

Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law

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One of the intractable problems of contemporary international law lies in the implementation of treaties in the domestic laws and practices of ratifying States. A welcome, though possibly unexpected, outcome of the successful negotiation of the Rome Statute¹ has been the determination of States Parties — including South Africa,² the United Kingdom,³ Germany⁴ and Australia⁵ — to enact legislation to enable their courts to assert the primary jurisdiction over the international crimes. The International Criminal Court (ICC) was inaugurated in March 2002 and its 18 judges have now been elected, seven of them women. The achievement of a permanent court to try international crimes has, nonetheless, overshadowed the fact that the Court has, at best, a secondary role in prosecuting for genocide, war crimes and crimes against humanity.

In order to ensure the primacy of Australian jurisdiction to prosecute for international crimes, and thereby to enable ratification of the Rome Statute, the Australian government introduced the *International Criminal Court Act 2002* (Cth) (*ICC Act*) and the *International Criminal Court (Consequential Amendments) Act 2002* (Cth) (*Consequential Amendments Act*), (the *ICC Acts*). The novelty and scope of this legislation has had a deep impact on Australian criminal law by amending the *Criminal Code Act 1995* (Cth) so that prosecutions can be made for international crimes.⁶ The *ICC Act* establishes procedures to

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1 Rome Statute of the International Criminal Court, opened for signature 17 July 1998, [2002] ATS 15 (entered into force 1 July 2002), UN Doc A/CONF 183/9: <<http://www.un.org/law/icc/statute/rome.htm>> (hereinafter Rome Statute).

2 *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*: <<http://www.gov.za/acts/2002/a27-02/index.html>> (7 October 2003).

3 *International Criminal Court Act 2001* (UK).

4 *Act to Introduce the German Code of Crimes Against International Law (CCAIL)*; for a description in English of the legislation see George Hirsch, 'Germany's Code of Crimes Against International Law' (2003) 19(9) *IELR*.

5 *International Criminal Court Act 2002* (Cth) and the *International Criminal Court (Consequential Amendments) Act 2002* (Cth) (hereinafter *Consequential Amendments Act*). Note that New Zealand, Canada, France, the Netherlands, Norway, Slovenia and Switzerland have also introduced similar legislation.

6 The *Consequential Amendments Act* is described as 'an Act to amend the *Criminal Code Act 1995* and certain other acts'.

enable compliance by Australia with requests for assistance from the ICC and for the enforcement of sentences. The *Consequential Amendments Act* is the vehicle for creating offences that are the 'equivalent'⁷ of the crimes of genocide, crimes against humanity and war crimes set out in the Rome Statute. Through these mechanisms, Australia retains the right and power to prosecute persons rather than surrendering them for trial by the ICC itself. The need to give effect to the primacy of Australian jurisdiction over crimes against humanity, genocide and war crimes has thus been the stimulant for a 'quiet revolution' in substantive and procedural criminal laws.

While the Rome Statute has encouraged the enforcement of international criminal laws in domestic law by nations that had been reluctant to do so in the past it has, in effect, 'ousted' the jurisdiction of the new court. It may be expected that most State Parties will, like Australia, be keen to assert their primary jurisdiction to prosecute.

This paper considers the following aspects of Australia's implementation of the Rome Statute in its national laws:

1. Inauguration of the International Criminal Court;
2. The 'principle of complementarity';
3. Australia's terms of ratification of the Rome Statute;
4. Implementation of treaties in Australian law;
5. Australian laws enabling prosecutions of war crimes prior to the *ICC Acts*;
6. The *Consequential Amendments Act* and its impact on Australian criminal law;
7. The *ICC Act* and procedural issues.

1. Inauguration of the International Criminal Court

The concept of an international criminal court has its contemporary roots in the Hague Peace Conference of 1907.⁸ In 1948, the United Nations General Assembly invited the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with the specific crime of genocide.⁹ Some of the most influential stimulants for the creation of an international criminal court were the Nuremberg and Tokyo trials and the famous dicta: 'Crimes against international law are committed by men not abstract entities.'¹⁰

The judges of the Nuremberg Tribunal recognised that individuals have a duty to comply with international criminal law; a duty that goes beyond the obligations

7 Explanatory Memorandum accompanying the International Criminal Court (Consequential Amendments) Bill 2002 (Cth) at 1: <<http://www.scaleplus.law.gov.au/html/ems/o/2002/0/200206204>> (7 October 2003).

8 Joint Standing Committee on Treaties (JSCOT), *Report 45: The Statute of the International Criminal Court* (2002) at vii.

9 General Assembly Resolution 260 of 9 December 1948; Article 6 provides that persons charged with genocide 'shall be tried by ... such international penal tribunal as may have jurisdiction'.

10 For a concise introduction to humanitarian laws and their background, see Gretchen Kewley, *Humanitarian Law in Armed Conflicts* (1984).

of national citizenship. Effective implementation of this principle in national laws has, however, proved to be difficult. National war crimes trials and the use of domestic laws to prosecute those accused of war crimes have been of mixed success. The Australian Commonwealth prosecutions under the *War Crimes Act* 1945 against Polyukhovich, Wagner and Berezowsky were, for example, unsuccessful, primarily because the trials were dependent upon evidence that was over 50 years old.¹¹ The Security Council was, by contrast, successful in establishing two ad hoc war crimes tribunals in response to the civil wars in Rwanda and former Yugoslavia.¹² Each of these tribunals is growing in experience and esteem and has significantly advanced legal jurisprudence relating to war crimes including rape, crimes against humanity and genocide.¹³ The Hague and Rwanda courts are, however, limited to their specific civil conflicts.

These two tribunals, the recently established Special Court for Sierra Leone,¹⁴ and alternative approaches through truth and reconciliation commissions in South Africa, strengthened international resolve to create a permanent international criminal court that would be available for all future conflicts, independently of Security Council authorisation. Moreover, a permanent and impartial tribunal, created by treaty, could avoid the stigma of 'victor's justice' and apply international criminal laws and procedures in a transparent and impartial manner.

Shortly after the creation of the United Nations ad hoc Tribunal at the Hague, the International Law Commission completed its draft statute for a permanent international criminal court. Under the authority of the General Assembly, a Preparatory Committee for the establishment of the ICC completed the draft statute. A UN Diplomatic Conference was then established in Rome between 15 and 17 July 1998 to finalise and adopt the convention.

With more than the necessary 60 ratifications, the Rome Statute came into force, with effect from 1 July 2002. By April 2003, there were 89 Parties including the United Kingdom and France and many nations from the Asia Pacific region. It was a close run thing whether Australia would ratify the Rome Statute in time to enable Australia to join other States Parties in the inaugural Assembly of State Parties with the capacity to nominate judges and prosecutors for the ICC. The Australian government made the decision at the 11th hour to consolidate its leadership role in negotiating the Rome Statute by enacting the *ICC Acts* and depositing its instrument of ratification.

11 Gillian Triggs, 'Australia's War Crimes Trials: All Pity Choked' in Timothy L H McCormack & Gerry J Simpson, *The Law of War Crimes: National and International Approaches* (1997) at 123–150.

12 See SC Res 955 UN SCOR, 49th Sess, 3453rd mtg, UN Doc S/RES/955 (1994) (Rwanda) and SC Res 827, UN Doc S/RES/827 (1993) (Yugoslavia).

13 See, for example, *Prosecutor v Jean-Paul Akayesu*, International Tribunal for Rwanda, ICTR-96-4-T, September 1998.

14 The Special Court for Sierra Leone is a mixed 'semi-international' tribunal, sitting 140 kms away from the capital to minimise instability or fear likely to be stimulated by the hearings. On 10 March 2003, it indicted seven accused of war crimes, crimes against humanity and other serious violations of international humanitarian law.

Many nations have remained outside the Rome Statute. China has, notably, made no commitment to the Statute at all.¹⁵ Significant failures to ratify include the United States and Russia, which have signed but not ratified the Rome Statute. Indeed, the United States, in an unprecedented act, has notified the United Nations' depositary that it will not proceed to ratify the treaty. In a letter to the Secretary General, the United States declared that it does not intend to become a party to the Rome Statute and that 'accordingly, the United States has no legal obligation arising from its signature on December 31, 2000'.¹⁶ Article 18 of the Vienna Convention on the Law of Treaties 1969 requires a State that has signed but not ratified a treaty to refrain from acts that would defeat its object and purpose.¹⁷ It is likely, however, that, once the intent of the signatory not to ratify is notified to the depositary, the obligation not to prejudice the treaty is terminated. As no State has previously made such a statement, it remains uncertain how an international tribunal would respond to any complaint that the US has acted in a way that threatens the viability of the Rome Statute.

