

**Justice Beyond Borders?**  
**Australia and the International Criminal Court**  
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The International Criminal Court (ICC) came into being on 1 July 2002. A four-person team opened an office in The Hague and will collect reports and allegations of genocide, war crimes and crimes against humanity until judges and a prosecutor are appointed towards the end of 2003. Although the court was heralded by many states and international lawyers as the most important positive development in international law since the formation of the United Nations, it did not get off to an auspicious start. The Bush administration was concerned that US military forces operating overseas would be particularly vulnerable to what it described as ‘politicised’ prosecutions. It therefore insisted that not only would it not be a part of the ICC, but also that it would not sanction the continuation of UN peacekeeping operations. Closer to home, the Australian Senate only ratified the ICC’s founding treaty, the Rome Statute, after a bitter debate that split both the Liberal and National parties. This was the case even though the Howard government—and Foreign Minister Alexander Downer in particular—had been a leading advocate of the court and ratification of the Rome Statute had been a Liberal Party election promise in 2001. The cost that Downer, and pro-ICC Attorney-General Daryl Williams had to pay in order to appease restive conservative backbenchers, the National Party, and an increasingly reluctant (and pro-US) Prime Minister and secure the ratification was a declaration that reaffirmed the primacy of the Australian judicial system over the ICC. The declaration insisted that no Australian would be prosecuted by the court without the consent of the Attorney-General, and asserted Australia’s right to define what is meant by the crimes of genocide, war crimes, and crimes against humanity.

We argue that although Downer and Williams should be commended for their commitment to international justice, the declaration attached to Australia's ratification was unnecessary and unhelpful. The first and third aspects of the declaration were unnecessary: the principle of complementarity enshrined in the Rome Statute means that the ICC already recognises the primacy of domestic jurisdiction, and the crimes covered are already considered to fall under universal jurisdiction, as the Nuremberg, Tokyo and more recent Pinochet trials showed (see Weller 1999). The second is unhelpful because it contravenes both the letter and the spirit of the Rome Statute. We will begin, then, by tracing the development of the ICC debate in Australian politics. In 1998, the government was an enthusiastic advocate of the court but by 2002 an alliance of an ardently pro-US Prime Minister, vocal right-wing parliamentarians and their supporters, and *The Australian* (and its foreign affairs editor Greg Sheridan in particular) combined to put ratification in doubt. Contrary to Prime Minister John Howard's claims, this debate was not well informed. Instead, it was characterised by hearsay, inaccuracy and scare mongering. The subsequent section of the article demonstrates this by focusing on the background to, and creation of, the Rome Statute.

### **Towards Australian Ratification**

Alexander Downer was one of the most enthusiastic proponents of the ICC at the Rome conference in 1998. He pointed to the failure to learn the lessons of the Holocaust and prosecute the perpetrators of the Cambodian genocide in the 1970s, arguing that at that time the international community 'had neither the [political] will nor importantly the mechanism to carry out such a task' (Downer 1998: 1). The Foreign Minister identified four 'fundamental issues' that he wanted the final statute

to address in order to ‘take this text [the Statute] and turn it into a court room made of bricks and mortar that will give our children a weapon with which to fight the malevolent tendencies that have stained this century’ (Downer 1998: 2). The first was the need to strike a balance between the jurisdiction of the court and domestic legal systems. Downer maintained that the Australian government favoured a system whereby national jurisdiction took precedence over the jurisdiction of the ICC, in cases where the state concerned is ‘able and willing’ to deal effectively with the alleged crime (Downer 1998:2). Second, the Foreign Minister pointed towards the need to agree appropriate mechanisms for triggering the ICC’s jurisdiction and an investigation by its prosecutor. Australia’s preferred option, he argued, was for a prosecution to be triggered by either a complaint by a state party to the Statute or by the Security Council under Chapter VII of the UN Charter. Third, Downer suggested that the relationship between the ICC and the Security Council needed to be resolved in a way that recognised the primacy of the Council in the maintenance of international peace and security. Finally, he demanded that there be agreement about the specific crimes that would be tried. While he suggested that there was widespread international agreement about what ‘genocide’ was (encompassed in the 1948 Genocide Convention) he pointed out that there was much less agreement about the specific definitions of ‘crimes against humanity’ and ‘war crimes’ and that the Statute needed to offer such definitions if it was to become the weapon of international justice he envisaged. Moreover, Downer stated that the Australian government wished to see the crimes of ethnic cleansing, systematic rape, and mass torture included in the court’s jurisdiction as well as crimes covered in existing international humanitarian legislation and the rules of war.

Downer got everything he wanted at Rome, as we will show later. He therefore moved for an early ratification to the treaty. The Rome Statute would come into force once 60 of its 139 signatories had ratified it and Downer, Williams and Defence Minister John Moore—with the support of John Howard—argued at the end of 1999 that Australia should be amongst the first to ratify the treaty (Downer, Williams and Moore 1999). That Downer himself was satisfied that the Statute met the four fundamental objectives he set down at Rome and that he believed that he was speaking for government policy as a whole was revealed in a speech he gave to a gathering of eminent lawyers from Australia, New Zealand, and the US in 2000. Here, Downer noted that Australia had aligned itself with the so-called ‘like-minded’ group of 67 states, including Canada, New Zealand, Germany, and the UK, that had lobbied for a powerful ICC with an independent and effective prosecutor. Indeed, in 1998 Australia took over the chair of that group from Canada (see Ball 1999: 199). Specifically addressing the American view that the Rome Statute constituted an unacceptable infringement on state sovereignty, the Foreign Minister observed that ‘in our view, this is incorrect’ (Downer 2000: 6).

