical scenario for you, which will not be as outlandish as the one I put earlier today. In the scenario, America continues to use uranium depleted bullets, and uses them, say, if the conflict resumes in Yugoslavia for whatever reason. According to article 8 and its sections, including 19, they are talking about the sorts of weapons and projectiles 'which cause superfluous injury or unnecessary suffering'. Could there then be a case mounted that the pilot of that particular jet was in fact engaging in a war crime?

Ms Brady—That is a good question. If you look directly at that provision, not only does it have to be an item of weaponry that causes superfluous injury but also it has to be the subject of a comprehensive prohibition, included in an annexe to the statute and agreed to by way of an amendment to the statute—

Senator SCHACHT—That is uranium weapons.

Ms Brady—as long as all of that is taken into account and—

Senator SCHACHT—The nature of the weapons has to be in the annexe.

Mr BYRNE—I do not think they have been approved at all.

Ms Brady—The prohibition on that particular form, depleted uranium—you have used the example—would have to be included in an annexe. That amendment would then have to be passed or agreed to through the amendment procedure, and agreed to by, I think, a seven-eighths majority of state parties. No country can be bound unless it has agreed to that specific amendment.

Senator MASON—I suppose Senator Cooney's point, Ms Brady, was that if you were fighting the Vietnam War today it would be very interesting to see how the ICC would apply. I move to something that Senator Schacht raised earlier, which was about particular procedural points raised. You say yourself that you were involved in participating in drafting laws of procedure in evidence, and you say, on the last page of your submission, that 'those provide a solid architecture for future courts' proceedings'. On page 7 of your submission you talk about the standard of proof. When Senator Schacht asked this before, we did not get a lot of detail from the previous witness. Given that you were involved in the drafting of this and that, with respect to evidence, rules of evidence are different whether you are here or in civil law countries et cetera, what are the rules of evidence with respect to hearsay? It may sound technical, but I ask because whether or not certain evidence is admissible can in fact determine whether, as you know—I used to be a prosecutor—a prosecution is successful.

Ms Brady—Absolutely. At the outset I must say that the due process and fair trial guarantees that both the statute and the Rules of Procedure and Evidence are among the most sophisticated and fair of any system of law. It is true that they were negotiated among 160 countries in working groups during the discussions and, in particular, that this balance that had to be struck between, especially, common law and civil law approaches to questions of procedure in evidence. It is significant to mention in this regard that the two basic drafts for the Rules of Procedure and Evidence were a draft proposal put forward by the Australian delegation and a draft proposal put forward by the French delegation; that these two formed the basis for the rules. From there, of course, we had further discussions and as it was a—

CHAIR—Can we get back to hearsay? He asked you about hearsay.

Ms Brady—Sorry. I just wanted to give the background, so if you understand—

CHAIR—Did he ask for the background? He wanted to know about hearsay.

Ms Brady—Fine. I will answer directly on hearsay.

CHAIR—Is it or is it not in the statute?

Ms Brady—On the question of hearsay evidence, if it is relevant and probative it would be admissible. It is very similar to our system of rules on hearsay that have been in our own New South Wales and Commonwealth evidence acts: that the judges will determine whether or not to accept the hearsay evidence based on whether it is relevant, probative and not prejudicial.

Senator MASON—As a former prosecutor, I can already see the opening the chairman has created for me. The fact is that they are not the same, and therefore it would be technically possible for someone to be convicted or, indeed, acquitted in an Australian court when they would have been acquitted or convicted in an international court, given that the rules of evidence are different.

Ms Brady—I think that would be highly unlikely.

Senator MASON—You are not sure about that, though, are you?

Ms Brady—The rules on evidence—

Senator MASON—I can remember being involved in civil law and common law. Senator Schacht raised this—

Senator SCHACHT—Did you lose both?

Senator MASON—Senator Schacht, I nearly always lost. That is why I entered politics.

Ms Brady—To answer your question, a lot of the common law rules that we have—for example, on hearsay—are driven by the fact that we have juries. We have juries of 12 people who come from the community to hear trials. They are not professional judges. On this tribunal

we are going to have the fact finders being a panel of judges, who perhaps do not require as many sophisticated and strict exclusionary rules of evidence. There are exclusionary rules in the Statute on evidence: evidence that is illegally obtained, evidence that is obtained in violation of fundamental human rights—you cannot torture somebody—

Senator MASON—I understand. But you see the chairman's point, though? It is a very fair point to say that they are not the same.

CHAIR—Thank you, Ms Brady, for establishing that for us, and thank you for the testimony. It has been a very comprehensive exercise.

Ms Brady—Thank you very much.

[2.17 p.m.]

BECKETT, Mrs June, (Private capacity)

CHAIR—Is there anything you wish to say about the capacity in which you appear?

Mrs Beckett—I am co-director and writer for Brill Publications, publishers of *The Issue*, but today I appear as a private citizen.

CHAIR—Although we do not require evidence on oath, these are legal proceedings of parliament and warrant the same respect as proceedings of the House or the Senate. The giving of any false or misleading evidence is a very serious matter. Would you like to make an opening statement before we go on to questions?

Mrs Beckett—Thank you, Mr Chairman. Although, as usual, the people of Australia have been left in complete and abject ignorance in relation to this statute, it appears that our government, together with Canada, has been the major force behind it. Without Australia's role, the statute would never have been born. Our minister's outrageous actions have been aided and abetted by the leaders of the major media empires, who have imposed a blanket ban on publicity regarding the statute. For years, any member of the public who has spoken of the New World Order has been mocked as a fool. Nonetheless, such a plan has been quietly fermenting in the background with the support of the media, both here and overseas.

In my supplementary submission I have referred to the communists' involvement with the UN, both at its inception and through the years—a matter of historical record. I have referred to the multitude of NGOs, which are applying extreme pressure on national governments, particularly in the USA, to ensure that the court is established in the interests of world government. One of these NGOs is the World Federalist Association, which makes no secret of its desire for global government. The well-known American CBS newsman, Walter Cronkite, in a speech to the WFA, is reported as having said that the UN should be strengthened, as a first step towards world government, with a police force able to enforce its international laws and keep the peace. He further said that we would achieve world government by giving up some of our sovereignty and has called for the ratification of the statute. Hilary Clinton allegedly hailed Cronkite for inspiring all of us to build a more peaceful and just world, while ex-President Clinton is reported as having sent a note to them some years ago wishing them future success.

Another influential journalist was Strobe Talbot, Clinton's deputy secretary of state, who wrote in *Time* magazine about a world in which nation states would disappear and people would become world citizens. It is obvious to me that we have been deliberately kept in the dark about this statute by our own media leaders, with very few exceptions, because of their support for global government.

As far as NGOs are concerned, I have said that their backgrounds are highly questionable. For instance, is the committee aware that the organisation known as Human Rights Watch, who have given evidence today, administer the Hellman-Hammett grant program, which is financed from the estates of two Americans who were notorious communist sympathisers? Does this not therefore raise questions about the political agenda of Human Rights Watch, which is so eagerly pressing for the establishment of the court? I would like to read you the special contribution to

the 1994 *Human Development Report* of the UN Development Program under the heading 'Global governance for the 21st century'. It states:

Mankind's problems can no longer be solved by national governments. What is needed is world government. This can best be achieved by strengthening the UN system. In some cases this would mean changing the role of UN agencies from advice-giving to implementation. Thus, the FAO would become the World Ministry of Agriculture and UNIDO would become the World Ministry of Industry. In other cases, completely new institutions would be needed. These could include, for example, a permanent World Police force which would have the power to subpoena nations to appear before the UN International Court of Justice or before other SPECIALLY-CREATED COURTS. If nations do not abide by the Court's judgment, it should be possible to apply sanctions, both non-military and military.

This same report includes a plea for a global tax that could generate $1 trillion a year for the UN and other international agencies. The minister has made one fatal mistake in all of this: he has foolishly overlooked the spirit of the Australian people. I am an Australian. On behalf of all those who have been denied a voice, I reject the concept of global government; I reject any attempt by anybody, either within Australia or overseas, to take away our democratic rights; and I reject absolutely and without reservation this attempt to destroy Australia's sovereign independence by ratifying the statute.

Senator SCHACHT—Mrs Beckett, I read your submission with some interest. I notice on page 12 of your submission you say:

For a great many years, a few brave souls have endeavoured to highlight, for the benefit of others, the dangers of the Fabian 'gradualism' approach, whereby One World Government will eventually take over.

Have you ever met a member of the Fabian Society?

Mrs Beckett—Not that I am aware of, but then they do not make it very public.

Senator SCHACHT—Let me tell you that I am a member of the Fabian Society and have been a member for 20 years plus. So you have met one, and you can report back to your friends that I am an evil person in favour of one government. I really want to point out to you that, if you know a bit of history about General Fabius, a very important date is coming up. It is the anniversary of one of his great battles, when he defeated the Carthaginians some 2,200 years ago. That is a date on which Fabians around the world will, from a secret room in the United Nations, rise up and impose a world government. You may be able to find, by reading ancient text, what that date will be. It is coming up soon, but I would suggest that it would be something that you might find very useful to go and investigate. You are probably not aware that us Fabians have taken over the CIA, the KGB, MI5, ASIO, the IMF, the World Bank and many other organisations. I think if you go and investigate all of those, you will find that there may be something in your conspiracy that you put down that us Fabians are going to achieve in the near future. Finally, you will probably see all of this in a future episode of the *X Files*.

Mrs Beckett—Mr Chairman, may I ask if that is relevant?

Senator SCHACHT—It is as relevant as the garbage you have written here.

CHAIR—Don't worry about that; it is more of a statement than a question. I will go back to the original order for questions which had Mr Adams starting.

Mrs Beckett—Mr Chairman, I thought the idea was that the people of Australia could have a say without being insulted.

Senator SCHACHT—I am not going to be insulted by this stuff without it being challenged. It is just garbage.

Mrs Beckett—You have the right to challenge it and I have the right to say it.

Senator SCHACHT—Of course. Absolutely. I believe in absolute free speech as a human right everywhere.

Mrs Beckett—Good. Absolutely—so do I.

Mr ADAMS—Mrs Beckett, globalisation, which is driven by economics as much as by anything else, is certainly imposing a lot of changes on many different groups in the world. Do you feel that people are setting out to set up world government, that that is the purpose of these changes that are taking place? Do you feel that it is not the economic process that is taking place—that evolutionary change of markets, change of politics and end of the Cold War—that sort of thing? Do you feel that there is a group of people driving this? I have picked up that you think there is.

Mrs Beckett—Yes, I most certainly do, and this has been going on for many years. The evidence is overwhelming if we care to look for it. But the trouble is, as I said in my opening statement, that anybody who dares to mention this could be a possibility is laughed at and mocked. I am sitting here saying that I believe it is happening, and that, little by little, all the stepping stones are being put into place. This statute of the criminal court is designed to take away our sovereignty. That is not June Beckett speaking; that comes from many greater minds than mine, including, I have to say, Sir Harry Gibbs, a former Chief Justice of the High Court, as you know. He has written to me twice on the matter. He said:

... I agree with you that if Australia ratifies the treaty, the result will be that Australia would have surrendered part of its sovereignty. I agree also that Australian service personnel and indeed other Australians may find themselves brought before the Criminal Court as a result of international politics.