One reason for the failure of some States to ratify lies with the fear of politically motivated prosecutions. Another lies with the scope of the jurisdiction of the ICC. A troubling feature of the Rome Statute for some States is that a national of a country that has not ratified can be brought before the Court if the offences were committed in the territory of a State that is a party to the treaty.¹⁸ It is therefore possible, as the United States argues, that its military officers could be subject to the jurisdiction of the ICC, even though the United States is not a party to the Rome Statute. This aspect of jurisdiction of the ICC is not, however, surprising because, whether or not a State has ratified the Rome Statute, it could also have what is loosely termed a 'universal jurisdiction' to prosecute non-nationals for certain crimes that have been committed extraterritorially. A universal jurisdiction can be founded on customary international law or, more often and with greater clarity, on a treaty power or obligation and includes piracy, war crimes, genocide, apartheid, drug-trafficking, hijacking, torture, attacks upon diplomats and hostage taking.¹⁹ Moreover, States that have not signed or ratified the Rome Statute may make a declaration ad hoc permitting the ICC to prosecute in relation to a crime committed on its territory or by one of its nationals.²⁰ It would be possible, for example, for Iraq to take advantage of this provision to enable prosecutions against United States military officers for activities during the conflict in and subsequent occupation of Iraq. As the United Kingdom and Australia are parties to the Rome Statute, their nationals are also subject to the jurisdiction of the ICC if a prosecution were to be initiated against them for acts committed in relation to this conflict.

15 <<http://untreaty.un.org>> as at 27 April 2003.

16 'United States (US): Letter to the Secretary-General of the United Nations Regarding the Rome Statute of the International Criminal Court' (2002) 41 ILM 1014.

17 Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1988) (1969) 8 ILM 679.

18 Rome Statute, above n1, Article 12.

The election of 18 judges is now complete, with 10 judges elected for List A, being candidates with competence in criminal law and 8 judges for list B, being those with competence in relevant areas of international law. The Assembly of States Parties has met twice and Mr Ocampo of Argentina was elected Prosecutor of the ICC on 21 April 2003.²¹ A representative of the Netherlands has been appointed as the focal point for the establishment of an international criminal bar. The Assembly has also established a special working group on the Crime of Aggression, the only major area of jurisdiction of the ICC that remains to be agreed. In short, plans for the new court are well underway.

2. *The 'Principle of Complementarity'*

It was a non-negotiable position of most States at the Rome conference that the ICC could assert its jurisdiction over international crimes only if the State, or States that also have jurisdiction over those crimes, are unable or unwilling genuinely to do so.²² The so-called 'principle of complementarity' means that any

19 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3, Articles 100–107 (entered into force 16 November 1994); *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, 860 UNTS 105, Article 4 (entered into force 14 October 1971); *International Convention on the Prevention and Punishment of the Crime of Apartheid*, opened for signature 30 November 1973, 1015 UNTS 243, Articles IV–V (entered into force 18 July 1976); *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85, Article 5(2) (entered into force 26 June 1987); *International Convention Against the Taking of Hostages*, opened for signature 17 December 1979, 1316 UNTS 205, Article 5 (entered into force 3 June 1983); *United Nations Convention Against the Illicit Traffic in Narcotic Drugs*, opened for signature 20 December 1988, 1696 UNTS 449, Article 4(2)(b) (entered into force 11 November 1990). It remains unclear which of the treaty provisions for universal jurisdiction now reflect customary international law. The right of a State to assert a universal jurisdiction in principle does not, however, meet the central need to gain custody of the accused. Belgian legislation of 16 June 1993, 'Concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and Protocols I and II of 8 June 1977' has been the basis for several arrest warrants issued in absentia against those alleged to have committed international crimes. A warrant issued against Congo's Minister of Foreign Affairs prompted an application by Congo to the International Court of Justice in the Arrest Warrant case: 41 ILM 536 (2002). While the majority of the Court determined the validity of the warrant on the basis of the immunity enjoyed by ministers of foreign affairs under customary international law, the joint separate opinion of Higgins, Kooijmans and Buergerthal JJ considers in some depth the question whether the 'inaccurately termed' universal jurisdiction justifies the issue of an arrest warrant where the accused is not within the territory of the prosecuting State. They conclude that a universal jurisdiction for certain international crimes 'is clearly not regarded as unlawful' (at [46]), and agree with the authors of *Oppenheim's International Law* (9th ed, 1992) at 998 that 'there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect' (at [52]). As to whether the presence of the accused in the territory of the prosecuting State is a precondition for universal jurisdiction, these judges agree that the issue of a warrant in absentia does not violate any rule of international law.

20 Rome Statute, above n1, Article 12(3).

21 Website of the Rome Statute: <<http://www.iccnw.org/buildingthecourt.html>>.

22 Rome Statute, above n1, Article 17.

State with jurisdiction over an alleged international crime has the primary right to exercise that jurisdiction. Article 17 of the Rome Statute provides that a case will be inadmissible before the ICC if it:

- (a) ... is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) ... has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute ...

Article 17 effectively reserves the primary power to prosecute war crimes, crimes against humanity and genocide to the State with jurisdiction over those crimes under the usual principles of international law. The provision has facilitated ratification of the Rome Statute by those States which had strongly resisted the possibility that the ICC could assert jurisdiction over an accused prior to any genuine trial by national courts. The principle of complementarity has thus proved to be the key to success in establishing the world's first international criminal court but, paradoxically, it has also stimulated States to pass legislation for national trials, thereby to deny any role to the ICC.

3. *Australia's Ratification of the Rome Statute*

While the extensive public debate in Australia had focused upon the international consequences of ratifying the Rome Statute, the debate generally did not consider the domestic implications of ratification created by passing the *ICC Acts*. The Joint Standing Committee on Treaties (JSCOT) had, however, considered many submissions arguing that, where Australia had jurisdiction, the principle of complementarity should operate to protect the primacy of its courts. JSCOT agreed with such concerns and recommended to the government that it should declare that:

- It is Australia's right to exercise its jurisdictional primacy with respect to crimes within the jurisdiction of the ICC, and
- Australia further declares that it interprets the crimes listed in Articles 6 to 8 [genocide, war crimes and crimes against humanity] of the Statute of the International Criminal Court strictly as defined in the *International Criminal Court (Consequential Amendments) Bill*.²³

In formulating its recommendation, JSCOT was careful to use the word 'declare' rather than, for example, 'reserves'. This was for good reason. The Rome Statute includes a 'transitional provision' or 'opt-out' clause under Article 124. A State may declare for a period of 7 years after the Rome Statute comes into force that it does not accept the jurisdiction of the ICC with respect to crimes referred to in Article 8 (dealing with war crimes) if the crime is alleged to have been

²³ JSCOT, above n8 at xvii–xviii.

committed by its nationals or on its territory. With the single exception of this transitional clause, the Rome Statute prohibits reservations to the treaty.²⁴ Any statement by Australia regarding its understanding of the nature of the legal obligations under the Rome Statute could not therefore constitute a formal reservation, prompting the question — what is the legal status of a declaration or understanding at international law?

At international law, a reservation is intended to ‘exclude or to modify the legal effect of certain provisions of the treaty in their application to that State’.²⁵ Fitzmaurice observed, however, that a reservation does not include ‘mere statements as to how the State concerned proposes to implement the treaty or declarations of understanding and interpretation, unless these imply a variation of the substantive terms or effect of the treaty’.²⁶

It is common for States to append an ‘interpretive declaration’ when ratifying treaties apparently with the intention of avoiding any implication that they have made a legally effective reservation or in order to avoid meeting specific requirements for a reservation required under a treaty. In the event of a dispute, the legal status of an interpretive declaration can prove to be critical to determining whether the relevant tribunal or court has the capacity to assert jurisdiction. The European Court of Human Rights (ECHR) in *Belilos v Switzerland*²⁷ considered the question whether an interpretive declaration was in law a reservation. On concluding that one of the Swiss ‘interpretive declarations’ was an invalid reservation, the ECHR observed that: ‘In order to establish the legal character of ... a declaration, one must look behind the title given to it and seek to determine the substantive content’.²⁸

On this basis, if a declaration is substantively a reservation it will be treated accordingly. If a declaration does not have the legal status of a reservation or if it fails to satisfy criteria for a reservation under a particular treaty, it will not have any legal effect. The willingness of the ECHR to give to a declaration the legal effect of a reservation where this is its real effect, suggests that States opposed to a declaration that is at risk of being interpreted as a reservation should take the precaution of objecting to it.

24 Rome Statute, above n1, Article 120.

25 Vienna Convention on the Law of Treaties 1969, above n17, Article 2(1)(d). See also Articles 19, 20, 21 and 2.

26 *Yearbook of the International Law Commission* (1950 vol 11) General Conditions of Formal Validity at 110. The legal effect of reservations was first considered by the International Court of Justice in the context of reservations to the Genocide Convention 1948. Clearly, reservations are not permitted if, as is the case with the ICC, there is a provision to the contrary. However, the Court advised that reservations are acceptable in principle if they are compatible with the object and purpose of the treaty under consideration: *Reservations to the Convention on Genocide Case* (Advisory Opinion) [1951] ICJ Rep 15 (hereinafter *Genocide Reservation Case*). The test of compatibility was subsequently adopted by the Vienna Convention on the Law of Treaties 1969. A reservation can be rejected by other parties, in which case there is no contractual relation between them.