On the possibility that Australian (or American) citizens could be prosecuted by the ICC, Downer argued that ‘it is possible that the court will hear a case against a person against the wishes of a state that is not a party to the Statute. It is equally possible that the court will hear a case against the wishes of a state party to the Statute. In neither case, however, is the court’s exercise of jurisdiction in conflict with the norms of [existing] international law’ (Downer 1998: 6). Those accused of crimes committed overseas are already subject to the jurisdiction of the state in which the crime was committed; the ICC does not present a new ‘foreign’ jurisdiction, but rather follows a well-established principle of international law. The definitional

problems that Downer identified at Rome had been satisfied, as had the Foreign Minister's concerns about the relationship between the ICC and the Security Council. Finally, Downer paid considerable attention to conservative American (and Australian) fears that the ICC would be little more than a 'kangaroo court' pursuing politicised and trumped up charges against the US, a view put forward most vociferously by US Senator Jesse Helms (Graff 2002: 32). According to Downer, 'it is inconceivable that any politically motivated referral to the court from a state party without sufficient merit based on evidence would satisfy the scrutiny of the prosecutor. Similarly, politically motivated referrals to the prosecutor from any other source would have to satisfy both the prosecutor and the pre-trial chamber of their independent merit before they could proceed further' (Downer 2000: 7).

In 1998, the Australian government explicitly supported the ICC idea and located itself alongside states like Canada and the EU fifteen (except France) who argued that the new court should be a powerful and independent instrument of international justice. Downer was not, he claimed, blinded by 'dewy eyed idealism' and went to Rome determined to resolve these four fundamental problems. After Rome, government statements suggested that Downer had accomplished his goals and contributed to the creation of a Statute based on the primacy of domestic jurisdiction, clearly defined crimes, a proper relationship with the Security Council, and safeguards against politicised prosecutions. There was no indication that the government had concerns with the Statute, that it would not be an early ratifier, or that it would add reservations to its eventual ratification. The politicians and commentators in Australia who began to criticise the ICC in 2002 showed little appreciation that Downer had held similar concerns at the outset of the Rome

negotiations in 1998 but was evidently more than satisfied that those concerns had been met in the Statute.

Support for Downer's position came from the substantive investigation of the potential impact of the ICC on Australia. The Australian Parliament's Joint Standing Committee on Treaties conducted an exhaustive enquiry on the Statute and its effect on Australian law. Chaired by Liberal Party MP Julie Bishop, the committee interviewed a wide variety of witnesses including representatives from DFAT, the Attorney-General's office, and the Defence Department, NGOs such as Amnesty International and the 'Council for the National Interest' and prominent individuals from both sides of the ICC divide. The committee's final report, published in May 2002 (Joint Standing Committee 2002) concluded that Australia should ratify the Statute. As a concession to right-wing concerns it argued that the relevant implementing act should include a declaration reaffirming the fact that 'this Act does not affect the primacy of Australia's right to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC' (Joint Standing Committee 2002: para 3.32). As we will see later, the Rome Statute's principle of complementarity enshrined the primacy of domestic jurisdiction, satisfying the committee's concerns. Notably, the committee's conclusion addressed each of the major complaints put forward by the domestic and international anti-ICC lobby:

- Sovereignty: the committee found that 'ratification of the ICC statute will not limit the rights of Australian citizens, or diminish the independence of Australia, or alter our internal system of government in any significant way' (para 3.3).

- Defining the crimes: the committee concluded that ‘the crimes in the ICC Statute are not novel and...are defined with the same degree of detail as other domestic criminal offences’ (para 3.3).
- The prosecutor: contrary to those who described the ICC prosecutor’s powers as ‘unchecked’, the committee found that it ‘will be subject to controls and will have to justify and seek approval for investigations and prosecutions (para 3.3).
- The impact on the Australian Defence Forces and its peacekeeping commitments: the committee succinctly stated that ‘the ICC will not inhibit ADF peacekeeping or other operations’ (para 3.3).

Thus, in recommending that the government take early action to ratify the Statute, the committee showed that it had considered the main anti-ICC arguments and had dismissed them, agreeing with Alexander Downer that Australia’s main concerns had indeed been addressed.

Although the parliamentary committee report had given the policy a resounding endorsement, Australia had held the chair of the ‘like-minded’ group of pro-ICC states, and the government had earlier professed its support for the Rome Statute as it was, the country witnessed an unedifying and uniformed debate about the ICC’s ratification, in which the Prime Minister backed away noticeably from one of his own government’s most well-established foreign policy objectives. The Australian right’s vehement opposition to the court frequently descended into racist innuendo. Queensland National Party MP, Paul Neville, denounced the ICC because, he claimed, it would place Australians at the mercy of ‘African and Asian judges’ (see Harvey 2002: 2). Adopting a clearly nationalist critique, Andrew Bolt suggested that supporting the ICC meant handing over Australian sovereignty to ‘malicious and

powerful foreigners' like George Soros (Bolt 2002: 19). The arguments put forward by more 'mainstream' political actors such as the leader of the anti-ICC campaign in the Liberal Party, Bronwyn Bishop, former National Party Senator John Stone and foreign affairs columnist in *The Australian*, Greg Sheridan, while they avoided overtly racist arguments, nevertheless demonstrated little appreciation that Downer had expressed their concerns some four years earlier and was happy that those concerns had been resolved in the final Rome Statute. Moreover, not one of them referred to the parliamentary committee's findings or proceedings.