He also said:

A Convention setting up a court to try war criminals is being considered for ratification at present. One can understand the desire to bring to justice persons who commit atrocities—

of course we all do—

but the establishment of the proposed international court will further surrender some of our sovereignty. It cannot be assumed that the alleged war criminals will always be the inhabitants of some foreign country. It has been suggested that Baroness Thatcher should be indicted for the sinking of the Belgrano. Who knows what military efforts of Australia might provoke a similar suggestion, and who can tell what action such a suggestion might provoke.

Indeed, a very good question.

Mr ADAMS—Sure, and it is worth having it on the agenda for discussion. The system in the world of large blocks of capital that are made up by corporations: are they driving globalisa-

tion? I think they are, to some degree, because of the way that they now operate and the size they have become. That is certainly imposing some pressures on sovereign states, on state governments and on countries, because they have to deal with these corporations which are of enormous size. Many of them have much bigger budgets than a country's budgets, given the money they control and the knowledge and skills that they have within them.

Mrs Beckett—Absolutely, yes.

Mr ADAMS—You made some comment about one other group that gave us evidence—you said that they seem to be more to the left of the political spectrum. How do we conciliate those two?

Mrs Beckett—I do not sit here pretending to be any kind of an expert, but it is clear to me that multinationals and big business do run the world together with the media empires which is why I mentioned that in the first place. The media moguls around here do not tell us anything that is going on.

May I say with deep respect, Mr Chairman, that I am most unimpressed with what I have heard today. I would say that 98 per cent of the population are unaware of this hearing of your inquiry. Indeed, I have to question why you are only sitting in Sydney for one day, when New South Wales is the most populous state. Until this morning, I was the only witness speaking against this treaty out of eight witnesses, six of whom are UN affiliated organisations, lawyer groups with clear vested interests and NGOs. Is this not a matter between the Australian people and the government? Nobody else really has any opinion to offer.

Senator COONEY—You said you were the only one. I think there is a very eminent ex-senator who is going to come to the table and perhaps point out to us the problem.

Mrs Beckett—I am very pleased to see it. I am very happy about that.

CHAIR—On the point of the scheduling, we generally schedule non-Canberra sittings when as many members as possible are available. We try and do major capital cities: Brisbane, Sydney, Melbourne and occasionally Adelaide, and we are looking forward to going to Perth. There is no rhyme or reason to it. It is getting everyone's diary together and if we had more time outside parliament, we would spend more time. Many seats these days are so marginal, I have to say, that there is a much greater pressure on certainly members of the House of Representatives and also the Senate.

Mrs Beckett—Yes, certainly.

Mr ADAMS—Yesterday we were here dealing with the WTO inquiry and its relationship to Australia.

Mrs Beckett—The reason I raised 'sitting for one day in Sydney' was not a criticism of you, because I understand you have other business to attend to. But is it not significant that out of the eight witnesses today, until the former Senator Stone joined us, there were only going to be two private citizens speaking to the inquiry? That, I believe, is significant because nobody knows it is happening.

Mr ADAMS—I can assure you that this committee will certainly receive submissions from any citizen who puts them before us—by sending them to Canberra in whichever form—for quite some time in the future.

Mrs Beckett—That is so long as people know it is happening.

Mr ADAMS—You made an attack on the media in your statement in that the media is running its line to stop discussion about the international courts of justice, or whatever. I just want to raise one more point on your opinion on globalisation and whether we can stop globalisation in the sense of corporations becoming bigger through the World Trade Organisation. Can we just say we will not deal with that as a country?

Mrs Beckett—We cannot say, 'We do not want to be part of it, thank you very much. We will go off and do our own thing.' The paramount point here and the most important thing is that our government's first duty, whichever side of the fence it happens to be on, is to look after its citizens, the welfare of Australians.

Mr ADAMS—Sure, that is what I believe in.

Mrs Beckett—We should not bow to overseas pressure, so we should not sit back and allow our farmers, for example, to walk off the land because we are importing salmon and Californian grapes, et cetera. We should not allow multinationals to not pay tax. We should insist that anyone who comes here should be an Australian, not a Chinese Australian or a Lebanese Australian, but an Australian, and if they do not like it, 'Please go home.'

Mr ADAMS—On the point on the trade issue that you dealt with—it is a little off the criminal court—but that is a very simplistic statement to make in the sense that, and perhaps I have a broader understanding of world trade, Australia exports 80 per cent of its produce so therefore we are a seller.

Mrs Beckett—Yes, but we could also be a manufacturer if all our manufacturing industries had not closed down. We are importing everything from paperclips to aeroplanes. Why? We can make them here. We have the expertise. We have the technology. We have the people. We have the skills. Yet we are importing everything. Why?

Mr ADAMS—We certainly used to, and you are quite right.

Mrs Beckett—Why have we not now? Because global interests have said, 'No, I want to do that.'

Mr ADAMS—Somewhere else?

Mrs Beckett—Somewhere else.

Mr ADAMS—Because it suits that block of capital to do it somewhere else.

Mrs Beckett—Exactly. So they are employing some poor devils in Asia, South America or wherever, and paying them $2 an hour. They are being totally exploited.

CHAIR—We must get back to the court.

Mrs Beckett—Yes, I would be delighted.

Senator MASON—Thanks, Mr Adams and Mrs Beckett. It is an interesting discussion because there is a common thread—you are quite right, Mr Adams—running through both days of hearings, and that is a concern with national sovereignty, whether it be in regard to economics or the legal system today.

Mrs Beckett—Yes.

Senator MASON—I will summarise a large argument very quickly, Mrs Beckett. You say in your submission that you do not defend the Milosevics of the world at all.

Mrs Beckett—Of course not. Who would?

Senator MASON—Indeed. The argument we have heard from many eminent witnesses today—I am sure you would agree, well motivated and sincere witnesses—is that, if we are to do something about the Milosevics of the world, can you think of a better way of doing that than by supporting something like this? In other words, have you got a better idea than the establishment of the International Criminal Court?

Mrs Beckett—No, I do not. I have freely admitted that I do not. But that does not mean to say we have to sign up to something which I think will have grave ramifications for all of us in a few years time, when I do not believe it is the answer. Today, if I may say so, there have been so many assumptions made. I have been making notes here. Things like ‘A permanent body is likely to be more effective.’ ‘Probably signing up to this thing will enhance our sovereignty.’ There are all these maybes, ifs and buts. We do not know.

Senator MASON—I think you are right and I think the committee as a whole has some reservations; there are assumptions made and so forth. I asked that question because we all want to move forward and the issue we have to weigh up is, on balance, whether perhaps a slight diminution of sovereignty is worth it in order to move forward internationally. I am not advocating anything. I am putting that forward as the position.

Mr BYRNE—What would you anticipate would be appropriate public consultation with respect to this? If you were designing something for this committee or this whole process, what would you be saying? How should we be consulting? What should actually happen?

Mrs Beckett—The first thing is that you have got to get the community involved.

Mr BYRNE—How would you do that?

Mrs Beckett—With a great big advertising campaign. That is the first thing. I think that, out of all the United Nations treaties and conventions that we have ever signed or contemplated signing, this would have to be the most important, because it has grave ramifications further down the line. This cannot be decided in five minutes. The way that Mr Downer sought, in obscene haste, before Christmas to ratify this thing by Christmas eve, I found appalling. It should take years of discussion. We cannot decide this sort of thing in five minutes. To answer your question, yes, let us have a big nationwide advertising campaign. Let us have meetings in regional centres. Let us invite further submissions, people having discussions, visiting speakers and this sort of thing. If it takes months or a year, so be it. At least we will know at the end of it what the people think. Is that not important?

Mr BYRNE—On issues like this, would you propose a referendum?

Mrs Beckett—Yes. You will notice at the end of my submission—

Mr BYRNE—Unfortunately, I have not seen the last part of it. Excuse my ignorance.

Mrs Beckett—Right at the end I finished with the punchline, you might say, as follows:

Centenary of Federation celebrations caused many of our political leaders to wax lyrical on the subject of democracy in Australia. I suggest that if the Government is really concerned with 'democracy' in this country it will allow the Australian people to make the decision in relation to this Treaty. I therefore challenge the Government to call a referendum on this subject, to be held in conjunction with the federal election at the end of this year.

It would add minimal cost. As we all know, a referendum held in conjunction with a federal election involves minimal cost. We were granted one on a most unimportant subject—the republic. Although we did not ask for it, we got it anyway. So why don't we have one on a subject which I believe is infinitely more important to every man, woman and child in this country?

Senator SCHACHT—Do you mean have a plebiscite on this?

Mrs Beckett—No, I mean a referendum.

Senator SCHACHT—A referendum is for matters under the Constitution. You cannot have a referendum on it. You can hold a plebiscite to get an indication as an understanding.

Mrs Beckett—Why can't we hold a referendum?

Senator SCHACHT—Because a referendum is for if you are taking about changing the Constitution. You are not changing the Constitution with this. Do you want to change the Constitution?

Mrs Beckett—We are not?

Senator SCHACHT—Sorry, you want to change the Constitution?

Mrs Beckett—How can you ratify the statute and not change the Constitution?

Senator SCHACHT—Because the parliament has got the power in the Constitution.

Mrs Beckett—How has it got the power?

Senator SCHACHT—It is written in the Constitution.

Mrs Beckett—Where?

Senator SCHACHT—Read the Constitution—it is in there.

Mrs Beckett—I know it very well. You are talking about external affairs.

CHAIR—If there is a conflict between the treaty and the Constitution—a clear conflict—I suppose, logically speaking, in order to validly ratify or validly pass an enabling act of parliament you would have to amend the Constitution. So I am sure that is not what you have in mind.

Mr BYRNE—I think the sentiment in what June is trying to say is that obviously there needs to be greater consultation in the decision—we can split hairs about referendums, plebiscites or whatever. I think the point that June and a number of people here are making is that, with a threshold issue like this, there should be some capacity to vote on whether or not they should accept it. I think that is the point you are making.

Mrs Beckett—Yes, indeed it is. I believe that is very important.

Mr BYRNE—Is it just this particular treaty or is there something in the future—if we are talking about the future? Just from your perspective, what do you think people actually want with respect to, say, future treaties and stuff like that? This is a threshold issue and it is of substantial significance to you and other people, but in the future what sort of mechanism would you be talking about with respect to future ratification of treaties that may impact on people?

Mrs Beckett—I have a fair bit to do with the community around me and indeed all around Australia being in the media business myself. I can tell you quite definitely that the public opinion is that they are horrified and shocked at the number of treaties signed on our behalf without any consultation whatsoever which have had all sorts of grave effects on us as a people and on our welfare. People are beginning to resent it very, very deeply. When word gets out about this—as it will—there is going to be an almighty outcry.