27 Eur Court HR, Series A, Vol 132. Judgment of 20 April 1988, UN Doc ST/LEG/SER.E/ at 86ff.

28 *Id* at 87.

Aside from the question of legal status of a declaration, tolerance by the UN depositary of interpretive declarations in State practice has proved to be an important strategy to encourage nations to ratify multilateral agreements. Indeed, States with federal constitutions such as Australia, often append some form of understanding to their instruments of ratification in order to protect themselves from any implication of breach where the federal body is unable to ensure compliance by constituent entities. An interpretive declaration can also assuage domestic concerns about the impact of the treaty and can be an effective technique to clarify the legal position for parties. Australia's ratification of the ICCPR in 1980 was, for example, accompanied by numerous reservations and declarations that have since been withdrawn.²⁹ Declarations can thus be useful in facilitating the development of confidence in multilateral agreements, often having the effect of encouraging a full commitment some years later.

In summary, declarations occupy a legal 'no mans land'. They have no legal effect whatsoever in international law, yet they are frequently employed by ratifying States.

Consistent with its practice and to meet community concerns, Australia added a qualification to its acceptance of the compulsory jurisdiction of the International Court of Justice.³⁰ Australia's ratification of the Rome Statute is accompanied by a declaration in which the following points are made:

- Australia 'notes' that a case is not admissible before the ICC if it is being investigated or prosecuted by a State;
- Australia affirms the primacy of its criminal jurisdiction in relation to crimes within the jurisdiction of the ICC;
- no person will be surrendered to the Court by Australia until it has had a full opportunity to investigate or prosecute any alleged crimes;
- no person can be arrested on a warrant issued by the ICC or surrendered to the Court by Australia without the consent of the Attorney General; and
- Genocide, Crimes against Humanity and War Crimes will be interpreted and applied 'in a way that accords with the way they are implemented in Australian domestic law'.

Australia's declaration is likely to be interpreted by an international tribunal to be a declaration, rather than a reservation and, as such, adds nothing to the nature and extent of Australia's legal commitment to the obligations set out in the Rome Statute. It does, however, provide a level of comfort to those concerned about diminutions of Australian sovereignty that could be implied by the treaty.³¹ The declaration has had the positive effect of enabling ratification while at the same

29 Gillian Triggs, 'Australia's Ratification of the International Covenant on Civil and Political Rights: Endorsement or Repudiation?' (1982) *ICLQ* 278.

30 Dean Bialek & Gillian Triggs, 'The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap' (2002) 3 *Melbourne Journal of International Law* 322 at 357.

31 Several submissions were made to JSCOT to the effect that Australian sovereignty would be at risk if the Rome Statute were to be ratified.

time providing a ‘belts and braces’ assurance that Australia has primacy of jurisdiction in relation to crimes also coming within the jurisdiction of the ICC. It was also of significance politically that the declaration should confirm that the Attorney-General must first consent before an accused person can be surrendered to the ICC, a point that is discussed below.

The question whether a declaration is, as a matter of international law, a reservation will be one for the relevant international tribunal. Were Australia to purport to rely on its declaration in relation to a matter before the ICC, it will be for the ICC to determine for itself whether the declaration is in legal effect a reservation.³² If the Australian declaration were to be judged by the ICC to constitute a qualification of the legal obligations under the Rome Statute, it will be a reservation prohibited by Article 120. If the declaration becomes ineffective for this reason, it is likely to be severed so that the ‘contractual’ relations among the States Parties to the Rome Statute remain effective.

Most declarations on ratification of the Rome Statute amount to an attempt to repeat its terms or to qualify the obligations by explanation or expansion rather than to limit the obligations imposed. Of the 89 States that have ratified the Rome Statute, 27 have lodged declarations setting out their understanding of its application.³³ Typical declarations relate to technical and language issues, are uncontroversial and do not challenge the legal commitment. Others, such as the declaration by Egypt, stress the importance of the Rome Statute being interpreted in conformity with the general principles and fundamental rights that are universally recognised. Similarly, the United Kingdom understands the term ‘established framework of international law’ in Articles 8(2) (b) and (e) of the Rome Statute to include customary international law as established by State practice and *opinio juris*. Israel, on its signature only, as it has yet to ratify, stresses the dangers of politicisation of the ICC. France considers that the ICC cannot preclude the exercise of self-defence at international law and seeks to protect its right to the possible use of nuclear weapons. France excludes ‘ordinary’ crimes, including terrorism and also excludes military targets and collateral damage. By contrast, New Zealand was concerned to ensure that Article 8 was not limited to conventional weapons, so that it *should* include nuclear weapons.

No other State Party to the Rome Statute has attempted to restrict its ratification of the Rome Statute in any manner similar to that of Australia; that is, to define the exact meaning of each offence, so that war crimes, crimes against humanity and genocide apply in domestic law only if they conform to the Australian legislation. While Australia’s declaration appears to be unique in State practice, there is a developing jurisprudence on the validity of reservations to human rights instruments as distinct from treaties dealing with other subjects. The evolving principle is that certain human rights treaties, presumably including the Rome Statute, may not be the subject of any reservation. The United Nations Human

³² *Genocide Reservation Case*, above n26.

³³ For the text of all current declarations, see <<http://untreaty.un.org>>.

Rights Committee in its General Comments of 1994 on reservations to the International Covenant on Civil and Political Rights 1966 considered that:

... provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject a person to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion nor presume a person guilty unless he proves his innocence ...³⁴

The significance of the views of the Human Rights Committee has prompted the International Law Commission to consider the validity of reservations to human rights treaties and a Report on the issue has been prepared.³⁵ Any reservations (in the guise of a declaration) to the Rome Statute will, in any event, be invalid in light of the general prohibition on reservations to this treaty.

As the *ICC Acts* replicate in large part the *Elements of Crimes*³⁶ describing the offences created by the Rome Statute, Australia's declaration appears to be little more than a statement of the obvious. If, however, Australian courts choose to interpret and apply domestic law in a way that is jurisprudentially different from that of the ICC as its judges interpret the law, it becomes possible that Australia could be in breach of its obligations under the Rome Statute. It is more likely, however, that national courts will make every effort to ensure that they apply the law within internationally accepted interpretations.³⁷ The far greater likelihood, in any event, is that Australia will try its own nationals and any offences that take place on its territory. If so, Australia's declaration will not be relied upon in practice.

4. Implementation of International Treaties in Australian Law

It has been axiomatic in Australian law that a treaty to which it is a party has no direct application in domestic law in the absence of implementing legislation.³⁸ The High Court decision in *Teoh's Case*, while a significant development of jurisprudence on the role of international law in domestic law, requires only that

34 General Comment 24 (1995) 15 HRLJ 464; (1995) 2 IHRR 10; see Belinda Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women' (1991) 85 *American Journal of Int'l Law* 281.

35 Second Report by Special Rapporteur, M Pellet, UN Docs A/CN.41477 and Add 1.

36 Assembly of States Parties, *Report*, ICC-ASP/1/3, Pt II.B *Elements of Crimes*: <<http://www.un.org/law/icc/asp/aspfra.htm>>.

37 This appears to be the legislative intention of the *ICC Acts*, as indicated by the Explanatory Memoranda accompanying the *Consequential Amendments Act* and the *ICC Act*, eg: 'it has been necessary to define some of the crimes by reference to standards set in the relevant international instruments'; 'the ICC crimes are defined in the draft text of the Elements of Crime'.

38 *Dietrich v The Queen* (1992) 177 CLR 292; *Kruger v Commonwealth* (1997) 190 CLR 1; see generally, Rosalie Balkin, 'International Law and Domestic Law' in Sam Blay, Ruzand Piotrowicz & B Martin Tsamenyi (eds), *Public International Law: an Australian Perspective* (1997) at 119–145.

administrators should take account of treaty obligations, but are not bound by them.³⁹ More recently, the High Court in *Lam's Case*⁴⁰ appears to have retreated from *Teoh*, suggesting that this differently constituted High Court is cautious about the role of treaties that have yet to be enacted in Australian law. A court may, nonetheless, look to a treaty in the event of ambiguity of implementing legislation or as an influence on the development of the common law.⁴¹ The Commonwealth has chosen not to introduce legislation to permit the direct implementation of most of the human rights treaties to which Australia is a party. With the signal exceptions of the Conventions on Race Discrimination⁴² and Sex Discrimination,⁴³ other human rights treaties are merely appended to the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) as the benchmark for human rights standards when the Commission carries out its statutory duties.⁴⁴

In conformity with Australia's processes for treaty ratification, JSCOT reviewed the Rome Statute and implementing legislation and considered their impact on Australian sovereignty, the legal system, current international obligations and the defence forces. It recommended that Australia should ratify the Rome Statute on the basis that the *Consequential Amendments Act* should not affect the primacy of Australia's right to exercise jurisdiction. JSCOT particularly recommended that the crime of rape in the *Consequential Amendments Act* be harmonised with the approach taken by the *Elements of Crimes*. JSCOT also recommended that it be made clear how offences arising between 1957, when the *Geneva Conventions Act* came into force, and July 2002, when the Rome Statute came into force, were to be covered with respect to crimes under Part 11 of the *Geneva Conventions Act*.