John Stone's main concern, for example, was that the ICC represented a dramatic loss of Australian sovereignty. Stone pointed out that the ICC could prosecute an Australian Special Forces soldier on 'trumped up' charges if it found that Australia had not made a genuine attempt to investigate or prosecute the crime. That decision, he argued, resided with 'two foreign judges' (Stone 2002: 11). This argument, which sits at the heart of the anti-ICC lobby's claims, is flawed in a number of respects. Firstly, the ICC can only prosecute perpetrators for one of three crimes: genocide, crimes against humanity and war crimes. The Rome Statute states that the commission of these crimes must be 'widespread or systematic' (see below). It is difficult to see how a 'trumped up' charge of systematic genocide, mass murder or ethnic cleansing, can be made. Moreover, such crimes will be criminal offences under Australian law and will therefore be investigated and prosecuted here. It is unthinkable that Australia would not investigate a charge of, say, the mass murder of civilians against one of its soldiers and prosecute the perpetrator if need be. Second, the 'two foreign judges' Stone refers to are actually eighteen judges who will hold a high level of legal qualifications and internationally recognised legal experience. These judges will be elected by - and be accountable to - the parties to the Statute.

Third, the pre-trial hearing that Stone alludes to will be comprised of *independent* (that is, non-ICC) judges. The prosecutor will also be elected by a two-thirds majority of the parties to the Statute, and the parties will also have the right to impeach the prosecutor if they believe that he/she is not behaving appropriately. Finally, the Security Council has the power to delay any prosecution indefinitely.

*The Australian's* Greg Sheridan showed a similar lack of understanding of the ICC. Sheridan's argument was based on a view of the UN reminiscent to that held by Jesse Helms. According to Sheridan, both the UN and EU are populated by meddling bureaucrats who would insist that the building of Jewish settlements in Palestine constitutes a punishable crime. Sheridan is right in arguing that the Rome Statute identifies the repopulation of occupied territories as a war crime. Such practices have long been proscribed by international humanitarian law; it should also be noted that since the Oslo Accords in 1992, the Security Council has consistently pronounced the illegality of Israel's settlement program. On the ICC itself, Sheridan argued that 'there is no serious argument for Australia to cede further sovereignty to a UN body that will be dominated by bureaucrats. Human rights are protected by states. Democratic governments are accountable and have democratic legitimacy. No one elected the UN' (Sheridan 2002: 17).

This supposed loss of sovereignty was also the main theme of sceptical right-wing parliamentarians who rallied behind former Liberal minister, Bronwyn Bishop. Bishop claimed that the majority of Liberal backbenchers supported her and agreed with Sheridan and others that the ICC represented a dangerous ceding of sovereignty as the Statute contained no absolute guarantees that an Australian would not be prosecuted by the court (Cole 2002: 1). One of Bishop's parliamentary allies, National Party MP De-Anne Kelly, went as far as to suggest that the crime of

genocide could be turned against the Immigration Department by its political opponents for its treatment of asylum seekers. (Cole 2002: 1). In fact, the wording of the Statute's definition of genocide is *exactly* the same as the definition found in the Genocide Convention. That Convention, signed by Australia in 1948, bound Australia to punish the perpetrators of genocide (see Ratner and Abrams 2001: 25-45). The Rome Statute does not, therefore, constitute a new commitment to the prosecution of the perpetrators of genocide or a new definition of the crime. It merely provides an additional mechanism for pursuing the perpetrators of this most heinous of crimes.

Bronwyn Bishop successfully rallied significant numbers of Liberal and National Party backbenchers to her cause, threatening the government with an embarrassing parliamentary revolt. Somewhat more troubling for Downer and Williams was the effect of this conservative campaign on John Howard. Shortly before the ICC ratification bill came before the Australian parliament, Howard visited US President George W. Bush. The President took the opportunity to warn Howard about the alleged perils of the ICC, an argument that the Australian Prime Minister later described as 'powerful' (Associated Press 2002a). Bush's argument, combined with the danger of a parliamentary revolt, persuaded Howard to adopt a much more cautious approach to the ICC, overturning three and a half years of consistent foreign policy. On his return to Australia, Howard told parliament that 'we're not going to enter into any international obligations that compromise the sovereignty of this country' (Anon 2002b: 9). On the same day, he also refused publicly to commit himself to the Statute when prompted to do so by the Labour Party's foreign affairs spokesman Kevin Rudd.

Howard decided to place his own political position vis-à-vis his party ahead of Australia's long-term foreign policy on the ICC by placing the matter of ratification in the hands of the coalition parliamentary group and the cabinet. After two days of party room 'debate', conducted 'amid anger, threats and recrimination' (Anon 2002a: 1) the Prime Minister referred the matter to the Cabinet. Although reports suggest that a majority of both the speakers at the party room discussion and cabinet ministers spoke in favour of the ICC (Cole 2002b: 2), Howard remained unconvinced. Within Cabinet, the anti-ICC case was put forward by Finance Minister Nick Minchin but outside, Alexander Downer's case was bolstered by the vocal support of Australia's two most senior military officers, Chris Barrie and Peter Cosgrove. Both these commanders argued that the ICC would protect Australian defence forces from war crimes and warlords (Associated Press 2002a). However, it was clear that Downer's preference for an unqualified ratification would not be met and when the Federal opposition moved a motion to that effect, Howard mobilised the Coalition's superior numbers to defeat it (Coorey 2002: 2).

In the end, Downer could only placate the Prime Minister and secure ratification by developing a compromise solution. The Foreign Minister proposed that the government should proceed with ratification but that it should insist on maintaining the primacy of its domestic jurisdiction and its 'sovereign right' to veto the prosecution of Australian citizens. The declaration devised by Downer contained, as noted, three key aspects: First it stated that 'Australia reaffirms the primacy of its criminal jurisdiction in relation to crimes within the jurisdiction of the court' (Howard 2002: 2). Second, as a follow-on from the first, the declaration insisted that no Australian citizen would be surrendered to the ICC without the consent of the Attorney-General. Finally, the declaration asserted that the crimes of genocide, war

crimes and crimes against humanity would be interpreted according to Australian domestic law.