Mr BYRNE—But this particular treaty—and I think John Stone was saying this also—is something that causes you and a number of other people of like mind to you very significant concern.

Mrs Beckett—Anybody who knows about it hates it.

Senator COONEY—Thank you very much for giving evidence. I think the evidence today has been good and given by people who are sincere. As I understand it, by what has been put so far—and the problems you find are, I think, very deep and proper problems—I think what you

fear is the exercise of arbitrary and capricious power, particularly by those who have not been elected.

Mrs Beckett—Yes.

Senator COONEY—But I suppose the exercise of the most capricious and arbitrary power is that power exercised by armed forces, whether it is the bombing of Darwin—which you would be too young to remember, but I do—

Mrs Beckett—That is very kind of you. It is not quite true but never mind.

Senator COONEY—Do not go into that! You heard of the terrible, frightful thing that nobody here would tolerate—the cutting off of babies' hands and arms. That was graphically described. I thought that what had been put so far was, 'This is the proposition we are putting. This court we are setting up has all these problems and all these great difficulties and ought to be looked at carefully, but wouldn't it be better to have this sort of thing which may have elements of being arbitrary and capricious but does not have the elements of capriciousness and arbitrariness that go with an armed force that comes in?' So I think the argument that has been put is like Churchill's argument. You might remember that in 1947 he said:

... democracy is the worst form of Government—

he said this in the British parliament, and everybody's head went back—

except all those other forms that have been tried from time to time.

What he was saying was, 'Democracy has got all sorts of problems, but really it is the best we can do.' I think that is the sort of argument that is being put here. People are saying, 'This has got all sorts of problems but it is the best we can do, and if we do not want the bloodshed and the devastation of rape and what have you, isn't it better to try to do it this way? If somebody invades us, we have got to retaliate—and we had to go into East Timor and what have you. If it could be done in a better way, in the sense of a less violent way, wouldn't that be better?' What do you think of that?

Mrs Beckett—I am not quite clear as to your question, but I understand you are saying, 'This is better than nothing.' Is that what you are saying?

Senator COONEY—No, not better than nothing; this is better than a war where we would have to invade, if you like, East Timor, or whatever. Can you follow what I am saying? Even though it might be arbitrary, it is better this way than having bombs dropped on us or us dropping bombs on others.

Mrs Beckett—Yes, of course—nobody wants that. But I picked up on a point I think you made earlier which was to do with the fact that this treaty will probably end up applying to only a certain number of countries. China has been mentioned several times. How about we think about the scenario whereby China invades Taiwan—which is not entirely impossible—and there is slaughter and mayhem—you name it, they have got it. If this court is up and running, the court would have, as I understand it, the ability to issue subpoenas and warrants and start

prosecuting. They could do that from The Hague and, no doubt, China would tend to ignore that, or they could try to impose themselves as the court on Chinese soil. Wars have been started for a lot less than that.

China, quite clearly, has no intention of becoming involved with this statute. Therefore, we have the Australias of this world and we have the European countries and quite a number of African countries and minuscule Third World countries such as the Solomon Islands all signing up to this thing, but most of the major powers—and when I say 'most', for example, there is a list which I drew up quickly: China, India, Indonesia, Cuba, Iraq, Libya, Lebanon, Malaysia, Saudi Arabia, Singapore, Sri Lanka, Pakistan, Taiwan, Turkey, Vietnam and Afghanistan—have not signed. One of the ladies this morning said, 'Oh well, once we have got 60 ratifications, the court will come into being and no doubt all these others will follow suit.' Can we sit here and honestly assume that? Of course, we cannot.

Senator COONEY—No. I think what was being said was, 'Perhaps we cannot get the big powerful countries, but wouldn't it be good if we could get some—if we could save some children and women in some African or European countries. Isn't it a good thing that we are able to save, say, 100 people from torture, death and devastation? If we could take this and could guarantee that, wouldn't that be a good thing to do?' I think that was what was being put.

Mrs Beckett—Of course, it would be a wonderful thing and, please God, that will happen. But there are absolutely no guarantees. Nobody wants to see the dreadful misery and horror that is going on around the world. Only a few miles to our north—and I put this in my other submission—the people of the Malukus are being slaughtered and tortured. Senator Schacht talked about female circumcision. We have not only females but males being forcibly circumcised in Ambon in their thousands simply because the Moslems want to force the Christians to join their faith. What is the UN doing about that? Nothing!

Senator COONEY—What could be said is that this court would be able to do something about that. I am not asking you for one minute to say it could, but, if it could stop that sort of thing in that sort of area, do you see any merit in having such a court?

Mrs Beckett—Yes, if it could. Yes, we would all agree with it, but we do not know that.

Senator COONEY—Right. Thanks.

Mr ADAMS—We have not got a public debate.

Mrs Beckett—Precisely.

Mr WILKIE—In your opening statement to us, Mrs Beckett, you made the statement that this statute was the most dangerous and sinister document ever seen. Can you justify that statement?

Mrs Beckett—It is dangerous from many points of view. The first, of course, we have already discussed, and that is a loss of sovereignty. We will become basically a servant to the international community, whatever that happens to be, and I have yet to find out what 'international community' really means.

Mr WILKIE—Can you please define that more, because we have heard legal evidence today to suggest that that is not the case. What do you base that statement on?

Mrs Beckett—Loss of sovereignty?

Mr WILKIE—Yes.

Mrs Beckett—I have already read you Sir Harry Gibbs's letter. There are many people around the country who feel that that is the case; it is not just me talking. We also will be putting our own peacekeeping forces in grave danger. For example, the peacekeeping forces who went to East Timor originally, as I am sure you recall, the Indonesian government were not at all happy about because they felt that we were interfering in their affairs. If this statute is ratified and the court goes ahead, what is to stop the Indonesians making a complaint to the court about Australia's interference in their affairs, whether it be East Timor, Ambon or whatever it is?

Mr WILKIE—But anyone can complain. They would have to prove a case.

Mrs Beckett—That is what they say, but what is their standard of proof? We have only got their word for it. There are all these airy-fairy things that they talk about here. For example, in article 7, there are the words 'sufficient gravity'. What do they mean? Who is going to decide what sufficient gravity is? They also talk about whether a state is unwilling or unable genuinely to prosecute. Who is going to make the decision as to what 'genuine' is?

Senator SCHACHT—Do you think all that material is useless?

Mrs Beckett—Basically, yes, in the way it is drafted. The intent may be a good idea, and certainly we have got to have something, but human beings all around the world are always going to be human beings. There are always going to be wars because of the struggle for power or religious domination and corruption of all types. Unfortunately there will always be war. That is the way we are made.

Mr WILKIE—That is no justification for doing nothing, though, is it?

Mrs Beckett—No, of course it is not. But what is wrong with the tribunals we have, the ad hoc ones which everyone says are no good? Why don't we strengthen them and put a bit more energy into that? Why do we have to tie up all our citizens and put them at risk? There is no statute of limitations here. It means that any one of us could commit some kind of crime which the international community sees as a crime against humanity and we could be prosecuted, we could be up on a charge. You or I could be in prison for the rest of our lives and have our property seized. Is that going to help the starving in Africa? I do not think so.

Mr BARTLETT—I will just make a very brief comment. You mention in your conclusion that it is abundantly clear that democracy in Australia is dead, and you referred to the number of treaties that are being ratified. I would like to encourage you by saying that the whole reason this committee is here is to provide some scrutiny of this process. This committee was established in 1996 to provide some degree of scrutiny. Albeit perhaps it does not go as far as you would want it to go, but the situation is now that before any treaty is ratified it has to come

before this committee. This is why we ask for submissions, this is why we have public hearings and present our report to parliament so there is at least a degree of public scrutiny. There have been not many, but some treaties have been proposed where the committee has recommended against ratification, and in fact the recommendation has been accepted. While it is not perfect, I would like to encourage you by saying that it is better than it has been.

Mrs Beckett—It is wonderful. I congratulate you. I am very happy about it.

Mr BARTLETT—I would make one request. Would we be able to have a copy of those letters from Sir Harry Gibbs?

Mrs Beckett—Most certainly, yes—anything you wish.

Mr BARTLETT—Thank you.

Senator SCHACHT—You say on page 11 that there is no difference in policy or effect between the two major parties and their cohorts—the Greens, Democrats and National Party—and that the elections in Australia will continue with the federal election at the end of this year. If you were to disagree with what all those parties are doing about this particular matter, you have an opportunity to put your own political party on this issue before the people and let them decide. Is that a plan that you are considering? The people will then decide and vote accordingly.

Mrs Beckett—Yes, there are a few points in that statement. The first point is, contrary to what you might be thinking, I am not aligned with any political party. I have to disagree with what you are saying about free elections. Indeed, I have made a decision that, under my rights in article 25 of the International Covenant on Civil and Political Rights, I shall not be voting this year for the simple reason that my free vote has been taken away from me.

Senator SCHACHT—So that is an international treaty you do agree with?

Mrs Beckett—No, I do not agree with any of them actually, but since it is there, I might as well use it.

Senator SCHACHT—You are exercising your right under that treaty not to vote, and you are ignoring the law of Australia

Mrs Beckett—I will obey any law that is a good law, but I refuse to have anything to do with a law that takes away my free democratic right to vote or not to vote as the case may be.

Senator SCHACHT—I am interested that you are using an international treaty that we have signed as a basis of opposing an Australian law democratically voted through by the elected parliament of Australia.

Mrs Beckett—Do I not have the right as an Australian citizen to use those mechanisms which are already in place?

Senator SCHACHT—I think you do have a right if you want to go and use an international instrument through the United Nations. I am just bemused that you are using it in this case to defend your right, but you say our democratic rights are now being taken away by signing up to other international treaties, including this one.

Mrs Beckett—Yes, I would have preferred that we do not sign any of them.

Senator SCHACHT—It really is an ironic position you have there, Mrs Beckett.

Mrs Beckett—Mr Chairman, if you just indulge me for a moment, I have not quite answered that yet. You talk about free votes. What is free about (a) a compulsory election and (b) having to compulsorily choose by way of preferences those people that you do not want?

Senator SCHACHT—It is the law of Australia.

CHAIR—I think this is Albert Langer's thing.

Mrs Beckett—Maybe it is.

CHAIR—When we review the International Covenant on Civil and Political Rights, maybe we could discuss this at some length. Thank you kindly for the testimony and the extra submission.

Mrs Beckett—You are welcome.

CHAIR—We take on board your suggestion about more hearings in capital cities.

[2.59 p.m.]

STONE, Mr John Owen (Private capacity)

CHAIR—Welcome. I have to formally advise you that, although we do not require evidence under oath today, these are legal proceedings of parliament and warrant the same respect as if they were taking place in the House or the Senate. Hence, the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Would you like to make an opening statement and then we will proceed to questions?