39 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (hereinafter *Teoh's Case*).

40 *Minister for Immigration and Multicultural Affairs v Ex Parte Hieu Trung Lam* (2003) 195 ALR 502. Hayne J, for example, argues that *Teoh* 'poses more questions than it answers' (at [121]).

41 *Polites v Commonwealth* (1945) 70 CLR 60; *Nationwide News v Wills* (1992) 177 CLR 1 at 43 (Brennan J). Note also the influence of international human rights law on the common law: see Brennan J in *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1 at 42 where he argued that Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights 'brings to bear on the common law the powerful influence of the Covenant and the international standards it imports'.

42 International Convention on the Elimination of all Forms of Racial Discrimination, 7 March 1966.

43 Convention on the Elimination of all Forms of Discrimination Against Women, 18 December 1979; implemented by the *Sex Discrimination Act* 1984 (Cth).

44 See <<http://www.hreoc.gov.au>>. For discussion of the theory of 'quasi-incorporation' of treaties in domestic law, see Ivan Shearer, 'The Relationship Between International Law and Domestic Law' in Brian Opeskin & Donald Rothwell (eds), *International Law and Australian Federalism* (1997) at 55–57. Note also the decisions in *Collins v State of South Australia* (1999) 74 SASR 200 and *Minogue v Williams* (1999) FCA 1585, affirmed [2000] FCA 125 (re: Standard Minimum Rules for the Treatment of Prisoners and ICCPR).

The external affairs power provides a wide licence to the Commonwealth when enacting laws to give effect to treaty obligations.⁴⁵ While some doubts were expressed to JSCOT about the possible inconsistency of the *ICC Acts* with judicial independence, JSCOT concluded that it is unlikely that the implementing legislation would fail for want of constitutional validity.⁴⁶

5. *Australian Laws for Prosecution of War Crimes Prior to the ICC Acts*

The offences adopted by the *ICC Acts* replace or supplement many Commonwealth laws for the prosecution of war crimes and similar offences that existed prior to implementation of the Rome Statute. The existence of such laws by no means indicates the extent of their enforcement. Indeed, Australian practice suggests that war crimes prosecutions have ultimately depended upon political will. Over the last 58 years, since the end of the Second World War, Australia had passed various acts that might potentially have been employed to prosecute such crimes. Apart from the war crimes prosecuted shortly after 1945, any subsequent trials have proved to be too little too late to enable conviction.⁴⁷ The following legislation has been in place for many decades but has failed either to prompt prosecutions or to gain convictions:

- *Genocide Convention Act* 1949. The Federal Court in *Nulyarimma v Thompson*⁴⁸ confirmed that genocide did not exist as a crime under Australian law, despite Australia's ratification of the Genocide Convention 1948 and enactment of the *Genocide Convention Act*.
- The *War Crimes Amendment Act* 1988 applies only to a slither of time during WWII — between 1 September 1939 and 8 May 1945 and then only to the war in Europe, excluding any application to the Pacific or elsewhere. *The War Crimes Amendment Act* is unusual in that, unlike the United Kingdom or Canadian war crimes legislation, it did not create crimes of genocide, war crimes or crimes against humanity. Rather, the legislation defined 'war crimes' by reference to 'serious crimes' that were 'ordinary' crimes under Australian criminal law. Prosecutions thus depended upon proof of murder, manslaughter, aiding and abetting and conspiracy. Primarily for lack of credible or available evidence, each of the three prosecutions brought under this legislation failed.⁴⁹ Emphasis on domestic criminal law by the *War Crimes Amendment Act* did not, quite aside from the procedural difficulties, meet the legal or moral dimensions of war crimes, genocide or crimes against humanity.

45 See, for example, *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (hereinafter *Polyukhovich Case*), especially Mason CJ at 528.

46 JSCOT recommended that the *Consequential Amendments Act* should not limit the jurisdiction of the Australian courts with respect to crimes under Part 11 of the *Geneva Conventions Act* 1957.

47 See discussion in Triggs, above n11.

48 See discussion of genocide in Section 6(A) of this article.

49 *DPP v Polyukovich* (No 2) (1993) 171 LSJS 1; *Malone v Berezowski* (1993) 161 LSJS 227 and *R v Wagner* (1993) 66 A Crim R 583.

- The *Geneva Conventions Act 1957* applies to crimes that are grave breaches of the four Geneva Conventions of 1949. While this legislation has been available for war crimes prosecutions over the last decades, no attempt has been made to prosecute for alleged offences, probably because there has been little interest in prosecuting acts arising after 1957.
- The *Defence Force Discipline Act 1982* applies to members of the Defence Forces and is very occasionally employed in relation to acts that might constitute war crimes.⁵⁰
- *Crimes (Torture Act) 1988* extends Australian jurisdiction to extraterritorial acts and, while not as yet the basis for any prosecutions, has a wide potential.
- *International War Crimes Tribunals Act 1995* relates only to the UN Security Council ad hoc tribunals and is not effective beyond the specific mandates of these bodies.

None of these acts fully enables prosecutions for the crimes within the jurisdiction of the ICC. For Australia to ensure that it could assert its primary right to prosecute for war crimes, crimes against humanity and genocide, new legislation was necessary.

6. *International Criminal Court (Consequential Amendments) Act 2002 and Australian Criminal Law*

The Rome Statute does no more than list the offences of genocide, crimes against humanity and war crimes, using as models the Genocide Convention⁵¹ and the four 'Red Cross' Geneva Conventions of 1949 and Additional Protocols of 1977.⁵² It has been for the Preparatory Commission for the ICC to agree upon the *mens rea* and *actus reus* elements of each offence. With the aim of assisting the ICC to apply the Rome Statute, the Preparatory Commission produced a draft text for the *Elements of Crimes*, now adopted by the States parties.⁵³ As a general principle, the *Elements of Crimes* require that the perpetrator must have committed the prohibited acts with intent and knowledge that can be inferred from the facts. Specific offences are, however, often associated with value judgments such as 'inhumane' or 'severe'.⁵⁴ The Preparatory Commission advised that it was not necessary for the perpetrator to have personally made such a value judgment. Presumably, the courts will also infer any value judgments. While the *mens rea* and *actus reus* of each crime are set out in the *Elements of Crimes*, the grounds for excluding criminal responsibility are not included and are to be found only in the Rome Statute itself.

50 A recent inquiry conducted into allegations that an Australian officer serving in East Timor had committed a war crime found that the allegations were not substantiated on the evidence.

51 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 (hereinafter Genocide Convention).

52 12 August 1949, 7 UNTS 5; (Additional Protocols 8 June 1977, 16 ILM 1391).

53 Above n36. The Preparatory Commission met in New York, 13–31 March and 12–30 June 2000 to finalise the draft pursuant to Article 9. It reported to States Parties on 2 November 2000. The *Elements of Crimes* have since been adopted by the required two-thirds majority of the members of the Assembly of States Parties.

54 Id at 5.

Those responsible for drafting Australia's *ICC Acts* concluded that the best way to ensure that Australia retains its 'primacy' to prosecute international crimes was to create new offences in Australian law that are 'equivalent' to the crimes listed in the Rome Statute.⁵⁵ With some exceptions, the Australian Government chose, uniquely, to adopt the technique and approach of the Preparatory Commission. The legal benchmarks for the *Consequential Amendments Act* were thus provided by the *Elements of Crimes* that has largely been adopted as substantive additions to Australian criminal laws. The *Consequential Amendments Act* amends the *Criminal Code Act 1995* by creating a new Division 268 in the Schedule to that legislation adding 124 new sections on 'Genocide, Crimes Against Humanity, War Crimes and Crimes Against the Administration of Justice of the International Criminal Court'.

Certain of the offences create entirely new crimes, such as genocide and crimes against humanity. Others were already part of Australian law, such as war crimes, though these have typically been expanded and modified. It is to the scope and detail of these offences that we now turn.

A. *Genocide*

The *Consequential Amendments Act* lists five forms of genocide as offences now subject to prosecution under the amended *Criminal Code Act 1995*. With effect from 1 July 2002, genocide is for the first time an offence under Australian law, despite Australia's ratification of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide on 8 July 1949, nearly 53 years earlier.⁵⁶ Indeed, it was something of a surprise to many that the Full Court of the Federal Court concluded in *Nulyarimma v Thompson*⁵⁷ that genocide was not an offence under Australian law.⁵⁸ While the *Genocide Convention Act 1949* (Cth) had approved ratification by Australia of the Genocide Convention, it did not specifically implement its terms. Rather, it merely scheduled the Convention to the legislation. It has been the position of successive Australian governments that domestic criminal laws relating to murder and manslaughter were sufficient to enable Australia to meet its obligations under the Genocide Convention were it to decide to prosecute for genocide. A similar reliance upon known and predictable national criminal laws was made in the *War Crimes Amendment Act 1988*.⁵⁹

Wilcox and Whitlam JJ, for the majority in *Nulyarimma*, accepted that genocide was a customary norm of international law attracting universal jurisdiction, being a peremptory norm from which there could be no derogation. Genocide was, in short, recognised as a *jus cogens* obligation upon all States; an obligation that existed before and independently of the Genocide Convention.⁶⁰

⁵⁵ Explanatory Memorandum, above n7.