Thus, having been one of the leading advocates of the ICC, Australia only ratified the Rome Statute hours before the ICC came into being and attached a more extensive reservation to the treaty than any other ratifying state, except France. As noted earlier, the first and third elements of the declaration were unnecessary whilst the second, we argue below, is either inadmissible because it breaches Article 120 of the Statute or alternatively may provide cause for other parties to the Statute to question the legality of Australian participation in ICC decision-making. Such a claim could arise from customary international law regarding reservations contrary to the spirit of the treaty. Before turning to these matters, however, the following section will demonstrate that the arguments put forward by the anti-ICC lobby were misplaced and misinformed because they replicated arguments previously aired and dealt with at Rome.

### **The Rome Statute and the Prosecution of War Criminals**

The idea that there are some crimes so heinous that they fall under a universal jurisdiction and that individuals, including sovereigns, should be held criminally responsible for acts committed during wartime are not new. Even before the Tokyo and Nuremberg trials after the Second World War, liberal states have tried to uphold these twin ideas along with the notion that the most appropriate way of dealing with war criminals should be ‘legalist’ rather than purely politically expedient. That is, liberal states have consistently held the view that war criminals should be put on trial—and given a fair trial at that—rather than summarily executed. Before Tokyo and Nuremberg, states attempted to deal with the vanquished Napoleon and the

defeated German Kaiser and his lieutenants through judicial proceedings (Bass 2000). Both attempts were, by and large, unsuccessful because the legal process could not be imposed on defeated states that were nevertheless unoccupied. The post Second World War trials were much more successful (see Minear 1971 and Jackson 1971). In the wake of these trials, the UN established an International Legal Commission (ILC) with the task of creating a global war crimes court. Along with many of the other of the UN's early aspirations the idea of a universal court fell victim to the Cold War stalemate. Nevertheless, states were able to agree in the 1948 Genocide Convention, that genocide constituted a universally punishable crime. Although no executive instruments were created to address that crime states have invoked this universal jurisdiction. Israel claimed universal jurisdiction for the crime of genocide when it forcibly extradited and tried Nazi war criminal Adolf Eichmann (Ratner and Abrams 2001: 30). Nevertheless, such prosecutions were limited to the Nazi perpetrators of crimes in the Second World War. No states claimed a universal right to put genocidal leaders like Idi Amin and Pol Pot on trial, creating a culture of impunity amongst states and non-state groups who commit crimes that shock the conscience of humanity. Amin and Pol Pot were only brought to heel by interventions from neighbouring states—Tanzania and Vietnam—both of whom (Vietnam in particular) were condemned by international society for breaking the rule of non-intervention (see Wheeler 2000).

This culture of impunity fostered by international society's failure to punish the perpetrators of crimes that shock the 'conscience of mankind' (Walzer 1977) became even more evident in the uncivil wars of the 1990s. In former Yugoslavia, Serb and Bosnian Serb forces launched a series of attacks against Slovenia, Croatia and Bosnia and Hercegovina. More than 200,000 people were killed in the Bosnian

war alone, the vast majority of them civilians, killed as part of a systematic campaign of genocide and ethnic cleansing (see Rieff 1995, Sells 1998). The worst massacre came at Srebrenica, in 1995. There, nearly 8,000 men and boys seeking refuge in a UN 'safe area' were slaughtered by Bosnian Serb forces (Honig 1998). In 1994, Hutu militias in Rwanda unleashed 100 days of genocide, killing over 800,000 Tutsis and Hutu moderates. Once again, international society was in attendance. However, rather than strengthen the UN force in Rwanda once the genocide began, the Security Council chose to withdraw it (Melvern 2000). Having failed to halt or ameliorate the bloodshed, the Security Council sought to punish the perpetrators by creating two ad hoc war crimes tribunals. Both tribunals (ICTY for Yugoslavia and ICTR for Rwanda) got off to very slow starts, lacking both political will and funds. For example, in 1994 the General Assembly gave the ICTY \$5.4 million to cover its expenses, compared with the \$94 million that the court received once it began investigating war crimes in Kosovo in 1999 (Bass 2000: 221, also Bellamy 2002). There were accusations of obstructionism by the Security Council, whose members seemed to place a higher value on *realpolitik* than on international justice (Goldstone 2000). Nevertheless, both tribunals have taken on momentum and have contributed to the development of international legal and political norms, not least through the arrest and trial of Slobodan Milosevic. They both gave renewed focus to the twin ideas of universal jurisdiction and individual culpability (Greenwood 1993: 646-654). An equally important development was the arrest of Augusto Pinochet and the two important legal decisions made by the British House of Lords: the first was that sovereigns did not enjoy immunity *per se* and the second was that there are crimes so serious that they fall under universal jurisdiction. Thus, a state could extradite to

another country an individual suspected of committing such crimes in a third country (see Barker 2000 Hawthorn 1999, Weller 1999).

The ICC and the Rome negotiations therefore grew out of a developing trend that built upon well-established international legal principles. However, what all the initiatives discussed above shared was their selectivity and the adjoining perception that the justice they meted out was nothing other than victor's justice. Although the statute of the ICTY covers *all* personnel deployed in former Yugoslavia after 1991 (thus, all Australian personnel in the Balkans have fallen under the jurisdiction of the ICTY since 1994), and the ICTY demonstrated its jurisdiction in 1999 by conducting preliminary investigations into the legality of NATO's air strikes, it is geographically limited, as is the Rwanda tribunal. There was therefore a widespread belief in the second half of the 1990s that the international community needed to develop a universal instrument to prosecute the perpetrators of the most heinous crimes.

