THE CONTRIBUTION OF THE INTERNATIONAL CRIMINAL COURT TO INCREASING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW

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I. A TRIFECTA OF INSTITUTIONAL AFFECTIONS

The 10th anniversary of the opening for signature of the Rome Statute for the International Criminal Court[1] constituted an important anniversary for the international community. It is opportune to use the occasion of this milestone anniversary to reflect upon the significance of the creation of the new international court and to assess the contributions it has already made to increasing respect for international humanitarian law. It was particularly satisfying for me to have made these reflections in an inaugural public professorial lecture at the University of Tasmania Law School organised jointly with Australian Red Cross – Tasmania. As human beings we seem to desire connection with the institutions that are meaningful in our lives. That 'sense of belonging' is certainly important to me personally and I have found it even more satisfying when the institutions I treasure have communicated a desire to extend a formal association to me. My inaugural public professorial lecture involved a happy confluence of three of the institutions I have fond regard for.

The first of these three institutions is the University of Tasmania Law School where I first studied the law in the same building (then without its current extension) as the Law School currently occupies. I moved from my hometown of Burnie to Hobart as a young, naïve, uncertain 18 year old in 1978 - the same year that Don Chalmers, then just a young lecturer, had first arrived in Hobart from the University of Papua New Guinea in Port

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[1] Rome Statute of the International Criminal Court, opened for signature 17 July 1998, entered into force 1 July 2002. Text available at: http://www.icc-cpi.int/library/about/official/journal/Rome_Statute_English.pdf

Moresby. Don taught Introduction to Law in his first year and I was one of his inaugural students – 30 years ago this year. Don and I will always share our commencement year at this Law School and I remain grateful to him and to other teachers of mine including Kate Warner and Ken Mackie who are still such an integral part of the institution. I was inspired by them three decades ago to think for myself, to formulate arguments and to use the law as an agent of change in the world and I have never forgotten the foundational guidance I received. All three of them, as well as fellow undergraduate students of mine now colleagues here, including Margaret Otlowski and Rick Snell, have always encouraged me and welcomed me back to Hobart for guest lectures and to teach in the Summer School from time to time. It is an honour to be appointed Adjunct Professor of Law and I am thrilled to have my ongoing relationship with the Law School formalised in this way.

The second institution is the Australian Red Cross, an organisation I have now been associated with for 17 years. I first joined the National Advisory Committee on International Humanitarian Law in October 1991 as a relatively junior academic volunteer. Since then I have grown to deeply admire the work of the International Red Cross and Red Crescent Movement - reliably ubiquitous as it is in every armed conflict in the world with its people carrying on their work of visiting those in detention, monitoring compliance with international humanitarian law and calling parties to account whenever its personnel observe violations of relevant international legal obligations. As an international lawyer it is exciting to be a volunteer member of an organisation that boasts in excess of 120 million volunteers worldwide and that exists in every single country on the face of the earth. I have also come to admire the work of Australian Red Cross – particularly its efforts to raise awareness and understanding of international humanitarian law, urging the Australian Government to ratify relevant international treaties and to adopt effective implementing legislation, and also encouraging the Australian Defence Force to maintain its high standards of implementation of legal obligations in the context of military operations. I had the privilege of chairing the National Advisory Committee on International Humanitarian Law for 9 years from 1994 until 2003 and to serve as a National Vice-President of Australian Red Cross from 1999 – 2003. I have also served as the Foundation Australian Red Cross Professor of International Humanitarian Law since the inception of the chair in 1996.

The third institution is the International Criminal Court itself and it may seem strange to express personal affection for a court of justice. However, the experience of joining the Australian Government Delegation to the Rome Diplomatic Conference for negotiation of the Statute for the International Criminal Court was a highlight of my academic career. I have followed the progress of this new institution very closely and I remain a devotee of the concept of the court. I worked extremely hard with some other colleagues, including my friend the Reverend Professor Michael Tate, on behalf of Australian Red Cross to argue for Australian ratification of the Rome Statute to ensure that Australia would take its place as an Original State Party to the Statute. It came as a shock to me that the Howard Government seriously contemplated not ratifying the Statute. I could not accept that Australia would adopt a position of non-participation and I did all that I could in the public debate and behind the scenes to ensure that that was not the Government's final

decision. I was jubilant the day that then Prime Minister Howard announced the decision to ratify the Statute and subsequently as Australia deposited its instrument of ratification of the Statute at UN headquarters in New York on the day the Statute entered into force.

All of this is to say that I considered it an entirely happy confluence in my inaugural public professorial lecture at the University of Tasmania to join forces with Australian Red Cross – Tasmania to discuss the International Criminal Court, an institution that I believe has already played an extremely important role in raising respect for international humanitarian law worldwide.

II. AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT

A. What Contribution in the Absence of Even a Single Trial?

In may seem overly naïve to attempt to assess the contribution the International Criminal Court has made to increasing respect for international humanitarian law before the court has even commenced its first trial. Courts exist to conduct cases and criminal courts are about trials. Here we are marking a 10th anniversary and this new court is yet to inaugurate its trials. To be completely frank I, and many other supporters of the court around the world, are disappointed about this fact. The first trial was scheduled to commence several times in 2008 - most recently in June – but the Trial Chamber stayed proceedings because of a controversial issue that arose. The first trial involves a Congo national named Thomas Lubanga, a former leader of a rebel movement in the civil war in the Congo. Lubanga has been indicted on the basis of multiple war crimes charges for recruiting and using child soldiers - as young as nine and ten years old - to participate in the conflict in the Congo.[2] Lubanga was transferred to The Hague in March 2006 and has been detained on remand there since.

The UN peacekeeping mission in the Congo handed over some documentary material to the Office of the Prosecutor at the International Criminal Court, but they did it on the basis of a strict confidentiality requirement that that information not be passed on. Apparently there are sensitive issues about the identity of some of those who have provided statements about the recruitment and use of child soldiers in the Congo and the UN has insisted upon compliance with its confidentiality requirement. The Rules of Evidence and Procedure for the International Criminal Court require the Office of the Prosecutor to disclose its documentary material to the legal team for the Defence.[3] The Prosecutor, Luis Moreno Ocampo, chose not to pass the material on and breach the confidentiality requirement he had agreed to when his officers took possession of the

[2] *The Prosecutor v. Thomas Lubanga Dyilo,* 'Document Containing the Charges, Article 61(3)(a)', ICC-01/04-01/06, 28 August 2008 available at: http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-356-Anx2_English.pdf

[3] See Rule 77 of the International Criminal Court Rules of Procedure and Evidence available at: http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf

documentation. In response, the judges took the view that the trial cannot proceed until the documentary material is handed over to the Defence. In June 2008, the Trial Chamber stayed proceedings in the case[4] and, until the issue is resolved to the satisfaction of the judges, the trial will not recommence. This is, of course, an extremely frustrating situation and it is hoped that an agreement with the UN will emerge that allows the transfer of the documentary material to the Defence Team without prejudicing the Office of the Prosecutor's right to have access to confidential material in the future – either in the Congo conflict or in any other conflict that the Prosecutor is examining.

That is the explanation for the failure to commence the first trial and the question remains whether it is possible to assess the contribution of the International Criminal Court to the development of international humanitarian law in the absence of a first trial? I believe it is possible to do so because the new Court represents certain fundamental ideals. I will attempt to demonstrate that the Court, the physical encapsulation of those ideals, has already had a profoundly positive influence on respect for International humanitarian law. If the court *never* conducts a single trial it will rightly be judged to be a monumental failure. The trial process is the pre-eminent practical application of fundamental ideals and, in the absence of trials, those ideals will quickly be exposed as chimeric. In this initial phase of its establishment, however, there are two important contributions that the court has already made to attitudes about international criminal law and the enforcement of violations of international humanitarian law and it is these contributions that I intend to assess. The first I characterise as the raising of global expectations that those responsible for the perpetration of atrocities must be held to account. The second is in the area of domestic criminal law. In my view the creation of the Court has provided a catalyst for countries around the world to implement an unprecedented level of comprehensive domestic criminal legislation. That is certainly the case in Australia and also in many other countries. I will return to assess each of these two key contributions of the International Criminal Court in more detail but first I turn to a brief explanation of some basic mechanical issues for the new Court.

B. Some Mechanics of the International Criminal Court

The International Criminal Court (ICC) was actually only established in The Hague in 2002 – certainly not 10 years ago. The event whose anniversary we mark in 2008 occurred in Rome following a five-week diplomatic conference during which the Statute for the new court was negotiated. On 17 July 1998, the day after the negotiations concluded, the Italian Government hosted a signing ceremony and the Statute was officially opened for signature. The Statute did not enter into force until 1 July 2002 after the necessary number of ratifications had been received.[5] It is only following entry into

[4] *The Prosecutor v. Thomas Lubanga Dyilo,* 'Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(a) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008', ICC-01/04-01/06, 13 June 2008 available at: http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1401_ENG.pdf

[5] Article 126(1) of the Statute states that:

force in July 2002 that the Court has been set up - judges have been elected, a Prosecutor has been appointed, staff have been recruited, a temporary court building in The Hague has been occupied and the Court has commenced its work. In particular, it is only since July 2002 that the Office of the Prosecutor has begun to investigate the various situations that have come under the jurisdiction of the Court.