⁵⁶ In force, 12 January 1951.

⁵⁷ (1999) 165 ALR 621 (hereinafter *Nulyarimma*).

⁵⁸ Members of the Aboriginal community had alleged that certain ministers had committed genocide by extinguishing native title on amending the *Native Title Act* and by failing to proceed with World Heritage listing of the lands of the Arabunna people.

⁵⁹ See discussion of the amendments by Triggs, above n11 at 127.

Despite the elevated status of the crime of genocide in international law, the majority of the Federal Court adopted the approach taken by the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex Parte Pinochet* (No 3)⁶¹ that there could be no jurisdiction over an international crime, whether created by treaty or customary law, unless legislation had been implemented to apply the crime in domestic law.⁶² The limited nature of the *Genocide Convention Act* confirmed Wilcox and Whitlam JJ in their support for contemporary and comparative jurisprudence that, in the absence of implementing legislation, the crime of genocide was not available in Australian law.⁶³

There is, however, another approach; one that is consonant with the early understanding of common law courts regarding the relationship between international and domestic laws.⁶⁴ The Federal Court might have concluded that, as genocide is a *jus cogens* crime attracting universal jurisdiction, it could be incorporated or recognised by the court as part of Australian common law.⁶⁵ Neither member of the majority in *Nulyarimma* was willing, however, to endorse the contentions of the appellants that, under Australian law, customary norms of international law can be incorporated into the common law without the need for prior legislation.⁶⁶

The historical failure by Australian judges to analyse the relationship between international law and national law has left jurisprudence uncertain, imposing a chilling effect on the pursuit of international legal rights through the Australian courts. The *Consequential Amendments Act*, while not resolving the problem of

60 Andrew D Mitchell, 'Genocide, Human Rights Implementation and the Relationship between International and Domestic Law: *Nulyarimma v Thompson*' (2000) 24 *MULR* 15 at 25.

61 [1999] 3 *WLR* 827 (hereinafter *Pinochet*).

62 It had been necessary in *Pinochet* for the UK to pass the *Criminal Justice Act* 1988 applicable after 29 September 1988, giving effect to the Torture Convention, before its courts could assert jurisdiction over the crime of torture, even though torture was recognised as a crime attracting universal jurisdiction at international law.

63 *Teoh's Case*, above n39; *Kruger v Commonwealth*, above n38; *Dietrich v The Queen*, above n38.

64 Lord Talbot was reported to have declared the opinion that '... the law of nations in its full extent was part of the law of England, ... that the law of nations was to be collected from the practice of different nations and the authority of writers': *Buvot v Barbut* (1736) 3 *Burr* 1481.

65 See, for example, the judgment of Millet LJ in *Pinochet*, above n61.

66 Detailed consideration of the possibility of direct incorporation of a *jus cogens* or customary rule in Australian law fell to the minority judge in *Nulyarimma*. Merkel J took the opportunity presented by the appellants to embark upon one of the most extensive examinations of the role of customary law in domestic law that has ever been undertaken by an Australian judge. He observed that the English, Canadian and probably also New Zealand judicial authorities favoured the incorporation approach to the adoption of an established rule of international law, provided that there was no contrary statute or common law. On examining the Australian case law, he argued that the 'common law adoption' approach is dominant over the incorporation or legislative adoption approaches. Where a crime such as genocide attracts universal jurisdiction, Merkel J concluded, it may become part of the common law of Australia by direct incorporation. However, this analysis represents a minority view among the Australian judiciary at present.

giving effect to customary international laws in domestic law, has provided the least equivocal statutory means of ensuring that genocide may now be prosecuted before national courts.

The *Consequential Amendments Act* adopts the Elements of Crimes as they relate to genocide and defines five offences of genocide by:

- Killing
- Causing serious bodily or mental harm, including torture, rape, sexual violence or inhuman or degrading treatment
- Inflicting conditions of life calculated to bring about physical destruction, including depriving people of essential resources such as food or medical services, or systematic expulsion from homes
- Imposing measures intended to prevent births
- Forcibly transferring children to a different national, ethnical, racial or religious group.⁶⁷

Drawing upon the Genocide Convention, each variation of the offence of genocide has two fundamental requirements in common. It must be demonstrated that the perpetrator ‘intends to destroy, in whole or in part’. In addition to the act itself, each of the genocide offences must be against the ‘person or persons belong[ing] to a particular national, ethnical, racial or religious group’.

In addition to these two common requirements, specific elements of each offence of genocide are added. The crime of forcibly transferring children, for example, requires that the person transferred is under the age of 18 years and includes circumstances in which the perpetrator is reckless as to whether the person is in fact under this age. The phrase ‘forcibly transfers’ is also further defined to include a threat of force or coercion caused by an abuse of power or by ‘taking advantage of a coercive environment’. The offence of genocide, committed by deliberately inflicting conditions of life calculated to bring about physical destruction, requires an additional *mens rea* element of intending that the ‘conditions of life’ should bring about the physical destruction of the group, in whole or in part.

While the *Consequential Amendments Act* generally mirrors the Elements of Crimes, it fails to adopt them in an important respect. The condition that ‘the conduct took place in the context of a manifest pattern of similar conduct directed against that [targeted] group or was conduct that could itself effect such destruction’ is omitted from each of the forms of genocide adopted by the *Criminal Code Act*. As a practical matter, it may prove easier for an Australian court to convict for genocide in the absence of this element.⁶⁸ It may be doubted, however, whether it is wise to assert jurisdiction over acts that may not meet the quantitative standards that would apply were the matter to come before the ICC itself. If the jurisdiction to prosecute for the universal crime of genocide is based upon a

⁶⁷ Subdivision B of Division 268.

⁶⁸ See Tim McCormack, ‘Australia’s Proposed Legislation for the Implementation of the Rome Statute’ in Mathias Neuner (ed), *Domestic Codes on International Crimes* (2002) at 8.

recognised substantive content at international law, it is arguable that a State may not assert jurisdiction over acts that would not fully constitute genocide either at customary law or under the Rome Statute. No explanation is given for this omission in the Explanatory Memorandum. Belying its name, the Explanatory Memorandum simply notes that the legislation usually defines each crime by reference to the relevant international instrument.⁶⁹

In these and other respects, the States Parties which were responsible for drafting the *Elements of Crimes* have developed the law of genocide significantly, certainly well beyond the substantive content of the offence under the Genocide Convention and of the jurisprudence developed more recently by the United Nations ad hoc tribunals for Rwanda and the former Yugoslavia.⁷⁰ The *Consequential Amendments Act* takes Australian law into almost completely uncharted territory in the sense that there is little international judicial experience in applying the offence of genocide and none in Australian common law. It is thus for the courts to develop the substantive content of genocide on a case-by-case basis.

B. Crimes Against Humanity

The category of crimes against humanity has had a limited place in Australian law as a defence only. The amendments of 1988 to the *War Crimes Act* 1945 permit a defence to a war crime if the conduct 'was permitted by the laws, customs and usages of war' and did not constitute a 'crime against humanity' at the time the conduct occurred. The concept of a crime against humanity is not defined by the *War Crimes Act* and was specifically rejected as a norm of customary international law by Brennan J in the *Polyukhovich Case*.⁷¹ The uncertainty of the status of a crime against humanity in international law, and the consequential lack of content for domestic law purposes, has been overcome by the adoption of the *Elements of Crimes* in the *Consequential Amendments Act*.⁷²

The *Consequential Amendments Act* mirrors the crimes against humanity identified in Article 7 of the Rome Statute. Each of the elements of the 16 forms of crime against humanity is set out, with the *actus rea* followed by the *mens rea*. A crime against humanity may not be committed in isolation or by an individual. Evidence of a link between the perpetrator and a State or organisational policy must be established. It is also necessary to demonstrate that:

- the acts have been committed as part of a widespread and systematic attack against a civilian population, in the sense that the perpetrator intended to further the attack;
- the crimes are a result of the policy of a State or organisation to commit the attack; and
- the perpetrator knew the act was, or intended the act to be, part of a larger attack on a civilian population, though not necessarily a military attack.

69 <<http://scaleplus.alw.gov.au/html/ems>> at 3.