Many of the states involved in trying to keep the peace argued that there was a need to end the culture of impunity and deter future offenders. Supporters of the idea argued that only a powerful, independent and universal judicial instrument would accomplish this (Akhavan 2001). The ILC created a Preparatory Committee (PrepCom) to begin work on a draft treaty based on a text that had originally been developed after the conclusion of the 1948 Genocide Convention. Throughout 1996-7 the PrepCom held a series of sessions looking at issues such as the core crimes that should fall under the ICC's jurisdiction, the mechanisms for triggering an investigation and prosecution, and practical questions such as the appointment of judges and mechanisms for guaranteeing fair trials. By the time a draft statute was presented to Kofi Annan in April 1998, it had grown from the 60 or so articles in the ILC's original text to 116 articles. The draft included 478 bracketed passages, which

the PrepCom indicated were areas where dispute remained (Ball 1999: 195-6). Annan believed, however, that the draft provided a sound foundation for negotiations and convened an international summit in Rome to work on a final Statute.

One hundred and sixty one states sent representatives to Rome. Not all states were committed to the idea, and some went to Rome to try to kill the very notion of an ICC. A protracted conflict in the US between the pro-ICC State Department and the Pentagon, which had been resolutely opposed to the ICC since the idea was first mooted, was won by the Pentagon. Throughout the conference the US thus refused to compromise even when confronted with an overwhelming majority against it, including virtually all of its closest allies. As an indication of the US position in Rome it is worth noting that the head of a delegation of US Senators who visited the negotiations stated in Rome that ‘this court is truly a monster, and it is a monster that must be slain’ (cited in Ball 1999: 192).

Broadly, the states involved in the negotiations divided into three groups. Firstly, there was the ‘like minded’ group, which was chaired by Australia and included over 60 states, such as Canada, the entire EU with the exception of France, New Zealand, Argentina, South Korea, Singapore, and South Africa. As noted earlier, this group favoured a strong and independent court. Second, there was the ‘Security Council’ group, comprising all the permanent members of the Security Council except the UK. This group argued that if there was to be an ICC, it should be controlled by the Security Council. In the end, Russia and France were suitably satisfied with the Rome Statute to vote in favour of it and sign it whilst the US and China opposed it. Finally, there were the ‘usual suspects’, states that opposed the very notion of an ICC and made uncomfortable bedfellows with the US. These states included Iran, Iraq and Libya. During the negotiations over 1,400 alternatives were

proposed and all the disputed aspects of the treaty on which consent could not be reached were voted on, on the basis of a two-thirds majority. At the end of the summit there was a vote on the final statute. One hundred and twenty states voted in favour (including Australia), only seven voted against (including the US, Israel, China, Iran, Iraq and Libya).

As the negotiations began it became clear that Alexander Downer's concerns, which we discussed earlier, reflected broader international concerns that had to be resolved if agreement was to be reached. There were broadly four major areas of dispute at Rome: (1) the definition of the crimes that would fall under the ICC's jurisdiction; (2) the relationship between domestic jurisdiction and the ICC; (3) the mechanism for triggering a prosecution; (4) the relationship between the ICC and the Security Council.

*Problem 1: Defining the Crimes.* We observed in the earlier section that one of the main criticisms of the ICC statute was the apparent lack of clarity about the crimes it is to prosecute. The ICC has jurisdiction to prosecute people for committing any one of four types of crimes: genocide, crimes against humanity, war crimes, and crimes of aggression. (It should be noted at the outset that the ICC has no authority over past crimes; its jurisdiction only covers crimes committed after 1 July 2002.) The delegates at Rome could not reach agreement on what constituted a 'crime of aggression', even though war crimes tribunals after both World Wars had prosecuted people for that very crime. It was agreed, therefore, that no-one would be indicted for 'crimes of aggression' until the international community had reached a consensus on what they are. At the other end of the spectrum, there was no problem reaching a consensus on what constituted genocide. Here, the Rome Statute adopted the precise wording of the 1948 Genocide Convention, which has been used to prosecute

individuals in both the ICTY and ICTR. It is worth noting that the ICTY did not find anyone guilty of genocide until this year (the deputy commander of the Bosnian Serb forces at Srebrenica) and that in 1999 the International Court of Justice insisted that ‘the threat or use of force against a state cannot in itself constitute genocide’ in response to a complaint against NATO by Yugoslavia. In order to prosecute someone for genocide, the prosecutor not only needs to demonstrate the fact of mass killing or deportation but also needs to prove the intent to destroy an established and stable group ‘in whole or in part’, as the Convention and Statute both state. ‘Trumped up’ prosecutions for genocide are therefore impossible.

While there is widespread agreement about what genocide is and the fact that it is illegal, there was much less agreement in Rome about the specificities of war crimes and crimes against humanity. The bases for the definition of war crimes were the four 1949 Geneva Conventions and the two additional protocols that were agreed in 1977, all of which enjoy the status of customary international law. Syria resurrected an argument used by Burma in 1977 to insist that war crimes should only apply in inter-state wars and not internal conflicts. Syria argued that restricting a state’s right to use force against secessionists or other guerrillas breached their sovereignty and would only encourage terrorists. This motion contradicted the precedents set by the ICTY and ICTR, both of which established that these crimes were relevant to both international and internal conflicts, was opposed by Germany and Canada, and ultimately defeated by a more than two-thirds majority (Economides 2002: 116-119). With reference to war crimes, therefore, the statute referred to ‘grave breaches’ of the laws of war that drew their specific crimes from the Geneva Conventions and additional protocols, both of which were already part of customary international law.