Pursuant to the Rome Statute the ICC is able to try crimes of genocide, war crimes or crimes against humanity wherever they occur in the world provided that certain preconditions are met. One important precondition, for example, is that the Court can only exercise its jurisdiction in circumstances where relevant States are genuinely unable or unwilling to try the individuals allegedly responsible for the specific crimes.[6] The ICC is intended only to supplement national courts, not to override them. The relevant States in question are the Territorial State (on whose physical territory the alleged crimes occurred) and the State of Nationality (the State whose national is alleged to have committed the crime). In some circumstances of course, the Territorial State and the State of Nationality will be one and the same. But in other circumstances those States will actually be different and, in either case, the Territorial State and the State of Nationality both have primary jurisdiction over the individual allegedly responsible for a war crime, a crime against humanity or an act of genocide. That *primary* jurisdiction gives either of the two States a better claim to jurisdiction than the ICC itself. The ICC can only step into the breach where one or other of those two States is 'genuinely unable or unwilling' to deal with the case themselves. I will return to the meaning of these phrases in due course.

The ICC has no retrospective jurisdiction: it can only deal with crimes that occur after the entry into force of the Statute on 1 July 2002.[7] So, for example, in relation to atrocities perpetrated in Timor Leste in 1999, the ICC has no jurisdiction. Those atrocities occurred before entry into force of the Statute. If there is to be any international justice mechanism for Timor Leste, that mechanism will need to be an *ad hoc* arrangement specific to the Timor Leste situation – similar perhaps to the international criminal tribunals for the Former Yugoslavia (in The Hague) and for Rwanda (in Arusha) or else some type of 'hybrid' international/national tribunal such as the Special Court for Sierra Leone (in Freetown) or the Extraordinary Criminal Chambers for Cambodia (in Phnom Penh).[8]

> This Statute shall enter into force on the first day of the month after the 60th day following the date of deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

The 60th instrument of ratification was deposited in New York on 14 April 2002 triggering entry into force on 1 July 2002.

[6] Article 17(1)(a) of the Statute states that a case shall be inadmissible where:

> The case 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* (emphasis added).

[7] See Article 11(1) of the Statute on 'Jurisdiction Ratione Temporis'.

[8] For a detailed discussion of options for international criminal justice for Timor Leste see: Asia Pacific Centre for Military Law and Judicial System Monitoring Programme, 'Report of Proceedings: Symposium on Justice for International Crimes Committed in the Territory of East Timor' (2003), text available at: http://www.apcml.org/documents/reportfinalenglish.pdf

The ICC cannot issue the death penalty: it will only be able to issue a maximum life sentence.[9] The ICC is an international court and many of the States Parties to the Rome Statute are also party to the Second Optional Protocol to the International Covenant on Civil and Political Rights[10] – a treaty instrument which prohibits the death penalty. No international court or tribunal will ever be established with the authority to administer the death penalty. Several national delegations at the Rome Diplomatic Conference in 1998 explained that it was inconsistent for them to hand out the death penalty in their own national jurisdictions for murder only to see the same penalty denied to war criminals convicted of crimes on a much greater scale: genocide, the killing of hundreds or thousands, the rape of the women of whole villages, for example.[11] However, these States were in a numerical minority in Rome and their arguments for retention of the death penalty by the ICC did not prevail. It is widely believed that one reason why the United States was so keen for the Iraqis to try Saddam Hussein themselves (rather than have him tried by an international court or tribunal) was precisely to ensure that Saddam would be executed after he had been convicted. That result would have been impossible had Saddam been tried before an international court or tribunal.[12]

The ICC has no police force so whenever the Prosecutor issues an arrest warrant for an accused person the ICC is dependent upon the cooperation of the international community, on governments, on national military and police forces, to arrest the individual accused and to physically transfer that person to The Hague for trial. There are four prisoners currently in The Hague on remand. In addition to Thomas Lubanga, Germain Katanga and Mathieu Ngudjolo Chui, also from the Democratic Republic of the Congo, and Jean-Pierre Bemba Gombo, a national of the Congo but on trial for alleged atrocities in the Central African Republic, are also awaiting trial.[13] The governments of the Democratic Republic of the Congo, the Central African Republic and Uganda, all States Parties to the Rome Statute, have each approached the ICC claiming that they are genuinely unable to deal with trials at the national level and asking for international assistance to try those allegedly responsible for atrocities. Following investigations and the subsequent issuance of arrest warrants these governments cooperated with the Court by arresting the accused and by arranging transfer of them to The Hague. The scenario is significantly different in relation to the Darfur situation. Sudan is not a State Party to the Rome Statute and the government in Khartoum has vowed not to cooperate with the ICC. Two arrest warrants have already been issued in relation to alleged atrocities in the

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[9] See Article 77 of the Statute on 'Applicable Penalties'.