70 See, for example, the *Akayesu Case*, Rwanda Tribunal, above n13.

71 Above n45.

72 Subdivision B.

Acts that can become crimes against humanity are murder, extermination, enslavement, deportation, imprisonment or other severe deprivation of physical liberty, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, sexual violence, persecution, enforced disappearance of persons, apartheid and other inhumane acts which cause great suffering or serious injury to mental or physical health. Each of these offences has been developed in detail in the *Elements of Crimes*, which, in turn, are largely reflected in the *Consequential Amendments Act*.⁷³

The inclusion of rape within the concept of crimes against humanity builds upon the jurisprudence recently developed by the ad hoc tribunal for Rwanda⁷⁴ and has been adopted by the *Consequential Amendments Act*. It is notable, however, that the Australian legislation did not advance so far as the *Elements of Crimes* in adopting a definition of rape that includes cases where a victim has been forced to penetrate another person. It remains, nonetheless, of great import for Australian law that it now recognises rape as a crime against humanity. Moreover, the *Consequential Amendments Act* makes a significant contribution to domestic law by listing those circumstances in which a person will not be taken to have consented. For example, a person who submits to the act because of psychological oppression or abuse of power or because they are unlawfully detained will not have validly consented for the purposes of a crime against humanity. It might be expected that, over time, Australian laws on rape will be influenced by any jurisprudence that evolves in application of these new international principles.

The *Consequential Amendments Act* may also prove to have wide and possibly unexpected implications for the enforcement of treaty obligations such as those dealing with sexual slavery and trafficking in women and children. Section 268.10 creates enslavement as a crime against humanity and includes trafficking in persons. Where a perpetrator exercises powers of ownership over persons and the conduct is committed knowingly as part of a widespread or systematic attack against a civilian population, enslavement will have been committed. Included in the rights of ownership is the exercise of power arising from a debt or contract; a situation that frequently forms the basis for cases of trafficking documented in Australia.⁷⁵ A growing concern for trafficking in the region and into Australia is indicated by Australia's acceptance in December 2002 of the Protocol on Trafficking in Persons, Especially Woman and Children of 2000 (Palermo Trafficking Protocol).⁷⁶

73 A definition of a crime against humanity is inserted into the Dictionary of the Code and provides that it means an offence under Subdivision C of Division 268 of the Code. There are certain drafting differences between the *Elements of Crimes* and the *Consequential Amendments Act* that may be relatively minor or, conversely, that could prove to have significant practical implications. Specific elements are, for example, supplemented or ignored by the legislation. Others are conflated or expanded.

74 *Prosecutor v Jean-Paul Akayesu*, above n13.

75 Liz Hoban, *Report on Trafficking in Women and Children in Australia*, Project Respect, April 2003.

76 On 11 December 2002 Australia accepted, though the Protocol is not yet in force.

The Council of Jurists for the Asia Pacific Forum on National Human Rights Institutions has recently reported on trafficking in persons in the region.⁷⁷ Data evidencing systematic trafficking from India, Thailand and Nepal is mounting. It may prove possible in the future to demonstrate that the trade is so widespread and tolerated by State officials as to constitute an ‘attack against a civilian population’ for the purpose of the legislation. Similarly, sexual slavery includes a threat to cause a person’s deportation, a further and oft reported example of how the *Consequential Amendments Act* could be applied in the future.⁷⁸ The *Elements of Crimes* may in this respect come to have a deterrent influence in the region and globally.

Aside from relatively minor variations in drafting between the *Elements of Crimes* and the *Consequential Amendments Act*,⁷⁹ there are other potential risks in adopting a definition of a crime against humanity that is markedly different from that which has been developed at customary or treaty law. A notable example of divergence of the *Consequential Amendments Act* from the treaty-based approach to an international crime concerns the offence of torture. The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment requires that the perpetrator inflicted ‘severe physical or mental pain or suffering’ for a specified purpose. Neither the Rome Statute nor the *Elements of Crimes* adopts this requirement for the purposes of a crime against humanity. In conformity with these instruments, the *Consequential Amendments Act*, in section 268.13, does not require a specific purpose. The curious result is that the new crime of torture as a crime against humanity varies in an important respect from the definition of torture in the *Crimes (Torture) Act 1988* implementing Australia’s obligations under the Torture Convention. Unlike the *Consequential Amendments Act*, the *Crimes (Torture) Act* requires proof of a specific purpose.

While McCormack argues that the definition of torture adopted under the leadership of the Rome Statute is a ‘liberated approach’ to the definition of a crime against humanity,⁸⁰ it remains problematic that a universal jurisdiction should be asserted by Australia over an act that does not conform to the international customary law and treaty rule. To drop the requirement that there be a ‘specific purpose’ in relation to the crime against humanity may make a successful prosecution easier. It could, however, render conviction vulnerable to the charge

77 The Report is available through the Asia Pacific Forum on National Human Rights Institutions: <<http://www.apf.com.au>>.

78 The recent newspaper report of the findings by the NSW Deputy Coroner on the death in detention of a trafficked woman, Phuongtong Simaplee, provides an example of the potential for application of the *Consequential Amendments Act*: ‘Coroner in call for action on sex slaves’ *The Australian* (25 April 2003).

79 Note, for example, section 268.21(1) and (2) regarding the forced disappearance of persons. The *Consequential Amendments Act* creates two offences that are a single offence under the *Elements of Crimes*, but that in any event constitute participation in the commission of an offence under the Rome Statute.

80 McCormack, above n68 at 11. Sections 268.25 and 268.73 of the *Consequential Amendments Act* dealing with the war crime of torture, both in international and non-international conflicts, continue to require this specific purpose.

that Australian law is more stringent against a perpetrator than is recognised by international law regarding jurisdictional reach.

The *Consequential Amendments Act* will doubtless attract further analysis. These few examples cited serve, nonetheless, to illustrate the scope and potential impact of the new provisions on Australian criminal law.

C. *War Crimes*

The Rome Statute lists four categories of war crimes as follows:⁸¹

- Grave breaches of the Geneva Conventions of 12 August 1949;
- Other serious violations of the laws and customs applicable in international armed conflict;
- Serious violations of Article 3 common to the four Geneva Conventions committed in a non-international armed conflict against persons taking no active part in hostilities;
- Other serious violations of the laws and customs of war in a non-international armed conflict.

The *Consequential Amendments Act* retains these four categories in Subdivisions D, E, F and G and adopts their legal content as defined by the *Elements of Crimes*.⁸² Many of these crimes already existed under Australian law by virtue of Part 2 of the *Geneva Conventions Act* 1957. The *Consequential Amendments Act* repeals Part 2 and adopts the war crimes that had been created by that part. In this way, the implementing legislation lists crimes that were largely known, though rarely enforced, in Australian law.⁸³ It also, and significantly, remains possible to prosecute for offences that are grave breaches arising between 1957 and July 2002.

(i) *Subdivision D: Grave Breaches of the Geneva Conventions and Protocol 1*

The *Consequential Amendments Act* lists 11 war crimes that mirror the pre-existing 'grave breaches' of the Geneva Conventions and of Protocol 1 to which Australia is a party. These offences were war crimes under Australian law, whether they were committed in or outside Australia, under Part 2 of the *Geneva Conventions Act* 1957.⁸⁴ In order to preserve these offences, the *Consequential Amendments Act* both repeals Part 2 of the *Geneva Conventions Act* and then 're-enacts' them as subdivision D.

The war crimes apply exclusively to 'protected persons' under the 1949 Geneva Conventions⁸⁵ and must have been committed in the context of an international armed conflict. Offences include wilful killing, torture to obtain information or a confession, inhumane treatment, biological experiments, wilfully

⁸¹ Rome Statute, above n1, Article 8(2).

⁸² Note the exception Article 8(2)(b)(xx) dealing with 'employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous or unnecessary suffering'.

⁸³ Division D, *Consequential Amendments Act*.

⁸⁴ Explanatory Memorandum, above n7 at 6.

causing great physical or mental suffering, destruction and appropriation of property, compelling a protected person to serve in hostile forces, denying a protected person a fair trial, unlawful deportation or transfer, unlawful confinement of a protected person and taking hostages.

The Preparatory Commission for the ICC recommended that all these war crimes should be interpreted within the established framework of the international law of armed conflict.⁸⁶ It is not entirely clear whether Australia intends to conform to international law in these respects. The Declaration accompanying Australia's ratification of the Rome Statute provides that war crimes, crimes against humanity and genocide are to 'be interpreted and applied in a way which accords with the way they are implemented in Australian domestic law'. If there were to be any divergence between the 'established framework' of international law of armed conflict and implementation in Australia, it becomes possible that Australia will have breached international law by asserting a jurisdiction that is beyond that which is recognised by the international community. It is probable, nonetheless and as suggested above, that Australian courts will harmonise international and domestic laws where any significant variations emerge.

(ii) *Subdivision E: Serious Violations in an International Armed Conflict*

Certain acts are war crimes even where they do not amount to 'grave breaches' of the Geneva Conventions. Where the act is a serious violation of customary international law and was committed in an international armed conflict, it may fall within the 26 war crimes listed by the *Consequential Amendments Act*.⁸⁷ Part 2 of the *Geneva Conventions Act 1957* covered many of these offences, thus the implementing act does not create offences that are new to Australian law. Examples of current interest include attacking a person after the perpetrator had led that person to believe they were entitled to protection; pillaging or taking property for personal use; severely humiliating, degrading or otherwise violating a person or the bodies of the dead; and sexual violence. The offence of rape for the purposes of a war crime under this subdivision includes the wide *actus reus* and *mens rea* developed in the *Elements of Crimes*.