Perhaps the most controversial area of disagreement over definitions was the issue of crimes against humanity. Unlike war crimes, crimes against humanity are not gathered in already well-established treaties. The Statute itself therefore had to offer an exhaustive and authoritative definition. This is found in Article 7 and Appendix D of the Statute. The Statute identifies crimes such as the traditionally recognised crimes of murder and rape and others that have emerged as a result of recent experience including rape and other forms of sexual enslavement, ‘forcible population transfer’ (ethnic cleansing), enforced disappearances (drawn from the Latin American experience), enforced sterilisation (opposed by China), and apartheid (Economides 2002: 118, Robertson 1999: 335).

The main dilemma that states confronted was the question of when a crime became significant enough in its scale to constitute a crime against humanity. There was widespread agreement amongst states that credibility depended on the drawing of a high benchmark. Thus, in order to breach Article 7 of the Statute the acts listed above have to be committed ‘as part of a *widespread or systematic* attack directed against any civilian population’ (emphasis added, Article 7). Many NGOs present at Rome were unhappy at the narrowness of this definition. One of the most controversial aspects of the Statute’s definition of crimes against humanity is that it includes a passage insisted upon by the Arab League that defines the transfer by an occupying power of its own civilians into occupied territory as a crime against humanity. Israel vehemently opposed this addition pointing out, quite correctly, that its settlement program in the Palestinian occupied territories would be proscribed. This prompted Israel to move from a position of cautious support for the Statute to one of outright hostility (Economides 2002: 118), although it should be observed that the addition was not entirely novel in terms of international law and—as mentioned

earlier—the Israeli settlement program had previously been deemed illegal by the Security Council.

Defining the specific crimes to be covered by the ICC was therefore a controversial issue, though perhaps not as contested as the anti-ICC lobby would have us believe. Instead, the provisions of the Rome statute drew upon existing treaties, the core of which—such as the 1948 Genocide Convention and 1949 Geneva Conventions and additional protocols—are regarded as customary international law. Perhaps the most controversial issue was the benchmark for ascertaining when the scale of the crime reached a level that would warrant ICC concern. On that issue, the Statute is very cautious, demanding that the commission of crimes be ‘systematic or widespread’, placing the onus on the prosecutor to prove that particular crimes are part of a wider set activities. Thus, a one-off episode in which, for instance, a single Australian SAS soldier deliberately killed a handful of civilians would not fall under the jurisdiction of the ICC because there would be no question that such a crime was either systematic or widespread. In the unlikely event that the soldier was retained by the SAS after the incident and went on to commit further crimes, that may fall under the ‘widespread’ criteria. In that case, the issue of the relationship between the domestic judicial system and the ICC would come to the fore.

*Problem 2: The relationship between domestic jurisdiction and the ICC.* One of the most frequent criticisms put forward by opponents of the ICC in Australia (especially Greg Sheridan) was that the ICC has less legitimacy than the Australian judicial system and should therefore not have the ability to overrule it. There are two striking points to make at the outset. First, no state proposed a system whereby the ICC’s jurisdiction would take precedence over domestic judicial systems that were willing and able to investigate and prosecute citizens for committing crimes of

genocide, war crimes and crimes against humanity; the ICC is not intended to replace national courts. As part of the ratification process, parties to the Statute are also obliged to add the three core crimes to their own statute books. Thus, crimes against humanity, as defined in the Rome statute, are now punishable under *Australian law*. Second, the relationship between domestic courts and the ICC is based upon the principle of complementarity. That is, the ICC is meant to complement rather than supplant domestic courts. The US argued that domestic jurisdiction should have primacy and there were no notable dissenters. Thus, the state whose citizen is accused has primary responsibility for investigating the allegations and prosecuting the alleged perpetrator if it sees fit. Only if it does not fulfil its responsibility would the matter fall under the jurisdiction of the ICC.

The debate focused on what criteria should be used to decide whether the domestic judicial system had fulfilled its obligations. As with the definition of the crimes, the agreed benchmark errs on the side of caution and severely curtails the ICC's jurisdiction. Thus, the ICC 'will act only when national courts are *unable or unwilling* to exercise jurisdiction' (Article 12). This is a major concession to sovereignty. All a state has to do in order to prevent an ICC investigation is demonstrate that it has investigated the allegations itself. Coupled with the insistence that the commission of crimes be 'systematic or widespread', it is clear that the ICC's jurisdiction would not come into force in any but the most extreme cases. Moreover, that jurisdiction would not be universal but would instead only apply if either the state where the crime was committed or the state whose citizen was accused was a party to the ICC.

*Problem 3: the mechanism for triggering a prosecution.* The court's critics in Australia and the US argued that these high benchmarks would be irrelevant if the

prosecutor was able to launch investigations independently of the Security Council. If the Security Council did not wield control, they argued, the prosecutor's office would become an overly powerful and politicised body. Such a body would in all likelihood try to force trumped up charges on the US because its service personnel played a unique role in maintaining international peace and security through its contribution to peacekeeping. The United States' unique peacekeeping role was frequently raised, the argument being that as the US had special responsibilities it should also have special protection against potential politicised prosecutions. In fact, the US has less than 750 soldiers and civilian personnel in UN operations worldwide, a figure that places it well behind the leading contributors. Moreover, the US contingent in the Bosnian mission that it threatened to bring to a premature end because of its ICC fears numbered a mere 45.

The 'like-minded' group, supported by the hundreds of NGOs in and around the fringes of the Rome negotiations, argued that a strong, credible and universal court needed an independent prosecutor who was free to initiate investigations. In contrast, the US, France and China argued that the prosecutor should only investigate cases referred to it by the Security Council. The type of court they envisaged was an ICTY on a global scale. The problem with this formulation was that it did not overcome the problem of selectivity and perception of 'victor's justice' that accompanied it. In effect, the Security Council group argued that whilst there should be an ICC, their citizens should be exempt from it simply because their states happened to have the power of veto on the Security Council. Of the permanent members, only the UK was vocally opposed to this proposition. The vast majority of other states also opposed this idea and used the voting procedure to block it.