[10] *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at Abolition of the Death Penalty*, opened for signature 15 December 1989, 999 UNTS 302, entered into force 11 July 1991.

[11] See, for example 'Trinidad in a Spot Over Death Penalty', *TerraViva: The Conference Daily Newspaper* available at: http://www.ips.org/icc/tv260602.htm

[12] For a detailed argument against the use of the death penalty by the Iraqi High Tribunal see: Human Rights Watch, *Judging Dujail: The First Trial Before the Iraqi High* Tribunal, (2006) particularly at p. 89. Text of report available at: http://www.hrw.org/reports/2006/iraq1106/iraq1106web.pdf

[13] For details of the cases pending and situations currently under investigation by the ICC see: http://www.icc-cpi.int/cases.html

Darfur region including one arrest warrant against the current foreign minister.[14] More recently, as is well known, the ICC Prosecutor has publicly announced his intention to seek ICC approval for the issuance of an arrest warrant against the Sudanese President Omar al Bashir.[15] Given the prevailing political realities in Khartoum, the current prospects for the arrest of any of these three Sudanese officials are non-existent unless any or all of them decide to take summer holidays in foreign countries.

We have seen how this institutional reliance on the cooperation of the international community works in practice with the experience of the International Criminal Tribunal for the Former Yugoslavia. In some cases it proves surprisingly straightforward to arrest individual accused and arrange for their transfer. For example, General Ante Gotovina, one of the most senior Croat indictees of the Tribunal for the Former Yugoslavia, had been at large following the issuance of an indictment against him in 2001 until he travelled to Tenerife in the Canary Islands in December 2005. Spanish police acted on an international arrest warrant, arrested Gotovina and transferred him to Madrid and then to The Hague. The physical capture of Radovan Karadzić and Ratko Mladić has proved to be much more problematic and after more than 10 years on the run it seemed that neither accused would face justice in The Hague. How dramatic then was the recent arrest of Karadzić despite his effective disguise and the adoption of a new and apparently convincing identity. The arrests of Gotovina and Karadzić demonstrate that, even where the prospects for arrest seem remote at a given time, circumstances can dramatically change and accused can still be brought to trial decades after the issuance of the original arrest warrant. I am sure we will see exactly the same sort of experience being played out at the ICC in relation to the individuals who currently seem immune from prosecution because of the refusal of relevant national authorities to cooperate with the Court.

C. Why so Long to Commence the Trial Process?

I have already explained that for the first four years after the opening for signature of the Rome Statute the international community waited for 60 countries to ratify the treaty and trigger entry into force. The 60th ratification was deposited at the United Nations Headquarters in New York on 14 April 2002 triggering entry into force on 1 July 2002.[16] Currently there are 106 States Parties to the Statute. There are 192 Member States of the United Nations and so 106 States Parties to the Rome Statute is significantly more than half the world's countries but still substantially short of universal participation. Following entry into force of the Statute on 1 July 2002, a meeting of States Parties was called and many administrative decisions were taken including on the process for nomination of candidates for election as judges and for the position of Prosecutor. The election of the judges and the appointment of the Prosecutor occurred in February 2003.

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[14] See 'Warrant of Arrest for Ahmad Harun' available at http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-2-Corr_English.pdf and 'Warrant of Arrest for Ali Kushayb' available at: http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-3-Corr_English.pdf

[15] See 'ICC Prosecutor Presents Case Against Sudanese President, Hassan Ahmad Al Bashir, for Genocide, Crimes Against Humanity and War Crimes in Darfur', 14 July 2008 available at: http://www.acc-cpi.int/press/pressreleases/406.html

[16] See above, note 5 for the Rome Statute formulation for entry into force.