(iii) *Subdivision F: Common Article 3 of the Geneva Conventions in a Non-international Armed Conflict*

Common Article 3 of the Geneva Conventions creates war crimes that are committed during a non-international armed conflict against a person who is not taking an active part in the hostilities. Included in this category of offence are persons who are '*hors de combat*', civilians and medical and religious personnel. As part of the mental element, the perpetrator must know the facts that establish that the person is not taking part in hostilities. The *Consequential Amendments Act*

85 'Protected persons' are defined by Article 4 of the 1949 Geneva Convention relating to Civilians as those who 'find themselves ... in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.

86 *Elements of Crimes*, above n36 at 18, in reference to Article 8.

87 Subdivision E.

lists six war crimes that arise in a non-international armed context, including sentencing or executing a person without a fair trial and taking a person hostage to compel a government, organisation, person or group to act or refrain from acting. Australian jurisprudence remains to be developed in relation to most of these offences.

(iv) Subdivision G: Serious Violations in a Non-international Armed Conflict

War crimes can also arise where there are serious violations of the laws and customs applicable in a non-international armed conflict. Subdivision G of the *Consequential Amendments Act* mirrors the war crimes set out in the Rome Statute Article 8(2)(e) that arise in internal armed conflicts where they are not covered by common Article 3. The Second Protocol to the Geneva Conventions of 1949, to which Australia is a party, describes these offences.⁸⁸ The offences include ordering that no survivors be taken, subjecting a person to mutilation or medical or scientific experiments that are not medically justified and directing an attack against protected objects.

(v) Subdivision H: Grave Breaches of Protocol 1

The Rome Statute omitted to create war crimes in relation to grave breaches of the Protocol 1 to the Geneva Conventions,⁸⁹ possibly because many States have yet to ratify this treaty. Australia is, however, a party to this Protocol and grave breaches of it were already crimes in Australian law under the *Geneva Conventions Act*. These offences have now been included under subdivision H of the *Consequential Amendments Act*. Where an act is committed against a person who is in the power of, or detained by, the enemy as a result of an international armed conflict, it may constitute one of seven war crimes. They are broadly crimes of ‘medical procedure’ that are breaches of Protocol 1 and are not covered elsewhere in the legislation. These war crimes are: the ‘removal of blood, tissue or organs for transportation’; ‘attacks against works and installations containing dangerous forces resulting in excessive loss of life’, such as a dam; ‘injury to civilians or damage to civilian objects’; ‘attacking undefended places or demilitarised zones’; ‘unjustifiable delay in repatriation’; ‘apartheid’; and, directing an attack against a recognised historical monument, work of art or place of worship.

In summary, most of the war crimes, as distinct from genocide and crimes against humanity, enacted by the *Consequential Amendments Act* existed under prior Australian law. While courts have had little experience in applying these offences, Australian criminal law relating to war crimes has not been significantly changed by the implementing legislation.

D. Responsibility of Commanders and Other Superiors

It will often be the case that the persons who committed the war crime are not those who ought ultimately to be criminally responsible for the act. The Rome Statute adopts the principle of command responsibility. Article 28 includes within the

⁸⁸ ATS 1991, n30, in force for Australia, 21 December 1991.

⁸⁹ Australia became a party in 1991, ATS 1991.

jurisdiction of the ICC the acts of a military commander who will be responsible for crimes against humanity, war crimes and genocide 'committed by forces under his or her effective command and control'. The commander must either:

- know or should have known that the forces were committing or were about to commit the crime; and
- fail to take all necessary and reasonable measures within his or her power to prevent the acts or to report the matter to the competent authorities.⁹⁰

Similar provisions apply to superiors who are not commanders where people under their authority and control commit international crimes.⁹¹

The *Consequential Amendments Act* adopts the doctrine of command responsibility by ensuring that such commanders and superiors do not escape punishment where they did not directly commit the offence but failed to take steps to ensure the crimes were investigated and the perpetrators prosecuted.⁹² The implementing legislation supplements Article 28 of the Rome Statute by including recklessness in the mental element of liability for commanders. Superiors can also be responsible if they 'consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such offences'.⁹³

E. Superior Orders and Other Defences

Implementation of the Rome Statute in Australian law has stimulated another revision of the law relating to the defence of superior orders. Under section 16 of the *War Crimes Act*, superior orders are not a defence to war crimes, although they can be taken into account for the purposes of sentencing. Subject to this provision, section 17(1) provides that a defence will be admitted if the act was:

- (a) permitted by the laws, customs and usages of war; and,
- (b) was not under international law a crime against humanity.

Superior orders can be a defence to a war crime, but not to a crime against humanity. An act will also be justified by the laws, customs and usages of war if it was 'justified by the exigencies and necessities of the conduct of war'.⁹⁴

The Rome Statute recognises several grounds for excluding criminal responsibility, including mental disease or defect, intoxication, self-defence or the defence of certain property, mistake of fact and duress.⁹⁵ Article 33 deals specifically with the defences of superior orders and prescription of law by providing that they will not relieve a person of responsibility unless the person was bound to obey orders of the government or of a superior, did not know the order

90 Article 28(a).

91 Article 28(b).

92 Section 268.115.

93 Section 268.115(3)(a).

94 Section 17(3), *War Crimes Act*.

95 Articles 31 and 32.

was unlawful and the order was not manifestly unlawful. Orders to commit genocide or crimes against humanity will always be manifestly unlawful.⁹⁶

Under Australian law, and as a matter of statutory interpretation, it is presumed that existing defences to criminal prosecutions will continue to apply unless there is clear evidence to the contrary.⁹⁷ It is to be expected therefore that the defences of mental illness, intoxication, duress, mistake of fact and self-defence will apply in the usual way before domestic courts. The *Consequential Amendments Act* replicates the Rome Statute by adopting the limited defence of obedience to superior orders in the commission of a war crime and rejecting the defence of superior orders in relation to crimes against humanity or genocide.⁹⁸ The law introduced by the *Consequential Amendments Act* is that, contrary to the *War Crimes Act*, a defence of superior orders will be allowed, provided that the accused was bound to obey the order, that he or she did not know the order was unlawful and that it was not manifestly unlawful. The Explanatory Memorandum makes no mention of this variation, though it may be hazarded that the reason lies in the perceived need to mirror the defences that would otherwise be available before the ICC, were it to assert jurisdiction. An accused would be likely to prefer prosecution for war crimes under the *ICC Act*, rather than under the uncompromising position under the *War Crimes Act*. As a matter of principle, however, it seems to be a retrograde step to permit the defence of superior orders under Australian law other than as a relevant consideration on sentencing.

F. Crimes Against the Administration of the Justice of the International Criminal Court

The *ICC Acts* also create a series of new Australian crimes relating to the administration of justice by the ICC. Under the Rome Statute, parties are bound to enact laws to criminalise offences against the ICC itself.⁹⁹ The *Consequential Amendments Act* creates numerous crimes including perjury, falsifying evidence, destroying or concealing evidence, deceiving witnesses, corrupting witnesses or interpreters, threatening witnesses or interpreters, preventing witnesses or interpreters, preventing the production of things in evidence, reprisals against witnesses and court officials, perverting the course of justice and receipt of a corrupting benefit.¹⁰⁰ Australian courts will doubtless resort to established principles of common law to interpret and apply these new offences.

The *Consequential Amendments Act* not only creates new offences against the administration of justice but also permits Australian courts to exercise a jurisdiction extraterritorially where the perpetrator is an Australian citizen.¹⁰¹ As a general practice, Australian criminal laws do not apply extraterritorially and

96 Article 34.

97 McCormack, above n68 at 21.

98 Section 268.116. The defendant bears the evidential burden of establishing the elements of this defence: subsection 13.3(3).

99 Article 70(4)(a), Rome Statute.

100 Subdivision J — Crimes Against the Administration of the Justice of the International Criminal Court.

courts will typically interpret such laws to apply only within territorial jurisdiction.¹⁰² There is, however, a growth in the exercise of jurisdiction over Australian citizens and residents where the acts occur outside the territorial jurisdiction. Examples include the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), *Whaling Act* (Cth) and *Crimes (Sexual Offences Overseas) Act* (Cth). It was necessary for the universal implementation of the Rome Statute that the *Consequential Amendments Act* should have a wide geographic scope. As Australia has jurisdiction over its nationals wherever they may be and a universal jurisdiction over war crimes, crimes against humanity and genocide, there will be no violation of established customary international law.