Having conceded ground on the benchmarks for defining crimes and adjudicating on jurisdiction, the ‘like-minded’ group dug its heels in on the role of the prosecutor. Thus, the statute allowed for three ‘trigger mechanisms’ for an investigation and prosecution. First, the ICC could investigate an alleged crime at the behest of the Security Council. Second, it could do so at the behest of a party to the Statute. Third, the prosecutor’s office could initiate an investigation but only if it convinced a pre-trial chamber consisting of independent judges (ie. non ICC judges) of the impartiality and seriousness of the case (Economides 2002: 124). The role of the prosecutor would be monitored by the parties to the Statute and the parties hold the right to impeach the prosecutor. It goes without saying, of course, that the prosecution could only bring a case before a pre-trial chamber if the scale and seriousness of the crime fitted the ICC’s jurisdiction and if the primacy of domestic jurisdiction criteria had been met.

*Problem 4: the relationship between the ICC and the Security Council.* The final major debate concerned the relationship between the ICC and the Security Council. As we noted above, most of the permanent members of the Security Council (except the UK) wanted the ICC prosecutor to be controlled by the Security Council. Following from the Rwanda and Yugoslavia tribunals, they argued that the only way to ensure that the court would be politically credible, impartial, and accountable would be to place it under the aegis of the Security Council. The US, France and China argued that the Security Council should hold ultimate control over the ICC, deciding what to investigate, who to appoint as judges and which allegations to dismiss. Such a proposal - by maintaining selectivity - struck at the heart of the very ideas underpinning the ICC—universal jurisdiction and individual culpability.

A compromise solution was put forward by Singapore and accepted by the 'like-minded' group and France, although the US and China continued to resist. The Singapore compromise states that the Security Council can suspend an investigation for up to 12 months and can pass such a resolution an indefinite amount of times. Thus, in effect, the Council can suspend any investigation indefinitely. The compromise appealed France because it gave the Security Council an important role, but also satisfied the 'like-minded' group because it placed the onus on the Council to block rather than initiate an investigation. The rationale behind this was that the Council would be unlikely to block an investigation unless there were very good reasons for doing so (and a high level of consensus). At the same time, however, the Singapore compromise also means that the Security Council can step in if there is evidence of politicisation or extreme political necessity. It therefore marks a sensible solution that gives the Security Council an important role in the ICC whilst preserving as much judicial independence as possible.

This brings us to the declaration that Australia tabled with its ratification of the Rome Statute. We have argued that the first aspect of the declaration, the reaffirmation of the primacy of Australian domestic law was unnecessary because it is enshrined in the Rome Statute's principle of complementarity. The third aspect, that Australia reserve the right to define what is meant by the crimes of genocide, war crimes and crimes against humanity, was also unnecessary: the relevant crimes and the exhaustive definitions given are drawn from well-established customary international law, to which Australia already subscribes, and will in any case be incorporated into Australian domestic law.

As we noted earlier, it is the second aspect of the declaration, the demand that no Australian citizen could be extradited to the ICC without the consent of the

Attorney-General that is potentially most troubling. On the one hand, it is perhaps most likely that it will become a practical irrelevance. By implication, a decision by the Attorney-General not to extradite a citizen would be based on a prior investigation of the allegations by Australia's law enforcement agencies since the incorporation of the crimes into Australian law obliges those agencies to investigate complaints made against Australian citizens. In this case, the ICC would have no jurisdiction because it could not be proved that Australia had been 'unable or unwilling' to investigate the allegations. There would therefore be no request for extradition.

It is inconceivable that the Australian government would forbid its own law enforcement agencies from investigating crimes covered by the Rome Statute. To take a hypothetical case, let us say that an Australian SAS soldier is accused of a war crime by deliberately killing 20 civilians in Afghanistan. Despite the allegations and the lodging of a formal complaint by a party to the Statute or the authorisation of an investigation by a pre-trial chamber of the ICC, the Australian government refuses to even investigate the allegations. (Note, Australia has to be either unwilling or unable to *investigate* the allegations.) Only then would the ICC's jurisdiction kick in, and then only if the Security Council believed the veracity of the claim to be such that the investigation did not warrant blocking. Only then would the prerogative demanded in the declaration come into effect. Such a situation would only come about if the Australian government chose to disregard entirely its own domestic legal obligations, an unlikely development.

The danger with this second aspect of the government's declaration is that it could be used to question Australia's membership of the ICC and threaten the protection afforded to ADF personnel by the ICC. In 1951, the ICJ passed a ruling that changed the function of reservations or declarations on treaties. It found that if

the reservation contravened the ‘object and purpose’ of the treaty at hand, other parties to the treaty have the right to consider themselves not party to the treaty vis-à-vis the party that had tabled the reservation (Ratner and Abrams 2001: 40). Let us take another hypothetical case: Australian peacekeepers are seized by enemy troops in East Timor who torture and execute them (East Timor has not yet signed or ratified the Statute but is expected to do so). Because the second aspect of Australia’s declaration could plausibly be considered to breach the ‘object and purpose’ of the Rome Statute in that it could grant effective immunity to Australian citizens, East Timor could declare that it does not consider Australia to be a party to the Statute. This means that Australian forces operating in East Timor would not have the protection of the ICC and the Australian government would be unable to demand the prosecution of the perpetrators either by East Timor or the ICC. It was just such a possibility that Barrie and Cosgrove were thinking about when they endorsed the ICC as an important contribution to the security of ADF personnel.