The judges were sworn into office in The Hague in March 2003 and the Court moved into its temporary building. Then the Office of the Prosecutor began its work and the Office has advised that by 2006, within only three years of commencing its work, it had received 1,732 communications from 103 different countries requesting investigation of various incidents.[17]

As indicated, three governments which are all States Parties to the Statute – the Democratic Republic of the Congo, the Central African Republic and Uganda – all approached the Office of the Prosecutor to ask for assistance with the investigation and prosecution of atrocities perpetrated in the course of each of their respective civil wars. The ICC exists to help those States that are genuinely unable to deal with the trial of international crimes themselves. In addition to the approaches of those three countries, the United Nations Security Council referred the situation in Darfur to the Prosecutor of the International Criminal Court.[18] There is capacity under the Rome Statute for the UN Security Council to refer situations to the Prosecutor for investigation and prosecution even in countries that have chosen not to become States Parties to the Rome Statute.[19] In the Darfur situation, the Office of the Prosecutor has deemed that the Government of Sudan is unwilling to prosecute those responsible for what the Prosecutor alleges are the perpetration of genocide, systematic rape, murder, destruction of traditional homes and forced deportation from those homes of the ethnic minorities in the Darfur region. I am sure the Prosecutor is correct here. Khartoum is unwilling to investigate and prosecute these crimes because the Government is at the very least complicit in, and quite possibly actually ordering and participating in, the atrocities inflicted against the Darfuris.

So in the course of only five years since the election of ICC judges and the appointment of the Prosecutor we have three States genuinely unable, in their own assessment, to undertake prosecutions at the national level, and another State clearly unwilling to take responsibility for the enforcement of international criminal law in its own national courts. In each of those circumstances the ICC has *prima facie* jurisdiction.

It is no easy task for the Office of the Prosecutor to investigate crimes in any of those countries. Criminal investigators have to travel to each country to examine and secure evidence – to secure crime sites for forensic experts to carry out their work, to identify potential witnesses, to locate and secure documentary material that may help establish criminal responsibility. In the cases of the Congo, Uganda and the Central African Republic, it is obviously easier to secure evidence and to collect information in circumstances where the respective governments are all cooperating with the Office of the Prosecutor. That is precisely the explanation for the issuance of arrest warrants in respect of all three conflicts and also the reason for the physical transfer of individual accused to custody in The Hague. The Prosecutor also has a mandate for the Darfur

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[17] See 'Update on Communications Received by the Office of the Prosecutor of the ICC', 10 February 2006 available at: http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf

[18] UN Security Council Resolution 1593, 60 UN SCOR Res. 1593 (5158th mtg), UN Doc SC/RES/1593 (31 March 2005)

[19] Article 13(2) of the Statute - 'Exercise of Jurisdiction'.

region and he has been working hard in the complete absence of any cooperation from Khartoum. In relation to Darfur, no ICC investigators have been permitted access to alleged crime sites in Darfur and the Prosecutor has had to rely extensively on material gathered by international humanitarian relief organisations and by the African Union and the UN combined peace mission in Darfur to be able to piece together sufficient evidence to mount the cases against those indicted. This is a complicated process and yet it still may seem as though it has taken a long time to bring the first case to trial. As I have already stated, many observers would have preferred to mark the 10th anniversary of opening for signature with the first trial already underway. I am sure the Prosecutor would also have preferred that and he must be anxious to start formal proceedings. However, it is important to understand that he has not been idle in these last five years since his appointment.

III. THE IMPORTANCE OF EFFECTIVE ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW

Before returning to the central question of the contribution of the ICC to increasing respect for international humanitarian law it is important to make some initial observations about this body of law and the fundamental importance of its effective enforcement. International humanitarian law is the body of international law that purports to regulate armed conflict - the way war is conducted. There are two key areas of international humanitarian law in terms of its substantive rules. The first area has to do with minimum standards of treatment for victims of armed conflict. International humanitarian law recognises four separate categories of victims – Geneva Convention I of 1949 establishes minimum standards of treatment for wounded combatants on land; Geneva Convention II establishes minimum standards of treatment for wounded, sick and shipwrecked combatants at sea; Geneva Convention III deals with minimum standards of protection for prisoners of war; and Geneva Convention IV with minimum standards of protection for the civilian population that happens to be caught up in an international armed conflict. Each of these categories of victims are not, or no longer, participating in hostilities and so are entitled to respect, to protection from attack, to receive medical treatment, to be free from torture or other physical and/or mental abuse and to other protections specific to their particular situation. Although the four Geneva Conventions of 1949 are not exhaustive of all the relevant international humanitarian law rules on protection for those affected by armed conflict, the Conventions are the bedrock of obligations in this area of the law.