Mr Stone—Yes. Thank you, Mr Chairman. May I say, incidentally, what a pleasure it is to see here my old opponent but also friend Senator Cooney, your deputy. He seems to have disappeared into the ether at the moment. Nevertheless, my statement still stands.

I have put to the committee not so much a formal submission on this particular statute but more of a general paper, which I delivered to a conference here in Sydney last November, on the general question of sovereignty and the use and abuse of the treaty power. I said in my covering letter to the secretary of the committee that I wished to talk to some extent about the framework of ideas set out in that paper, but of course with particular reference to this statute. On page 7 of that paper—this is the reason I therefore mention it—I set out what in my opinion is the basic question in treaty making: how do we decide when it is in the national interest for Australia to accede to a treaty? I take the liberty of quoting the answer I gave to that question:

> The answer to that question, I suggest, is that it is in Australia's national interest to enter into a treaty: (a) when doing so provides us with something that we need; and (b) when we cannot provide that something solely by our own actions.

I add a codicil:

> Even if those two necessary conditions are satisfied, that may not be sufficient reason to enter into the treaty if the obligations we undertake by doing so outweigh the value of the desired benefits.

Going on from that, let us examine what has been put to this committee, not by our witnesses but indeed by the Attorney-General and the Minister for Foreign Affairs, on the national interest in this matter. I address myself to a document laughably described as a national interest analysis to that effect.

On any rational or reasonable interpretation of that document, you would have to say that this treaty fails the national interest test. There are, of course, many treaties which pass that test, such as perhaps the one you were discussing yesterday, the World Trade Organisation document, the International Telecommunications Union and things of that kind, but this one ignominiously fails the national interest test, in my judgment.

I do not have time in these initial remarks to go into that opinion in detail, but let me pick a few points from the committee document. The document submitted to the committee by the Attorney-General's and Foreign Affairs departments, in referring to the basic objective, says that the absence of a permanent international criminal tribunal was a major obstacle in deterring

serious crimes—and Yugoslavia and Rwanda were mentioned. In other parts of the document, the departments put forward the view that the establishment of this International Criminal Court will prove a deterrent to the commission of the bestial acts and the crimes against humanity that were the subject of those and many other incidents in the post-war period.

I regard that as total fairyland stuff. Mention was made this morning of Mr Milosevic—a notably unsavoury individual. Does anybody seriously suggest that Mr Milosevic, with his internal political considerations, would have paid the least attention to the presence of the International Criminal Court, had it been in existence at that time, in launching his various attacks against assorted people whom he did not like? It is ludicrous to suggest that people of that calibre are going to take the slightest notice of the existence of this body. That is even assuming that Serbia—if that would be the country in the future—were a member of this body.

Mention has been made of Sierra Leone and Liberia. Iraq could have been mentioned; the Sudan was mentioned. Does anybody suggest that people who are committing these atrocities in those countries are going to be deterred from committing them by the fact of the existence of a bunch of international legal activist bureaucrats such as this? Of course, they are not. It is ludicrous. I found it astonishing that the Attorney-General of this country should seriously suggest to the people of this country—through your committee, Mr Chairman—that it would be so.

In this document reference is made to the international community, because it has been said that this would be in the interests of or approved by the international community. I do not know how you define the international community, Mr Chairman. Can you touch it? Of course, you cannot. How do you know what ‘it’ believes? Indeed, the same point emerges a little later where it says, ‘Broad support has emerged.’ What broad support? Have the people of any country in the world, in particular any democratically governed country, been consulted on the matter? Without agreeing with everything that the preceding witness said, I think she had a very powerful point by saying the citizens of this country have certainly not been consulted on the matter in any effective manner.

For these purposes, ‘broad support’ means, for United Nations officials, more power and jobs. It means foreign offices around the world, such as our own Department of Foreign Affairs and Trade, chiefly comprising meddlesome officials who have lost any sense of the national interest—

Senator SCHACHT—Some of your old Treasury officials on the gravy train of the World Bank—

Mr Stone—I do not think they are relevant to this. May I suggest to Senator Schacht, whom I remember less fondly than I do Senator Cooney—and of course the usual gaggle of international legal activists, including those in our own Attorney-General's Department, for whom this sort of operation simply means more jobs, more influence and more possible power.

It is stated again in this document that the government took the view that it was in Australia’s national interest for there to be a permanent international judicial body which could deal with these grave crimes. On what grounds? What are the pros? They are not stated, apart from this mythical one about deterring such crimes in the future. What are the cons? They are certainly

not stated in their so-called national interest analysis—which is a joke, as a piece of serious legal analysis.

Then—and this is the last point I deal with under this heading—it is mentioned that:

The Court will operate where a national jurisdiction is unwilling—

or unable—

genuinely to carry out the investigation or prosecution of persons alleged to have committed crimes.

There are three words there that are very important: unwilling, genuinely and alleged. Each of them import uncertainty into the meaning of that sentence. Unwilling in whose judgment? In the end, as I think was elicited in your questioning of witnesses this morning, the judgment as to whether a country has been unwilling to prosecute an alleged offender will be made by the court—not by Australia if that happened to be the country in question. An even more speculative question is whether that prosecution has been genuinely pursued. It would be even more speculative, but again the decision is made not by the country in question, such as Australia, but by the court.

Of course, the word ‘alleged’ immediately raises a whole host of questions because, as we all know, allegations can be brought forward without sufficient proof, or anything which Australian courts would find to be sufficient proof, for the allegations in question. Against all that, I have heard it said several times this morning by lawyers in one guise or another that, of course, when these things are considered they will be considered at the highest standard of judicial probity. The people are to be of great integrity, of moral stature—and I have forgotten what the other flowery adjectives are, but they are all of the same order.

The fact of the matter is that this is where the great error on the part of those favouring this ratification begins. To the extent that one may believe the sincerity of these people—and I do not question their sincerity, for these purposes at any rate—they all appear to think that this body will function like the kind of body we in this country know as a court. The fact is that it will not function like a court at all. It will function as a political body. I apologise to all the parties represented here, but the most apt metaphor I can think of is a political party preselection committee—that is, deals will be done, the numbers will be sought. I think Senator Cooney put his finger right on this when he pointed out this morning to one of the witnesses that, after all, these judges—never mind the prosecutor and all the other flunkies—will be elected officials. And what is more, their re-election—to the extent that that is possible, and it is to some degree—will depend upon their having a good track record in their prosecutorial or judicial findings, in the eyes of, in the end, the assembly; that is to say, the representatives of the states parties, or the court.

There was a comparison made this morning with the special UN tribunals on the former Yugoslavia and also on Rwanda, and it was said that these had functioned perfectly well, with very respected judges, with the names of some eminent persons mentioned. I do not think Mr Fraser’s name was actually mentioned, but I think that of Sir Ninian Stephen was, and he is a Knight of the Garter laden with that and many other honours. I have forgotten who the other eminent person was, but I am sure he was almost equally eminent. These people have sat on

these tribunals. Surely you cannot say that these tribunals were not judicially proper bodies, but I think there is, in fact, something of a question about the activities of these tribunals as a matter of fact—but I will leave that to the people better qualified in the law than I to argue—and indeed, the whole chain of events from Nuremberg onwards with the victors making the law, so to speak. But never mind.

My point is that the tribunals on the former Yugoslavia were appointed by the Security Council, as it would be possible under this proposed statute for the Security Council to refer matters to this court. The Security Council is, after all, with some qualifications, a reasonably responsible body—at least by United Nations standards it is an extraordinarily responsible body. The reason for that, of course, is that it is a smallish body composed chiefly of great powers, or at least minor powers who have got enough votes on some occasions, and in which six or seven—I have forgotten the exact number now—actually have a veto, so it has to behave with some degree of propriety and responsibility. They cannot go putting on their mates as judges for the tribunal on the former Yugoslavia because that would not be accepted by the people who have got a veto on the matter.

But what if that tribunal had been appointed by the UN General Assembly? There would have been potential there for the most extraordinary horse-trading deal to be done. We would have found Fidel Castro's brother, if he still has one, sitting on one of them, no doubt, as we have on one of the human rights committee, if I recall correctly. But, you see, in this court the assembly is, in fact, the equivalent of the UN General Assembly. If the United States were to become a member—which it certainly never will—it would have the same vote as Angola, or the Solomon Islands—which was a nation mentioned, if that is the word, earlier.

The question of Australian sovereignty has been mentioned by a number of the members of the committee, and there has been some attempt to deny on the part of some of the witnesses earlier today that we would be giving up any sovereignty if we were to ratify this treaty. Of course we would be giving up some sovereignty. You can argue about the degree of sovereignty which we would be giving up, but the question of whether we are or are not giving up, as far as I can see, is not in question. Of course we are because, in the end, we do not have the final say, and that is what being sovereign or not sovereign is all about. The only question therefore is—and this is true of all treaties, or should be—in giving up some sovereignty, are we getting greater benefits in return? That is all, and I have already argued that in my opinion we are certainly not. As I said, your argument of deterrence is laughable; it is not worth spending time on—or at least not any more time.

I will conclude these opening remarks by referring to another piece of paper which I did submit to the committee, although perhaps you may not have bothered to read it, and that was an article which I prepared for the *Adelaide Review* in December last year. Perhaps you might allow me the liberty of reading the final paragraph of that article. I said:

Space precludes further comment. One thing, however, may finally be said. Not long ago the Government was forced into the most abject of backdowns on its previous intention to ratify the OECD's *Multilateral Agreement on Investment*—a treaty which, whatever may have been its defects, was simply not in the same class of offensiveness as the proposed *Statute of the International Criminal Court*. With that ignominious experience in mind, the Prime Minister would do well to take (one would assume, for the first time!) some interest in this matter. If, by contrast, he continues to leave it to be handled by the two hapless ministers who have so far been entrusted with the carriage of it, he should be aware that the electoral conflagration likely to ensue next (election)—

this was written last year—

> year will not only make that earlier MAI experience look like a children's tea-party, but that nothing will so rapidly revive the Hansonism which he has spent so much effort trying to dampen down.

And I may say, just to underline the point, that that article was written more than three months before last Saturday's Western Australian election.

CHAIR—Thank you. I will start the cross-examination with Senator Schacht. We might get the unpleasantness over with quickly.

Senator SCHACHT—I have got only one question. Mr Stone, you were a long-standing Treasury official before you became a senator for the Queensland National Party for three years. During that period, did you serve directly as a member representing Australia on the IMF or the World Bank?

Mr Stone—I did, indeed. I can enlighten you and the rest of the committee on that matter.

Senator SCHACHT—So you are happy to participate in an international organisation like the IMF or the World Bank, which has affected Australia's sovereignty?