## **Conclusion**

When it came to the Rome Statute, Australia proved to be a reluctant ratifier. Having been at the forefront of the ‘like-minded’ movement lobbying for a powerful and independent court, Australia was not one of the first 60 states to ratify and added a series of reservations to its ratification to appease the right-wing in the coalition.

While we commend Alexander Downer for his commitment to the ICC and his determination to secure ratification even when the Prime Minister wavered, one of the main features of political debate about the ICC in Australia was misinformation and misinterpretation. We agree that ratification of international treaties requires discussion and input from the broader community, but in this case misinformed fears

of a loss of sovereignty and attempts to drum up the bogeyman of ‘foreign meddling’ very nearly meant that Australia would not participate in an important mechanism designed to prevent the very kinds of atrocities its government and citizens rightly condemn. The position of the anti-ICC lobby in Australia was baseless; critics ignored Downer’s negotiating position in Rome, failed to engage with his claim that his concerns had been met in the Statute, and completely ignored the findings of the parliamentary committee. Combined with Howard’s increasingly pro-Bush persuasion, these arguments almost prevented Australia’s ratification and caused an embarrassing *volte-face* in foreign policy. It remains to be seen whether this episode will prevent Australia from playing the pivotal role in setting up the court that Downer’s commitment to international justice warrants.

## References

- Akhavan, P. (2001), ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’, *American Journal of International Law*, 95:1, pp. 7-31.
- Anon (2002a), ‘Coalition Tears Flow in Battle Over Court’, *The Australian*, 19 June.
- Anon (2002b), ‘PM Determined to Keep Sovereignty’, *Townsville Bulletin*, 20 June.
- Associated Press (Australia) (2002a), ‘Fed; No Pressure from US on ICC—Howard’, 13 June.
- Associated Press (Australia) (2002b), ‘ADF Says Officers not at Risk: Barrie’, 3 June.
- Ball, H. (1999), *Prosecuting War Crimes and Genocide: The Twentieth Century Experience* (Kansas: University Press of Kansas).
- Barker, J. C. (2000), *International Law and International Relations*, London: Continuum.
- Bass, G. J. (2000), *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press).
- Bellamy, A. J. (2002), *Kosovo and International Society*, London: Palgrave-Macmillan.
- Bolt, A. (2002), ‘Justice for Sale’, *The Herald Sun*, 20 June.
- Cole, M. (2002), ‘Revolt Looms over Treaty’, *The Courier Mail*, 4 June.
- Cole, M. (2002b), ‘Cabinet to Ratify Treaty on War Court’, *The Courier Mail*, 19 June.
- Coorey, P. (2002), ‘Downer in Battle for New Court’, *The Advertiser*, 18 June.
- Downer, A. (1998), Speech by Alexander Downer on the Establishment of an International Criminal Court, Rome, 15 June 1998.

- Downer, A. (2000), 'Upholding the "Sword of Justice": International Law and the Maintenance of International Peace and Security', speech given to the joint meeting of the Australian and New Zealand Society of International Law and the American Society of International Law, Canberra, 28 June 2000.
- Downer, A., D. Williams, and J. Moore (1999), Joint Press Release: Australia Commits to International Criminal Court, 12 December 1999.
- Economides, S. (2002), 'The International Criminal Court', in M. Light and K. Smith (eds), *Ethics and Foreign Policy*, Cambridge: Cambridge University Press.
- Goldstone, R. J. (2000), *For Humanity: Reflections of a War Crimes Investigator*, New Haven: Yale University Press.
- Graff, J. (2002), 'America is not Pleased', *Time*, 8 July.
- Greenwood, C. (1993), 'The International Tribunal for former Yugoslavia', *International Affairs*, 69: 4, pp. 641-655.
- Harvey, M. (2002), 'Race Jibe as Libs, Nats Split on Court', *The Herald Court*, 19 June.
- Hawthorn, G. (1999), 'Pinochet: The Politics', *International Affairs*, 75:2, pp. 253-258.
- Honig, J-W (1998), *Srebrenica: Record of a War Crime*, London: Penguin.
- Howard, J. (2002), 'International Criminal Court', Press Release from the Office of the Prime Minister, 30 June.
- Jackson, R. H. (1971), *The Nurnberg Case as Presented by Robert H. Jackson*, New York: Cooper Square Publishers.
- Joint Standing Committee on Treaties (2002), Report 45: The Statute of the International Criminal Court, May.  
www.aph.gov.au/house/committee/jsct/ICC/icc/htm
- Melvern, L. (2000), *A People Betrayed: The Role of the West in Rwanda's Genocide*, London: Zed Books.
- Minear, R. H. (1971), *Victor's Justice: The Tokyo War Crimes Trial*, Princeton: Princeton University Press.
- Ratner, S. R. and J. S. Abrams (2001), *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford: Oxford University Press.
- Rieff, D., (1995) *Slaughterhouse: Bosnia and the Failure of the West*, London: Vintage
- Robertson, G. (1999), *Crimes Against Humanity: The Struggle for Global Justice* London: Penguin.
- Sells, M. A. (1998) *The Bridge Betrayed: Religion and Genocide in Bosnia*, Revised Edition, London: University of California Press.
- Sheridan, G. (2002), 'Scepticism of UN is a sign of our Wisdom', *The Australian*, 8 June.
- Stone, J. (2002), 'Who Led us to Court Disaster?', *The Australian*, 24 June.
- Walzer, Michael (1977), *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, New York: Basicbooks.
- Weller, M. (1999), 'On the Hazards of Foreign Travel for Dictators and Other International Criminals', *International Affairs*, 73 (3), pp. 599-617.
- Wheeler, N. J. (2000), *Saving Strangers: Humanitarian Intervention in International Society*, Oxford: Oxford University Press.