The second main area of international humanitarian law has to do with limitations on the so-called means and methods of warfare. There is a whole range of prohibited weapons: chemical and biological weapons,[20] dum-dum bullets,[21] blinding laser weapons,[22] anti-

[20] *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, opened for signature 13 January 1993; 32 ILM 800, entered into force 29 April 1997, ('CWC'); and *Convention on the Prohibition of the Development, Production and Stockpiling of*

personnel land mines[23] and now, most recently, cluster munitions.[24] There are also elaborate rules on the law of targeting: on the definition of a military objective and civilian objectives, on the level of force which can be brought to bear on a military objective it if it happens to be located in close physical proximity to the civilian population, on rules and prohibitions on the deliberate placement of military objectives in a civilian population in the hope of avoiding attack and on the use of human shields. There are also extensive prohibitions on certain military strategies: the use of starvation as a means of warfare, wilful terrorising of the civilian population and perfidy.[25]

International humanitarian law has been developing since the mid-19th century. The very first multilateral treaty on the regulation of the conduct of war was 1864 - 60 years after the British selected the site of Hobart's first settlement at Sullivan's Cove and 11 years after the cessation of transportation to Van Diemen's Land. So much has happened since 1864 in terms of treaty-making and multilateral efforts to establish a plethora of obligations on parties to armed conflicts. Despite this flurry of lawmaking though, the popular view of international humanitarian law since 1864 has consistently been sceptical of its efficacy.

In the days following the opening for signature of the world's first multilateral treaty for the legal regulation of the conduct of war, the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field,[26] Florence Nightingale, writing from Geneva to a friend in England, articulated her own scepticism of the likely efficacy of the new treaty:

> [I]t would be quite harmless for our government to sign the [Geneva] Convention as it now stands. It amounts to nothing more than a declaration

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Bacteriological (Biological) and Toxin Weapons and on Their Destruction, opened for signature 10 April 1972; 1015 UNTS, entered into force 26 March 1975, ('BWC').

21 *1899 Hague Declaration 3 Concerning Expanding Bullets,* opened for signature 29 July 1899, UKTS 32 (1907) Cd. 3751, entered into force 04 September 1900 ('Hague Declaration 3').

22 *Protocol on Blinding Laser Weapons* (Protocol IV to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects), opened for signature 13 October 1995, 1342 UNTS, entered into force 30 July 1998 ('CCW Protocol IV').

23 *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, opened for signature 18 September 1997, 2056 UNTS 241, entered into force 1 March 1999 ('Ottawa Treaty').

24 *Convention on Cluster Munitions,* adopted in Dublin 30 May 2008 and to be opened for signature in Oslo 3 December 2008. Text available at: http://treaties.un.org/doc/source/MTDSG/ENGLISH_final_text.pdf

25 There are multiple treaties wich include one or more of these particular rules but the principal treaty source incorporating the bulk of these obligations is the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts,* opened for signature 8 June 1977, 1125 UNTS 3, entered into force 7 December 1978 ('Additional Protocol I').

26 Opened for signature 22 August 1864, entered into force ???? in Geneva. Text available at: <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/87a3bb58c1c44f0dc125641a005a06e0?OpenDocument>.

> that humanity to the wounded is a good thing. … People who keep a vow would do the thing without the vow. And if people will not do it *without* the vow, they will not do it *with*.[27]

Many people since 1864 have articulated a similar sentiment – that international humanitarian law is at best only aspirational. Daily media reports confirm that violations of this so-called body of law occur seemingly routinely with impunity for those responsible. So, with some justification, people often question whether there really is such a thing as a *law* of war or are international humanitarian lawyers simply delusional? I have some sympathy for this popular view because, in the absence of mechanisms to effectively enforce the law in the face of repeated violations of it, the task of defending the characterisation of principles as a legal regime is ultimately unsustainable. The undeniable basis for this popular scepticism is precisely the reason why the movement which has led to the creation of the ICC is so important for the goal of increasing respect for international humanitarian law.

When I first joined the Australian Red Cross in 1991 international humanitarian law was seen very much as an esoteric area of international law - the exclusive preserve of military lawyers, of the international Red Cross Movement and the odd (and I mean numerically although some other colleagues would probably have thought of it in psychological terms) academic interested in the subject area. The 15 year period from 1993 has witnessed a staggering transformation of international humanitarian law from the esoteric to the mainstream. This body of law is now taken far more seriously than at any other stage in its historical development. One manifestation of the transformation is in media reporting. We now have almost daily media coverage of atrocities in Darfur, Timor Leste, Guántanamo Bay, Abu Ghraib, Zimbabwe or Burma. There is nothing new in media reporting of atrocities of course. What has changed is the relatively new media interest in scrutiny of the conduct of military operations or of calls for accountability for atrocity. On the latter, the international media interest in the arrest of Radovan Karadzić, his transfer to The Hague and his initial appearances in court, or the ICC Prosecutor's announcement of his intention to seek approval for an arrest warrant for Omar Al-Bashir, the President of Sudan, is symptomatic of a quantum shift in thinking.