CHAIR—Mr Chairman, through you, firstly, may I put it to Senator Schacht that he would be better to play the ball rather than the man. Secondly, I suspect he knows nothing about my experience on the board of the IMF and of the World Bank. I served there as a representative not only of Australia but of New Zealand, South Africa and, indeed, for the last two years, of Lesotho and Swaziland. In that connection, I represented the interests of those countries on those bodies. Senator Schacht, it is partly because of my experience on those bodies that I speak with some force now on the question of the behaviour of international organisations.

Senator SCHACHT—As a result of that experience, are you suggesting we should withdraw from the World Bank and the IMF?

Mr Stone—I have suggested, in print, not that we should withdraw but that the IMF should be basically wound up apart from having responsibilty for, if they still want to belong to it, some of the smaller developing countries for whom it may still be of use. Indeed, we could in that case withdraw from it, but I did not actually suggest that.

Senator SCHACHT—And the World Bank?

Mr Stone—The same is true of the World Bank.

Senator SCHACHT—So unlike the previous witness, you do support, in your terms, where appropriate, international treaties, international organisations, et cetera?

Mr Stone—Of course. If you were listening at the time, Senator Schacht, you might have noticed that I specifically went out of my way to approve Australian membership of the World Trade Organisation, the International Telecommunications Union, the Universal Postal Union

and many other treaties. If you had perhaps taken the trouble to read my paper, you would have known that I had made that point very clear.

Senator SCHACHT—You are concerned that the loss of sovereignty will come about because the processes of the ICC are such that you do not believe that a number of countries that have authoritarian undemocratic governments will treat the ICC seriously or properly, that basically they will just chuck anything in the bin and ignore any decisions of the ICC, even if it is referred to it from the Security Council? They will not cooperate?

Mr Stone—I think, for the purpose of these discussions, it is better to set aside the provision whereby the Security Council can refer. Because, after all, they are doing no more than what the Security Council already do, except that it has a particular body in existence to do it with. But I think that is, in a sense, irrelevant. It is the other aspects of the body that concern me particularly.

In response to your question, which I think I have already answered this morning in the course of questions from other senators, I think somebody very neatly brought out the logical nonsense which the treaty inherently contains. That is to say, if we are to believe that the court cannot be employed against the nationals of any state which is not a party to the treaty, unless those actions were committed on the territory of a state that is a party, then we have an extraordinarily Humpty-Dumpty situation, where all the rogue states of the world, like Iraq, Iran and China—for these purposes at least—certainly half the states on the African continent, the so-called Democratic Republic of the Congo, for example, by simply not joining this body will be immune from its attentions. So the only ones that are left are countries like Australia and some of the European countries who are bemused by their own experience in the European Court, not a subject of universal approbation. They will be the only ones who will be members of it, plus a few odds and sods that have been roped in under political pressure. So they will be talking to themselves. The only thing we will have done is yield up some sovereignty for nothing. Not even in terms of the Attorney-General's Department disingenuous presentation will there be in the least bit a deterrence for these people. How are we going to deter Milosovich from doing anything when his country is not even a member of the court?

Senator SCHACHT—So the present model, because of lost sovereignty and practicality, is not going to work because the rogue states will not sign up or, even if they do sign up, will ignore the provisions. Do you have any suggestion for an alternate model or should there be no model at all?

Mr Stone—I do not believe in an international criminal court at all. I do not believe in it any more than I believe in many of the other institutions which have been set up to ride roughshod—

Senator SCHACHT—But you believe in international economic arrangements such as the IMF which can penalise countries? The World Bank can penalise countries if they do not meet arrangements.

Mr Stone—No. What the IMF can do is withhold funds.

Senator SCHACHT—That is a punishment.

Mr Stone—I suppose that is true but, equally, if I want to go to my banker and borrow from him, I expect to have some conditions apply to me. Bankers do not normally hand out money with no conditions, and the same is true of the IMF, but I do not want to get into discussions about the IMF anyway.

Senator SCHACHT—I am just comparing them.

Mr BARTLETT—Most of the witnesses this morning argued that the complementarity provision was sufficient to protect Australian sovereignty. You have clearly argued quite strongly that that is not the case.

Mr Stone—Yes.

Mr BARTLETT—Mention was made by one or two people this morning that maybe the ability of the Security Council to delay prosecutions, perhaps indefinitely, may provide some degree of protection. What is your opinion of that?

Mr Stone—As I think that witness himself, or herself, said, they would need to take legal advice on that particular matter, and so would I. In any case, whatever be the outcome or the answer to the question, I take little comfort from it. The truth of the matter is that, once we are in this, we are in it.

Mr BARTLETT—So you do not see any way that our involvement could proceed without substantially affecting our sovereignty?

Mr Stone—I simply take this view: as far as I am concerned any Australian who commits a crime, whether here or elsewhere in the world, should be punished for doing so. They should be tried and punished for doing so. But, before he can be punished, he should be tried and he has the right to be tried by an Australian court, by real judges, although even that is somewhat questionable these days. He should be tried by a jury of his fellow citizens, and he should have appropriate rights of appeal within his country. That is it. I do not believe that anyone, any government worth its salt, surrenders its citizens to the mercies, tender or otherwise, of some external body and says, 'We have surrendered him because you have given us a warrant.' There is no evidentiary requirement—and this is a separate, somewhat different point of detail but a very important detail. Surrendering him or her to the administration of this body is a disgrace, and even to contemplate it is a disgrace. I believe it is a shameful action on the part of the Attorney-General even to propose such an action.

Mr WILKIE—Thank you for your evidence. I have not got any questions. You mentioned earlier the election in Western Australia. Coming from Western Australia and knowing it is such a wonderful place I know that it became even better on Saturday night. Thank you very much.

Mr Stone—Perhaps I could respond to that by noting that Mr Wilkie is the member for Swan. If I recall correctly, at the last election—and this is something of a digression, but please, I am provoked—I believe Mr Wilkie was one of the four beneficiaries of One Nation preferences arranged by his old friend Noel Crichton-Browne. I only point it out to him, and I am sure he will be apprised of the point, that if by some chance that party should preference against sitting

members at the next election, and he would be in the gun, then he may not be sitting on this committee much longer. I would regard that as a great shame.

Mr WILKIE—I will respond to that very quickly. Mr Crichton-Browne is probably not a friend of mine.

Mr Stone—I am aware of that, and I am sorry if I offended you.

Mr WILKIE—In fact I would have won without One Nation preferences, but thank you.

Senator COONEY—Thank you for coming along, Mr Stone. On that issue, it is not directly in line with what we are talking about but I think it is a matter worth commenting on, apropos of what you say. We, as a nation, are willing to surrender up Australians for trial, as you know, on the 'no evidence' test. We went into this, as you will remember. The Australian situation contrasts with the situation in a lot of the countries in Europe which have the civil law. They refuse to give up their people to Australia but will try them, to be fair. But we, as a nation will give up our Australian citizens to their jurisdiction on the no evidence test. I just thought I would make that clear.

Mr Stone—I must say that I have only recently become aware of that. I understand that is a fairly recent development.

Senator COONEY—It is.

Mr Stone—I regard that as totally deplorable. Are we talking about extradition procedures here?

Senator COONEY—Yes, that is right. The other thing is that we have now passed some legislation which says that we will try our own people when they commit crimes overseas. In fact, we are going to discuss this shortly. We try our own people when they commit crimes overseas. We extradite our people overseas. The other countries say, 'We're not going to extradite our people if they are citizens. If they're not citizens, we will. But if they are citizens, that's it.' It is a real issue. I understand what you are saying. My problem with the approach that you have taken is that I can see all the problems that arise from this treaty but it is based on some aspiration, some hope, that we may be able to deal with the terrible situations you have heard described.

Mr Stone—The road to hell being paved with good intentions!

Senator COONEY—I understand that exactly. But if the road to hell appears, we can denounce—that is a technical term but just to make it more sensible, perhaps—or withdraw from the treaty on a year's notice. This is what is in my own mind, but I would be very interested in your comments. Wouldn't it be worth the risk, given the terrible situation with women and children—you have heard all that described during the day, and I think that you feel much the same way about those issues as the people who were describing them; I do not doubt that for one minute—us signing the treaty, knowing that we can denounce it, to see if good can come from it in an area which is so filled with tragedy? As I say, you have heard the issue.

Mr Stone—My answer to that in blunt terms is no, but let me be a little more elaborate than that. First of all, I did hear the impassioned and once or twice quite poignant remarks of one or two of the witnesses this morning, particularly the woman from UNICEF. But I could not help reflecting with myself. I listened to her and then watched the response of the committee but no-one actually said to her, 'While we agree entirely with the spirit of everything you've said, what you haven't addressed is whether or not this international court will make the slightest difference to those atrocities.' My answer to that is that it will not make the slightest difference to those atrocities. So what was the relevance of all that evidence, with respect to the sincere people giving it?

Senator SCHACHT—She believes it will; you believe it will not. That is a difference of opinion, Mr Stone.

Mr Stone—That is true, although I am not sure she actually went so far as to say that it would. But I think she said she hoped it would. Anyway, we will not quibble about that, Senator Schacht.

Senator COONEY—I have not made up my mind about this but, having listened to those witnesses, I am tempted to sin and think perhaps this is a worthwhile treaty to look at, at least. I think it is proper for me to indicate how my mind is working.

Senator SCHACHT—It is not a sin.

Senator COONEY—I think, Senator Schacht, Mr Stone understands perfectly what I am trying to say.

Mr Stone—I do indeed, Senator Cooney.

Senator COONEY—And may I say Senator Schacht does not lack a sense of humour, does not lack a sense of irony. I would just like to make that clear.

Mr BYRNE—You mentioned in your article your perceptions about why America will not sign the treaty. Would you care to detail now what you believe America's concerns are with respect to the ratification of this treaty?

Mr Stone—May I just pose a comment. One of the witnesses this morning had the gall, when reference was made to the fact that the United States was not a signatory, to say that they had signed the treaty. Technically that is true. It was one of those shameless acts of President Clinton within days of leaving office—one of his PR gestures. However, let me also say that I would be very surprised if the new administration does not, in the appreciably near future, send a letter to the Secretary of the United Nations asking them to please disregard President Clinton's letter, which is all they need to do. Be that as it may, that is a speculation on my part.

The United States' objections to this treaty, as I understand them, are very similar to those that I have stated in the case of Australia except in one respect: that the United States is the most powerful military power in the world. It is invariably called upon when there is some brush fire to be put out, as we saw in Somalia, Bosnia and Kosovo—well, there was not one to be put out in Kosovo, but they took it upon themselves to do so.

The people who think seriously about these matters in the United States will say to themselves, 'When that next happens, one of our many friends in the United Nations, let's say from one of the Muslim countries, is going to suddenly jump forward with claims that a member of our forces—as, for example, in Somalia—has been responsible for some atrocity'. Of course, that will go before the US courts in the first place and they will be thrown out. But that is not the end of the matter, as I said in my opening remarks. It will then be open to this political body—I emphasise political not judicial body—to find that this court action in the United States was not genuinely proceeded with, that the prosecution was not genuinely undertaken or that there was an unwillingness on the part of the US authorities to even proceed with it at all, which might well be the case, too.