G. Attorney-General's Consent to Prosecution for International Crimes

While the *Consequential Amendments Act* may have significantly added to and amended Australian criminal law, any trial for international crimes is subject to a major pre-condition. No proceeding may be brought under the amended *Criminal Code Act* without the Attorney-General's written consent and offences must be prosecuted in his name.¹⁰³ Subject to the jurisdiction of the High Court through the prerogative writ provisions in section 75 of the Constitution, a decision by the Attorney-General to give or to refuse consent to prosecute: '... is final, must not be challenged, appealed against, reviewed, quashed or called in question; and is not subject to prohibition, mandamus, injunction, declaration or certiorari'.¹⁰⁴

The notion of a 'decision' to refuse is defined to include any condition or restriction or any variation of the decision.¹⁰⁵ In order to ensure that a person may be arrested without delay, the *Consequential Amendments Act* provides that they may be arrested, charged and remanded in custody or released on bail before the Attorney-General has given his consent.

In these ways, the implementing legislation makes it clear, not only that Australia has primacy of jurisdiction, but also that any decision to allow a prosecution will lie exclusively with the unimpeachable 'political' judgment of the Attorney-General. While it is highly improbable that an Attorney-General would permit prosecutions against members of his own government or officers of the defence forces, it becomes possible, for example, for any subsequent government to prosecute those who were responsible for any war crimes that might have been committed in the recent conflict in Iraq.

While these provisions appear to be valid under the Constitution, it remains open to the judgment of the ICC itself whether a State party 'is unwilling or unable genuinely to carry out the investigation or prosecution' under Article 17 of the

101 Section 268.117 provides that sections 15.3 and 15.4 of the *Criminal Code Act*, extending geographical jurisdiction of the legislation, apply to genocide, crimes against humanity and war crimes and also to crimes against the administration of the justice of the ICC.

102 See generally Ian Brownlie, *International Law* (5th ed, 1998) at 310; Ivan Shearer, above n44 at 187–190.

103 Section 268.121.

104 Section 268.122(1).

105 Section 268.122(2).

Rome Statute. If a State were to be unwilling or unable to do so, the ICC may assert a secondary jurisdiction over the offences. As is discussed below, however, the ICC may not be able to obtain physical control of the alleged perpetrator for a trial because, if they are present in Australia, the Attorney-General could refuse to surrender the accused under the new *International Criminal Court Act 2002 (ICC Act)*. This legislation is discussed below.

7. *International Criminal Court Act 2002*

It has been observed that the *Consequential Amendments Act* sets out the elements of each new offence created by the Rome Statute. By contrast, the *ICC Act* deals with the more practical aspects of Australia's working relationship with the ICC by facilitating compliance with Australia's obligations under the Rome Statute.¹⁰⁶ Parties are required 'to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'.¹⁰⁷ The *ICC Act* has 189 sections setting out detailed procedures for all the aspects of Australia's compliance with requests from the ICC, including those for the:

- Arrest or provisional arrest of a person and the surrender of a person to the International Criminal Court;
- Identification and location of a person or items;
- Taking or producing evidence, including expert reports;
- Questioning any person being investigated or prosecuted;
- Service of documents;
- Facilitating people to appear voluntarily before the International Criminal Court;
- Temporary transfer of prisoners to the International Criminal Court;
- Examination of places or sites;
- Execution of searches and seizures;
- Provision of records and documents;
- Protection of victims or witnesses;
- Preservation of evidence; and
- Assistance with the forfeiture of property related to crimes within the jurisdiction of the International Criminal Court.

The *ICC Act* affirms the primacy of Australia's right to exercise its jurisdiction over crimes within the jurisdiction of the ICC.¹⁰⁸ No person can be arrested or surrendered at the request of the ICC without a certificate signed by the Attorney-General that it is appropriate to do so.¹⁰⁹ The Attorney-General has an 'absolute discretion' whether to provide such a certificate; a discretion that can be reviewed only by reference to prerogative remedies within constitutional limits. The *ICC Act* provides various factors the Attorney-General must take into account when deciding on competing requests for surrender of an accused person.

¹⁰⁶ Article 86.

¹⁰⁷ Article 87.

¹⁰⁸ Section 3(2), *ICC Act*.

¹⁰⁹ Section 22.

The discretion is not, as a matter of international law, entirely absolute. If the Attorney were to refuse a request for cooperation, and if the ICC were to find that this refusal is contrary to the Rome Statute, the ICC has the power to refer the matter to the Assembly of States Parties or to the Security Council.¹¹⁰ The *ICC Act* recognises this possibility by requiring the Attorney-General to take it into account when deciding how to respond to a request for cooperation.¹¹¹ These provisions might be tested by a hypothetical question. If, for example, a member of the Australian armed forces were to be the subject of a request for surrender from the ICC in relation to offences committed during the recent conflict in Iraq, Australia could refuse the request on the ground that any trial would be conducted before Australian courts under the principle of complementarity. If, however, no genuine efforts were made to try the perpetrator in Australia, the ICC could assert its secondary jurisdiction and again request surrender. A failure by Australia to cooperate with the ICC in these circumstances would be in breach of Australia's obligations under the Rome Statute.¹¹² The ICC could then exercise its power to refer the issue to the Assembly of States Parties or to the Security Council itself. The ICC has, in this sense, a capacity to seek support for its actions both through its membership and the United Nations. While a failure to cooperate with the ICC by Australia would be in breach of the Rome Statute it would not, however, conflict with the *ICC Act* because the discretion of the Attorney-General is stated to be 'absolute' in Australian law.

8. Conclusions

The ICC was born some months before the conflict in and occupation of Iraq. The continuing need for a permanent international criminal court thus needs little demonstration in contemporary foreign relations. Establishment of the ICC has, however, had an unexpected impact on the domestic laws of ratifying States. Already, 11 or so Parties have enacted legislation to ensure that they are able to assert their primary right to prosecute for war crimes, crimes against humanity and genocide. The ICC may prosecute international crimes only once it is clear that a State is unwilling or unable to conduct a trial. The recent cautious practice of the Office of the Prosecutor for the ICC confirms the secondary role that the tribunal is likely to play.¹¹³

For its part, Australia has given direct legislative effect to its obligations under the Rome Statute. The *ICC Acts* constitute a 'quiet revolution' in Australian law and practice for two reasons. First, the enactment of legislation to give effect to treaty obligations, especially in relation to human rights, is not the norm in

110 Rome Statute, above n1, Article 87(7).

111 Section 15.

112 Article 86.

113 For a description of the current activities of the Office of the Prosecutor see *Press Release*, 16 July 2003: <<http://www.icc-cpi.int>>; Gillian Triggs, 'The International Criminal Court: are reports of its death exaggerated?', paper presented at the launch of the Centre for Global and International Law, University of Sydney, 14 August 2003.

Australian practice.¹¹⁴ Earlier legislation dealing with war crimes had been piecemeal and restricted. War crimes trials were confined to offences arising from the Second World War in Europe and, arising over 50 years after, rendered the prosecution evidence unreliable. No prosecutions of offences had been initiated under the *Geneva Conventions Act 1958* in relation to war crimes committed after 1945. Against this background, full implementation of the Rome Statute as part of Australian law marks a unique commitment to prosecuting international crimes in its national courts and to cooperating with the ICC. Were a case such as *Nulyarimma* to come before the courts again, it would not be stymied by the argument that genocide is no longer an offence under Australian law. By comparison with the offences created by the *ICC Acts*, the Human Rights and Equal Opportunity Commission, confined to a persuasive and educative role in giving effect to the human rights treaties to which Australia is a party, is significantly weaker.

Secondly, the *Consequential Amendments Act* radically amends Australian criminal laws by granting jurisdiction to courts over acts of genocide and crimes against humanity where they occur after 1 July 2002. In these respects, prosecutions will now be possible, with the authority of the Attorney-General, over serious international crimes that had not previously existed under Australian law. In so far, however, as the *ICC Acts* apply to war crimes already covered by the *Geneva Conventions Act*, the legislation merely restates existing law. The *ICC Acts* amend Australian laws by permitting the defence of superior orders to war crimes and by creating a series of new crimes relating to the administration of justice by the ICC.

Complex questions concerning the jurisdiction of the ICC and interpretation of the substantive crimes developed by the Parties in the *Elements of Crimes* are likely to arise in the future. Most States in the international legal community of 191 nations have remained outside the Rome Statute. 'Rogue' States, as currently identified, are typically not parties; Iraq being an obvious example. For non-parties, the development of offences not earlier recognised at customary international law, but now part of the *Elements of Crimes*, may pose problems. Divergent practices and jurisprudence may emerge as States adopt differing means of giving effect to their obligations under the Rome Statute. These and other legal questions will doubtless provide much grist for the international lawyers' mill. Moreover, as Australian lawyers are not generally familiar with international criminal law, or with the evolving jurisprudence of the ad hoc tribunals for Rwanda and Former Yugoslavia on genocide, crimes against humanity and war crimes, a resurgence of interest in these aspects of international law might be expected. For the present, Australia's leadership role in negotiating, ratifying and enacting the Rome Statute provide it with the tools to prosecute those accused of international crimes. It remains to be seen whether the political will, represented by the power of the Attorney-General, will exist to authorise prosecution.

114 See, in particular, the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) and the human rights treaties scheduled to it.