In relation to media interest in the conduct of military operations, part of the shift is a consequence of improved technology. Those old enough to remember the Gulf War of 1991 will recall the so-called 'CNN effect' as for the first time in the history of armed conflict we witnessed live television footage of the conduct of military operations – from a distance but nevertheless live coverage of it – all beamed via mobile satellite dishes set up on the roofs of hotels in Kuwait City and in Baghdad. Now, live footage is broadcast in real time by journalists embedded with military units engaged in the conduct of the military campaign.

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[27] Quoted from a letter from Florence Nightingale to Dr. Longmore in relation to United Kingdom participation in the Geneva Convention of 1864 by C. Moorehead, Dunant's Dream: *War, Switzerland and the History of the Red Cross* (Harper Collins, London: 1998) p. 47.

Media reporting is fuelled by demand for knowledge. If no-one cared about the conduct of military operations or about accountability for atrocity international media outlets would not bother to report on these issues. That quest for knowledge and understanding also manifests itself in other ways. The University of Melbourne, for example, has taught international humanitarian law in the LLM coursework program for 12 years this year, ever since the Australian Red Cross Chair of International Humanitarian Law was established in 1996. Over 350 students have successfully completed that course and there is no apparent slowing of demand. I use the figures simply to illustrate the point that I am making. I do not mean to create the impression that the University of Melbourne's experience is unique. It is not. What is happening in Melbourne is also increasingly happening around the world in many law schools. There is a huge demand for knowledge in this area of the law because, now that we have institutions and structures to enforce the law, the law is being taken much more seriously. Suddenly there are career paths that never existed before: for judges, for defence counsel, for prosecutors, for registry officials. We have many students from UTas and from Melbourne and from other Australian law schools who are currently undertaking internships at the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, at the Special Court for Sierra Leone, at the Extraordinary Criminal Chambers for Cambodia and at the ICC. I delivered a public lecture in The Hague in June 2008 and almost one fifth of the audience of 70 people were former students from Melbourne and UTas – an incredible statistic to observe at first hand.

IV. DEVELOPMENTS IN THE ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW

In the aftermath of World War II the establishment of the Nuremberg and Tokyo War Crimes Tribunals set a new precedent as the first ever international war crimes tribunals. British Prime Minister Winston Churchill expressed the desire to dispense with a trial system and, instead, to summarily execute the Nazi leadership by firing squad. The Soviet leader Joseph Stalin was similarly minded. Why give the Nazis a platform to try to justify their actions; why go through a trial process when guilt was pre-determined?[28] It was US President Harry Truman who rejected that particular argument and who advocated persuasively instead for the establishment of a proper judicial process. For an inspiring example of great moral and legal principle couched in soaring oratory, read the opening statement of Robert Jackson, the chief US Prosecutor at the Nuremberg Trial. Jackson was a justice of the US Supreme Court seconded to the US Government to lead their prosecution team at Nuremberg. His opening statement is a wonderful speech and he said amongst other things:

> That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the

[28] See Geoffrey Robertson, *Crimes Against Humanity* (2nd ed, 1999), 198; and also Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005), 49-50.

> judgement of the law is one of the most significant tributes that Power has ever paid to Reason.[29]

Jackson was surely correct. It was a huge breakthrough that the victorious Allies at the end of World War II chose not to engage in unbridled vengeance as some of them were so obviously tempted to do. Instead, a judicial process was established and the onus was on the Prosecution to prove beyond reasonable doubt that each of the 22 German defendants at Nuremberg and the 25 defendants at Tokyo were convicted of the charges against them beyond reasonable doubt. The Allies accepted that some defendants might be acquitted of some or all of the charges against them and, in fact, that is precisely what happened in some cases in Nuremberg and in Tokyo.[30] It seems sadly ironic that despite this tremendous international leadership at the end of World War II, the US has sunk to such depths in its approach to prosecuting its self-declared 'global war on terror'. It is important to acknowledge that if it had not been for the US and for President Truman's commitment to great legal and moral principle, then we almost certainly would not have had the fundamentally important precedents of the Nuremberg and Tokyo Trials.

Interestingly, scepticism has always existed – in the past, in the present and doubtless always in the future. Robert Jackson's Chief Justice of the US Supreme Court, Harland Stone, was one such sceptic. Stone said that:

> Jackson is away conducting his high-grade lynching party in Nuremberg. I don't mind what he does to the Nazis but I hate to see the pretence that he is running a court and proceeding according to the Common Law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas.[31]

Fortunately Jackson was acutely aware of the task at hand and of the historical significance of the venture. He did a superb job at Nuremberg,[32] and without the precedents of Nuremberg and Tokyo, we would not have seen a revival of international criminal law in quite the way that we have in the last 15 years.