The United States are saying, just as I did a moment ago about Australian citizens, 'Under no circumstances are we going to yield up US citizens to the mercy of such a body as this'. It is like Lord Palmerston, who in 1853 or thereabouts fought a small war about a Maltese citizen. I remember the phrase 'civis Britannicus sum'—I am a British citizen—for the Maltese person in question. Palmerston fought that, or at least had a very sharp brush with foreign affairs at the time, because he was not prepared to do what this court would now demand the United States authorities do.

Mr BYRNE—I am mindful of the shortness of the time available, so I will pass on to my colleague.

Senator MASON—You mentioned that the setting up of this court would not act as a deterrent. In my prior life I was a criminologist, and I think you are right. Criminals are not deterred by courts; they are deterred by surety of capture and sentence. That is a very different issue. You are quite right. Secondly, you mentioned that rogue states who do not want to ratify this treaty are therefore not under its umbrella. Am I right in suggesting that you still support the idea of ad hoc tribunals established by the Security Council?

Mr Stone—Yes, if that is the view of the 'international community' as reflected in the UN Security Council. I do not think such tribunals are terribly useful; they do not build a great deal of good. Nevertheless, if that is what the Security Council wants to do, I certainly have no objection. If they can indict and punish at least some of these people that is fine. But that is a very small, ad hoc response to the atrocities that we are talking about in those cases. But I do not have any objection to that.

Senator MASON—My final question is one I asked before and that Senator Cooney has touched on as well. We all agree that we do not like the Milosevics of the world. What is the best way of ensuring those people are prosecuted? Is it through the ad hoc tribunals, or do you have any other ideas?

Mr Stone—I certainly do not have any other ideas which would involve giving an international body power over Australian citizens, that is for certain. Secondly, while these intentions are, I am sure, extremely good, I very much doubt whether in the end—and something of this was said by the preceding witness—people of the Milosevic stamp, and he is not the only one in the world—

Senator MASON—No, I appreciate that.

Mr Stone—Look at the man who I think may even now be the president, look at the key people in the People's Republic of China at this day: personally responsible for the blood in Tiananmen Square. We have perfectly good diplomatic relations, and I am sure if he wants to come to Australia tomorrow the welcome mat would be out for him.

Senator MASON—And Mr Mugabe was a hero for years and years and has been involved—

Mr Stone—Mr Mugabe is another classic example.

Senator MASON—Absolutely.

CHAIR—Mr Stone, calling upon your experience serving as the Secretary to the Treasury and being relatively close to cabinet practice in Australia, how are questions of the constitutional validity of these acts of parliament or treaties dealt with in the cabinet process?

Mr Stone—If, as I know did occur, a submission on this matter went to the cabinet—although I am led to believe it was very briefly considered, by which I mean considered in considerable haste—it would perhaps have been a joint submission from the Attorney General and his Foreign Affairs colleague Mr Downer, and it would normally have included, or certainly should have included, a consideration of any constitutional issues that might arise. For example, I heard you raise this morning the question of whether this was consistent with section 71 of the Constitution, whether it was possible for the federal parliament to subject Australian citizens to the powers of a court external to Australia. I do not know the answer to that question, but I would have expected such a question to be considered in any cabinet submission that went forward. I do not know whether that was the case or not.

Senator SCHACHT—Is Treasury, as the chief economic adviser to the government, included in an IDC on these matters that have international implications? Would it be normal for Treasury and PM&C to be involved with Attorney-General's and Foreign Affairs in preparing a brief in normal circumstances, if there was not, as you say, a bit of a rush of the blood to get it through?

Mr Stone—On this particular matter?

Senator SCHACHT—Generally on these sorts of detailed treaties. It is a detailed treaty—I am not arguing about that.

Mr Stone—On treaty questions generally, I would have thought that Treasury would not be a member of any interdepartmental committee, unless it were a treaty such as the IMF treaty.

Senator SCHACHT—Yes, apart from the financial ones.

Mr Stone—You mentioned PM&C. PM&C would certainly be a member of any such IDC treaty at all times.

CHAIR—Many thanks for your testimony. I want to mention before I call the next witness that the deputy chair and I received a request from a gentleman who had made a written

submission to us, but who is attending today in the gallery, for permission to give some brief testimony. We have decided we will take that after we hear from Justice Dowd.

[3.39 p.m.]

DOWD, the Hon. Justice John, AO, President, Australian Section, International Commission of Jurists

CHAIR—Welcome. Is there anything you wish to add about the capacity in which you appear?

Justice Dowd—As well as being President of the Australian Section of the International Commission of Jurists, I am also a member of the International Commission itself. With me as an observer is Mr David Bitel, the Secretary-General of the Australian Section of the International Commission of Jurists.

CHAIR—Although we do not require evidence on oath, I must advise you these hearings are legal proceedings of parliament and warrant the same respect as if they were taking place in either the House or the Senate, so the giving of false or misleading evidence is a serious matter. Would you like to make an opening statement and then we will have cross-examination.

Justice Dowd—I understand we are only dealing at this stage with the International Criminal Court?

CHAIR—Yes.

Justice Dowd—Our brief submission underlines the points that we wish to make. It is our view that this treaty will come into effect at some point in time in any event. In terms of Australia's fairly proud record on human rights, it would be appalling for Australia not to be one of those that is part of the process of it coming into effect. Australia has taken a very prominent role in the setting up of this treaty. We think it is one of the most exciting international developments that is occurring and it will ultimately stop the appalling process of ad hoc tribunals, with all the problems and complications that occur there. But, ultimately, the aim of such an International Criminal Court is to deter criminals.

It is only when those who lead states—and states are the main architects of criminality—have some real concern about it that there may be some deterrence. Most criminal penalties do not deter anybody in the normal course; that is a question of punishing someone appropriately. This, however, takes it a stage beyond punishment to deterrence, and deterrence is perhaps one of the primary aims. Australia ought to be part of this. We ought to make it easier for countries that look to Australia. Australia has a disproportionately high profile in human rights matters, people will take a lead from us and we have a duty to make it easier for others. Chairman, it may be easier to pass it over now to questions.

CHAIR—By all means. I will ask Senator Schacht to begin as he has a plane to catch.

Senator SCHACHT—The main argument that we have had in the submissions and at the hearing today is the question of derogation of Australia's sovereignty by signing and ratifying the treaty and becoming subject to it. People's concern is that the actual mechanisms of the

court, once established, are such that there is a lot of unclear process that could affect what we would see as fair due process of people. Since you have moved on from politics and now have an eminent role in international jurist matters, do you think those concerns are relevant and can be addressed? And if we sign up and ratify, can we subsequently keep clarifying and developing the matters of process that are still being raised?

Justice Dowd—Firstly, when it comes into effect—and it will, whether we sign it or not—it will set standards for a lot of the countries that are not yet part of the international court, such as the common law countries, those that have reciprocal arrangements. The procedures set out in part 36 are very comprehensive; In fact, there is a lot more comprehensive requirements set out in this than for the states that you and I come from, where the qualification to become a chief justice of any state is simply to have been a legal practitioner for seven years, whether you have effectively practised or not. So someone who takes out a law degree can be appointed by any government, and there is no check on it. The reason it does not happen—and political appointments occur, I understand—is that we do have safeguards and we do have a free press to stop that.

The procedures of part 36 are quite comprehensive and require the highest level of competency, and there is a procedure that not everyone can get through. The fact that someone may come to be appointed from a primitive country—primitive in our legal sense; I do not mean in standard of living—is not a real concern because they will not be appointed. They will not be put forward. Countries do not lightly put forward people for appointment to a position such as this just to put a spanner in the works.

Senator SCHACHT—You are a former practising politician like all of us. We say, 'Well, there are 60 countries now and there may be 100 in a few years time, and it is coming up for an election for the term.' We all have a view that maybe there will be some horse-trading. China might say they have got a good bloke and they want us to support him, on the basis that they will vote for ours. It is a bit like elections to the Security Council with the trade-offs. How do you stop that—even though you have got this level of qualification that it is a transparent document—when, in the end, they all declare that these are good and wonderful jurists?

Justice Dowd—Trade-offs occur now at the United Nations level in an appalling manner at the security level, because they are straight political positions and they largely operate behind closed doors. The beauty about courts is they are public, open and on record. They are there warts and all. Frankly, although this is important to us—people concerned with human rights—it is not as significant an appointment as it would be to some of the NGOs that spend lots of money and it is different from positions on the Security Council, where power flows from it. This largely deals with individuals. It may be individuals from a particular state. An appointment to this court is not internationally as important, and thus I frankly do not think it is going to be the subject of backroom deals.

Senator SCHACHT—And the issue that there have to be two Christians, three Muslims, one Asian and one African on the bench will not be a criteria that will dominate the quality?

Justice Dowd—It will happen sometimes. You cannot stop that. It happens in politics; you know, getting a handicapped Jewish lesbian—sorry, David, about the Jewish bit.

Senator SCHACHT—We put a Queenslander like Justice Callinan on the High Court, which was seen a very political act but that was that.

Justice Dowd—All of our courts are subject to the possibility now. Failures do occur. But the principle here is so important. With all the presidential appointments to sit here, frankly, states which put people up that are going to embarrass that state are very few and far between.

Senator SCHACHT—Mr Stone made a comment in earlier evidence, and I think it is a reasonable point that has to be weighed up. That is, in some of the rogue states, the nasty states, where the biggest human rights abuses occur, if they do not ratify it—whether it is an African or an Asian country—and therefore atrocities happen, there is no way you can take action. Is that a weakness of the court?

Justice Dowd—The strength of the court is: once it is established, it will perhaps eventually not get to those. It is the countries in between. It is the scores of countries throughout the world that are fighting to get an independent legal system. Our organisation deals with a lot of nations and I visit a lot of nations in the region. There are people there as judges who want to be real judges. They want to be independent. They get it by a process of osmosis: by bringing Indonesian judges here, by talking to us, by establishing links, by talking to the new East Timorese judges and so on. Frankly, we can do a lot as we bring people in. I do not think we should ever look at the principle of establishing a court such as this—a milestone in the development of humankind—on the basis of the worst countries. Eventually they will come in, because, remember, contracts ultimately depend on rule of law. If you are going to invest in a country, you want to be able to ensure you are going to enforce your judgments. Most countries, with the obvious exceptions, do want an independent legal system with integrity. Indonesia and others want it. I think the strength of this is that it is a movement in the right direction, which will not cover them all.

Senator SCHACHT—So if a country such as China wanted to get into the WTO, in the end they would need commercial law protection to keep their economy growing to get investment, even internal investment?

Justice Dowd—For the very reason they allowed Hong Kong to remain independent because of its court system—because of the fact that they can contract with people. Indeed, within China, they wanted at one stage to try and get a sort of common law system into Shanghai because they understand that China needs the rule of law as well. Those of you that have had experience dealing with China would know that it is very difficult to get anything contractually on the ground for one of the greatest markets in the world. They know that they need an independent legal system and Hong Kong is an example of what they are prepared to do.

Senator SCHACHT—A question raised by the last couple of witnesses who oppose supporting the treaty is a question specifically about the derogation of Australia’s sovereignty. You strongly support the treaty and us being involved in the arrangement. Are there any particular areas where you see there will be some adjustment to our sovereignty but which, even so, are not critical to the independence of Australia and the operation of our own democracy and the protection of our own citizens?

Justice Dowd—'Sovereignty' is an emotive word which covers, without thinking it through, a whole range of matters. The fact is, once we enter into any treaty—and Australia has thousands of treaties with the United Nations, and be it with other nations—it is part of the mutual respect you have for another nation. You only enter into a treaty with another nation which trades the same amount of sovereignty as you do. Australia is not forced to go into anything but, when you look at the nations that are signing here who are prepared to surrender some small part of their sovereignty, largely over here dealing with criminals, it is not a big surrender to surrender people for trial by an international tribunal of your own sovereignty because we should try them ourselves if we can. If we cannot, then that small amount of surrender is something only on a reciprocal basis and I do not see that Australia loses. I think, in fact, we are enhanced by being mature enough to make sure that criminals are apprehended. We have an interest in apprehending criminals, as do the nations in the world that want to sign this treaty.

Mr WILKIE—How would you respond to the suggestion that has been made by other witnesses that if we ratify the treaty we will be leaving Australian nationals open to oppressive and often unsound prosecutions in the future?

Justice Dowd—It is easy to make the assertion of oppressive and unsound prosecutions. When we look at the question of extradition treaties, we have worked out safeguards in that respect. In extraditions, we only sign treaties with countries that we are satisfied have a proper system. The system is set up by the statute. It is the statute which governs how people will be dealt with, not allegations from a country. Any one of us here in Australia, here in New South Wales, can be subject to an unwarranted allegation, be it of a sexual nature or all of the sorts of allegations that anyone can make—and sometimes totally false allegations. I have seen them. I have appeared in matters. I have presided over matters where false allegations have been made. That is what the legal system is about. The allegations can be made before a court or otherwise. All we have to do is make sure that they are dealt with by a proper procedure with proper safeguards so they can be disposed of. Not many countries are going to start a totally spurious claim against an individual about a crime if in fact the probabilities of that succeeding after enormous expense are just going to get nowhere.

Senator COONEY—As I understand it, you want this to be a fair system and a system that impinges equally on various countries. Yet when I read 2.2 of your submission, I begin to wonder. It says:

> It is not until the court is established that it will be possible to instil in the minds of the leaders and senior military officers in totalitarian states, those most likely to commit genocide, war crimes and crimes against humanity—that there may be personal consequences for their criminal acts before the treaty comes into effect. That cannot occur until the statute comes into effect.

It seems to me that the organisation that you are representing comes to this court with a mindset that it is going to be the totalitarian states that are going to be the ones that are going to need punishment. Places such as Northern Ireland, the Middle East and Sri Lanka are not going to commit any of these crimes because they are in a different category, but these totalitarian states are the ones we are going to be after. Is that a healthy attitude to come to this statute with?

Justice Dowd—The point that was made by that paragraph is a point of instilling fear. That has nothing to do with the everyday workings of the court. That just simply makes a point to those who probably will never come before the court that in fact there may be no place to hide;

there may in fact be retribution. The court will deal with a specific charge in respect of a specific matter in respect of a specific person. So the working of the court will in fact exist. It will operate like every other court in the land. Courts process sausages. A case comes up; you deal with it and get on to the next one. But it is that very process of dealing with criminals, letting those off who in fact are not properly tried, convicting those that are and sending a message of deterrence to others. The paragraph that you have read is a secondary issue beyond the primary point that we wanted the statute to operate and criminals to come before it. The people who are going to be deterred from crime will not ever come before it if in fact we succeed.

Senator COONEY—I can understand what you are saying but if you look at the evidence over the years from the Nuremberg trials to trials before that—and I have put this before today—and if you look at Dresden, the bombing of the Chinese Embassy in Belgrade or the shooting down of the Iranian aircraft, there did not seem to be much talk there that this is the sort of thing that this court would deter. But what you do write is that there are particular sorts of regimes that it would deter.

Justice Dowd—Yes.

Senator COONEY—Why hasn't, in the history of the thing, there been some operation of this court or courts similar to it in the way that you would expect a criminal court to deal with it—a criminal court where, no matter who you are, you are brought before the court and that is it?

Justice Dowd—It has been a matter of jurisdiction. It has been this sovereignty business that people keep worrying about, `We'll deal with our criminals.' The world has grown up a lot in the last century. There have been criminal tribunals for the winner largely, but sometimes not always the winner, where people are tried and dealt with. Winning states such as the United States try their own and we try our own for crimes committed during war which may or may not be war crimes—that happens. We are now moving into an area of dealing with an international common law where in fact people are committing crimes that the world has said are crimes. You need to have a generally respected common law of international crimes such as genocide, crimes against humanity and war crimes, before in fact you can have a tribunal. We now have those; international criminal law exists. Over the years there was no understanding of international criminal responsibility. It was just the victor's law. When Wilson tried idealistically to set up the League of Nations and so on we were at an embryonic developing stage transferring from the 19th century, which was a colonial century, the end of colonialism. This last century has been the winding down of colonialism. We are moving now to international responsibility and that can only happen in an international world where people move and, if you have an appropriate tribunal, criminals can be brought before it.

Senator COONEY—So the International Commission of Jurists are happy to assure us that, if this body is set up, it will try people without fear or favour, of whatever nation.

Justice Dowd—No, we are not in the business of giving assurances. We are not worth suing for that. We say that this is a significant step down the path of bringing criminals to trial to fill in the gap that has occurred because we have not had a body such as this. We think this model is as responsible and balanced a model as we can get to make sure that participating states accept the fact that some of their criminals will commit offences overseas. We have moved this way in

terms of mutual assistance treaties, confiscation of assets and towards extradition. We are growing up internationally. The wheels have not fallen off Australia every time we have signed an extradition treaty or a mutual assistance treaty. These operate in our courts before my court all the time.

Senator COONEY—Take extradition: that is a classic example. I think Australians find some difficulties when we have to extradite our people.

Justice Dowd—We are dealing with that later.

Senator COONEY—I understand that, but I think the issue is that we just use it in a way that other civil law countries do not. We will come to that so I will get off it. But 4.1.1 is the other paragraph I wanted to ask you about. Has the court been established as a criminal court to investigate and try and you do not have any trouble with the investigative function and the judgment function being rolled in together?

Justice Dowd—I live in a country where the same budget allocation goes to the same minister who pays for the judge, the Hansard staff, the Public Defender and the Public Prosecutor, all under the same minister, being paid for out of the same budget and appointed by the same minister. At the trial I started yesterday, everyone in court was on the public payroll. The safeguards to provide integrity between prosecution and judge are governed by those very strict requirements of the statute to have people of integrity and probity. We all have to rely on human beings to carry out the wishes of government. I think the statute goes a long way to providing those safeguards. No-one is an island, be they a judge or anybody else.

Senator COONEY—But the budget you have just talked about is run through the Attorney-General—or hopefully it is. As a result of history and tradition and our culture, there has been at least state wise a discipline put upon the Attorney-General to make sure that the functions are properly kept apart for him or her to act as you would expect a first law officer to act. There is no tradition here; there is no culture here.

Justice Dowd—There is no discipline involving the Attorney-General of the state of New South Wales as to who he or she appoints.

Senator COONEY—No, but there is a culture that he or she will do it in a right and correct manner.

Justice Dowd—Not everyone would agree with you on that.

CHAIR—It is subject to parliament though.

Justice Dowd—It is not. Appointments are appointments by the executive of crown prosecutors, public defenders and judges.

Senator COONEY—But the chairman is saying you can comment on that. The parliament can comment.

Justice Dowd—It cannot because, under the standing orders of the state of New South Wales, as in every other state, you cannot reflect on a judge unless you move a substantive motion and move a motion against the judge. There is a safeguard against that so there are not the safeguards here.

Senator COONEY—But someone can get up and say, 'We thought this judgment was bad'—not speaking of your judgments.

Justice Dowd—Of course, and it would be a terrible country if you could not criticise if a judge goes off the rails. It is reflecting on the judge's integrity or probity, but judges are the most exposed people of any citizen, and we have a very active and enthusiastic press chasing them in every way they can.

Senator COONEY—Thank you very much.

Senator MASON—Thanks very much for your submission. We have covered a host of issues today. They are not necessarily critical but are problematic with respect to this convention. They are everything from the quality of judges through to criminal procedure and the different justice systems in other nations and how to bring them together and marry them with the conventions, even the broadly cast crimes of genocide and crimes against humanity. Let me not get into that now. But there was one point that Mr Stone made that did resonate well with me. It was not so much rogue states not becoming a part of this convention, but that virtually everyone joins up in the end and, let us say, it reflects on the United Nations General Assembly.

I am not a great fan necessarily of the United Nations General Assembly. I have never believed that one vote, one value in the UN General Assembly necessarily equates to justice and the rule of law. I read something recently by Daniel Patrick Moynihan about when he was the ambassador to the United Nations for the United States back in 1976. He said it was post-Watergate, post-Vietnam, and the West could not muster more than a dozen votes on any issue. Things change. At the moment in terms of the West and the rule of law, the West is doing rather well. Twenty-five years ago it was doing appallingly. What worries me is that perhaps in another 25 years the conduct of Australia or the United States in, for example, the Vietnam War would potentially be subject to this convention. Does that make sense? It concerns me that if we had had this convention 25 years ago, I am not certain that there would not have been moves to bring Americans and Australians to that court as war criminals. If you look at the voting patterns of the United Nations General Assembly in 1974, 1975, 1976 and 1977, before the West reasserted itself in 1980s, I am not sure you could say that would not have happened. I am not a great fan of the democratic culture of the United Nations General Assembly.

Justice Dowd—The United States is normally one of the last countries to sign a lot of treaties for this very reason. The world expects the United States to be the policeman of the world, to send their young men and women in to get killed and then later on when things go wrong, they expect to bring charges against them.

Senator MASON—I agree with that.

Justice Dowd—Australia will be more vulnerable than a lot of other nations because we have got peacekeeping forces one way or the other—police or army in half a dozen countries—and, now that we have been appointed sheriff by the new US administration rather than deputy sheriff for this region, our role is going to grow by enormous public pressure as things go wrong in places in the Pacific. People are going to look to Australia—they do it now. We are not as conscious of it as we think but there are going to be demands, particularly as bits of Indonesia might fall off from time to time. There is going to be pressure on us to be part of peacekeeping forces.

We can be very proud of what we did in East Timor and for the fact that we were ready. We did it well in military terms eventually. We got it right there. It is going to be expected that we will do it again in places like West Papua or in Papua New Guinea and all of those other places. The answer is, yes, we place ourselves, as Australia, more at risk than does a little country that can send a force here and a force there. Largely we will be called on. We are slightly more vulnerable, but I think the Australian public want us to do that. They certainly wanted us in East Timor. The people that elect the politicians want Australia to be a grown up, adult country and to accept its responsibilities. Allegations will be made against us but there are filtration systems within this. The prosecutorial discretion is there. You cannot just make sure someone comes up for trial just by making an allegation. There are procedures here, judicial and non-judicial, that will filter out a lot of those cases.

Senator MASON—I accept that. But at the height of the Vietnam War—and I was around, just barely—you can imagine in that context what it was like in the late 1960s and 1970s. You can imagine something like this tool being used against countries like the United States and Australia. I do not think that is over the top really given the composition—

Justice Dowd—There will be interest groups that will try and do it to countries like Australia. But we have progressed a long way in the last 60 years or so. With respect to the rape of Nanking, which involved a million people—a figure of 400,000 is mentioned but I think it was probably a million, taking in Greater Nanking—it took 10 years before those criminals were brought to trial, and some of them died as a result of that tribunal. I think China and Japan learnt a lot. Japan was a bit slow to learn—it has learnt it now with what happened with the tribunals after World War II. Those things have had a salutary effect. I suspect we were not the only virgins in World War II; we may have even done some things wrong there. Surely, we have a higher standard than just saying, ‘We might get charged for something we do. We must avoid this.’ I would like to think we are adult enough to say, ‘If we did something wrong, we should be dealt with for it.’

Senator MASON—I was not thinking so much of that. I was thinking more of other parties being malevolent towards us or towards the West’s interests.

Justice Dowd—The tall poppy syndrome is available outside Australia as well.

CHAIR—There is some doubt expressed about the Commonwealth power to vest judicial power under section 71 of the Constitution in a court that is not an Australian court. What is your view of that provision?

Justice Dowd—Part 3 applies to Australian courts. The foreign affairs power applies to foreign affairs. What we are doing is setting up something extra-Australian in the power vested in the Commonwealth to do that. The Commonwealth uses that power in a whole range of matters and treaties for the protection of the world. Part 3 deals with our court system.

CHAIR—In so far as our citizens are caught by the criminal jurisdiction of the proposed tribunal, they lose the protection of section 71.

Justice Dowd—If I commit an offence in another country and they have got power to get me through extradition or because I go there, I lose that power. The chapter 3 power has got nothing to do with protecting me, the alleged criminal. That is to ensure that the system within Australia has integrity and probity and does not govern an international treaty, which covers extradition and the International Criminal Court.

CHAIR—In the case of an Australian, whether it is something that is alleged to have been done within our territory or in a state outside Australia that is not a state party to this, the judicial power of the Commonwealth does not apply. That is not what we are exercising here, is it?

Justice Dowd—No. We are not exercising Commonwealth judicial power; that is established by part 3 of the Judiciary Act. It establishes a system of courts here. That operates independently from what happens to someone who comes before an international court.

CHAIR—Therefore, using the external power, in a sense, there is no limit on that?

Justice Dowd—No. As is the case with all the mutual assistance treaties, with respect to some of the assets that are confiscated in Australia, I have been involved in hearings recovering those assets from other countries. The criminal has come here and has been dealt with by our criminal courts, and I have the power under that to make orders in respect of those assets overseas. That happens in reverse. That happens as a part of any treaty which is a mutual surrender of sovereignty, like any contract, in respect of the specified matters.

CHAIR—In respect of something that was alleged to have taken place within Australia by an Australian citizen, if such a—

Justice Dowd—It might still constitute an offence overseas. For a New South Wales court to take proceedings against a Queenslander, the offence may only be committed in Queensland, but if there is nexus, if a contact with New South Wales is established, we can bring proceedings. If a child molester who comes from Australia molests someone in Thailand, we can deal with them here for a Thai offence. Similarly, if they have laws the same as ours, a child molester who comes here can be tried in Thailand if there is a nexus—that is, if it is a Thai citizen or there is some link. That is how you established the sex tours legislation, on which I had to give evidence.

CHAIR—In a sense it would come back to a trial taking place here in Australia, with a judge appointed by Australian legislature and so forth.

Justice Dowd—Yes.

CHAIR—Some of the misgivings expressed here today have been fundamental in the sense that it is difficult for some of us to understand how an Australian citizen could suddenly become the subject of a non-Australian court done by an Australian government. That just does not seem to make sense.

Justice Dowd—But this happens now. I use the example of Queensland because from New South Wales—and a lot of people agree with this—Queensland is a separate legal entity. So if there is an offence committed in Queensland that breaches a New South Wales law, if there is a connection, then New South Wales can enforce it if that person is brought here. The same thing happens internationally and happens now for offences. This idea that we are only dealing with crimes here is not right and has not been the law in Australia or in Australian states for a long time.

If I can give you an example: one case I heard here was about on ICAC information. Information was disclosed contrary to the ICAC Act in Queensland. The undertaking had been given here. That person was tried and convicted here because the nexus was the giving of the undertaking here under New South Wales law. Most people do not see the boring mechanics of that. We would have to adjust to the fact that there is no longer a moat around Australia, and we can be dealt with. I can conspire to commit an offence in Chile and, if I have some nexus with that, I can be dealt with by that country—that happens now.

CHAIR—Yes, conspiracy can go quite wide. I suppose it does get back to what you described as an emotional attachment to an abstract noun but, while it is very real, you are asking us in many ways to set aside that Westphalian notion of state sovereignty. In this case, it is a very basic thing for us to do and, in order to prove the case, I should add that we have adopted an informal practice with these treaties that we do not approve them unless it is proved to us that they are in the national interest. That it is simply asserted to be so does not carry much weight from the government, but if it can be proved to us that this will deter outlaws and perpetrators of atrocities that you described early on in your opening statement, then we would give some consideration to it, but we have to balance it up against these things. Thank you for giving evidence at this public hearing today.

[4.18 p.m.]

KIMBERLEY, Mr Gareth John (Private capacity)

CHAIR—Welcome. I have to advise you that, although we do not require evidence under oath, today's hearings are legal proceedings of parliament and they warrant the same respect as if they were taking place in the House or the Senate, so the giving of false or misleading evidence is a serious matter. Would you like to make an opening statement?

Mr Kimberley—Yes. Firstly, thank you very much, Mr Chairman committee members, for giving me a brief opportunity to make a summary of some of the points that I wish to make. I must admit I am very concerned about the number of submissions that have been made for the yes case. I myself only found out about this by accident, but I note that the people representing the yes case seem to have been very well informed and very well prepared and were able to technically cope with many of the questions put to them. I am not in that position, of course, being a private citizen. My answers to any questions would be very simplistic and my views, of course, are purely views of my own and are observations that I have made since I became aware of this.

It seems to me that it has been accepted that there is some loss of sovereignty involved. Everyone seems to agree that there is some loss of sovereignty involved and that it is just a matter of degree and whether we are prepared to accept it. Some have actually said that there is no loss of sovereignty but I cannot accept that. It seems to me that this court will indirectly be able to override national governments, and indeed there would be no point in setting up the court if it could not. Therefore if there is to be a loss of national sovereignty, no matter how small, this affects every Australian citizen. As I say, I did not know about this and I am sure the majority of Australians do not know about it. They would only have known about it presumably if they had seen the advertisements in the paper. But our friends in the legal profession obviously are very well informed and very well prepared.

All I can say is that I have some very definite views of my own. I am very concerned that the Australian people are not being consulted. I think any loss of sovereignty requires a democratic government to consult the people. To me, it looks as if this International Criminal Court is going to be run by some of the same people in the United Nations who perhaps found us guilty of human rights violations against the Aborigines. It will have judges from countries such as Zimbabwe, South Africa, Uganda and China. They will be able to pass sentences of up to life imprisonment, as well as ordering massive fines and confiscations. To me it was an incredible display of naivety that our government rushed into signing the Rome treaty without stopping to think, because Australians could well end up being amongst the first to be put on trial in this kangaroo court. We have already been accused of genocide by our own Aborigines, been found guilty of human rights violations by a bigoted and ill-informed UN committee and been accused of crimes against humanity by confining refugees in hell-holes. Our peacekeeping soldiers in East Timor have been accused of war crimes and, to top it all off, we continue to admit to the whole world that we are guilty of carrying out atrocities against the Aborigines but we refuse to apologise for them. These are the very crimes that this new court will be designed to deal with. One can only assume that our government has become so obsessed with pushing the cause of

globalisation and its naive belief in a new world order that it has completely lost touch with reality.

With regard to the United States, some people seem to use the words 'signing the statute' very loosely. They say that the United States has already signed or that the British have already signed. What they actually mean is that they have signed the Rome treaty statute. The way I understand it, the US government opposes the ICC not only because it is genuinely concerned about the loss of sovereignty that that nation would suffer but also because of the threat that this new court could pose to its military forces. Obviously this has not gone over well with the incoming Bush administration, which has vowed to reverse the Clinton action, and it is highly unlikely that Congress will authorise the signing of the ratification statute. But with Australia now having to take over much of the peacekeeping duties in our area that had previously been left to the Americans, any concerns they may have about the ICC should also be of concern to us. In this regard it is essential that we work closely with the US government.

It seems to me that the present government showed its determination to push this treaty through when the foreign minister, Mr Downer, and the Attorney-General, Mr Williams, issued their joint media release on 25 October last year, stating that the government had already intended to introduce legislation to ratify the statute, presumably before this committee had even begun its inquiry. This is a violation of normal parliamentary procedure. Surely the government waits until it hears from this committee, or it gets a recommendation from this committee, before it makes decisions like that. In any case, as it will affect our national sovereignty, why have the people not been given more information on it?

There will be nothing to stop the ICC, as far as I can see, from demanding the arrest of Australians on trumped up charges and having them dragged off to The Hague to stand trial. The way I understand it, the Australian government would be obliged to cooperate. The court will have the backing of the United Nations and any refusal to cooperate would have serious consequences for us. It will be a bonanza for the lawyers and all the supposedly aggrieved minority groups, and all at our expense. This all-powerful court in a foreign land will be paid for by us but controlled by foreigners. Signing the ratification of statute will have the effect of transferring sovereignty to the UN via the ICC. With regard to costs, it seems very strange to me that this government can readily raise the unspecified millions of dollars required for the ICC but cannot find enough money for defence, education, health, transport or saving our rapidly deteriorating environment.

In conclusion, from my point of view this dangerous statute must not be signed without a full national debate and the clear consent of the Australian people. Thank you.

CHAIR—Thank you for your submission. We would like to take your evidence on board as part of our consideration. If there is another opportunity for questions and cross-examination, we will call you back, but today we must proceed to the next topic, a new hearing of our inquiry into extradition arrangements.

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

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

Committee adjourned at 4.27 p.m.