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29 Opening speech delivered by Justice Robert H Jackson, Chief of Counsel for the United States, before the Tribunal on 21 November 1945. Text of the speech available at: http://www.yale.edu/lawweb/avalon/imt/document/nca_vol1/chap_05.htm

30 For assessments of the trials and their historical and legal significance see, for example, Richard Minear, *Victors' Justice: The Tokyo War Crimes Trial,* Princeton University Press (1971); Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard East Asian Monographs (2008); Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press (2008); Robert Conot, *Justice at Nuremberg*, Harper & Row (1983); Whitney Harris, *Tyranny on Trial: The Trial of the Major War Criminals at the End of World War II at Nuremberg, Germany 1945-46*, Southern Methodist University Press (1999).

31 See Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals,* Princeton University Press (2000), 25 where the author quotes from A T Mason, *Harlan Fiske Stone: Pillar of the Law* (1956)*,* 716.

32 For an excellent, albeit brief, account of the significance of Jackson's personal contributions to the Nuremberg Trial see William Maley, 'The Atmospherics of the Nuremberg Trial' in David Blumenthal and Timothy L.H. McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?*, Martinus Nijhoff Publishers (2008), 6-7.

Nuremberg and Tokyo promised much that the international community subsequently failed to deliver. The trials constituted important precedents but did not lead on immediately to a permanent international criminal court. Instead, it took until the early 1990s for the promise of Nuremberg and Tokyo to start to materialise as a consequence of the UN Security Council's decision to create the *ad hoc* International Criminal Tribunal for the Former Yugoslavia in 1993, and the International Criminal Tribunal for Rwanda the following year in 1994.[33] Ironically, the UN Security Council established the Tribunal for the Former Yugoslavia because member States of the Council were not prepared to put troops on the ground in the Balkans. This is an intriguing case study. Member States of the Security Council were angered by Serbian aggression in the Balkans and felt compelled to respond but no State wanted to commit troops knowing full well that significant losses would be incurred. Not wanting to be seen to be indifferent to the horrors of ethnic cleansing, massacres, systematic rape, looting and destruction of homes and public property, the Council decided to establish an international criminal tribunal. Had the Security Council known in 1993 how much the tribunal would cost to operate and how long it would take to conduct the trials, I strongly suspect that the Council Members would never have agreed to the initiative.

Early critics of the ICTY claimed that the Tribunal would be an expensive waste of resources since, in the absence of any police powers of arrest and detention, it would never try the individuals most responsible for the atrocities committed in the Balkans. The arrest and subsequent trial of the first defendant, Dusko Tadić, only served to confirm these criticisms – Tadić was hardly a strategic mastermind of gross atrocity. But early scepticism proved to have been misguided. Slobodan Milošević spent the final five years of his life imprisoned in The Hague while he was subjected to international trial; Biljana Plavsić was sentenced after pleading guilty; General Krstić and General Blaškić were both tried and convicted; General Gotovina is currently being tried and the trial of Radovan Karadžić will soon commence. It is true that General Radtko Mladić remains at large but he cannot venture outside the physical confines of his enclave and with a changed political environment in Serbia he may yet also be arrested and transferred to The Hague before the ICTY finishes its current list of cases and closes down. The achievements of the ICTY in dealing with some of the most senior political and military figures allegedly responsible for serious international crimes in the Balkans is impressive indeed.

I would go further and suggest that a brief case study of each of the Balkan States most affected by the conflicts during the 1990s demonstrates the significance of both the establishment and the effective functioning of the ICTY as a catalyst for much more substantive effort at national enforcement of international criminal law as a complement to international efforts. Many of the national trials that have been undertaken commenced as vengeful initiatives against 'other' ethnic minorities and as a way of

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[33] Statute of the International Criminal Tribunal for the former Yugoslavia, annexed to Resolution 827, 48 UN SCOR, 3217th mtg, 29, UN Doc S/Res/827 (25 May 1993); Statute to the International Criminal Tribunal for Rwanda, annexed to Resolution 955, 49 UN SCOR, 3453rd mtg, UN Doc S/RES/955 (1994).

shifting blame for atrocities away from the ethnic majority. But slowly the tide has turned so that now trials have also been instituted against those from the dominant ethnic majority. It is now apparent that the existence, and the operation, of the ICTY have provided the international community with opportunities to pressure authorities in different Balkan States to increase co-operation with the Tribunal itself, as well as to redress legal inadequacies in domestic judicial processes.[34] These recent developments surely support the arguments for an effective international criminal law regime – not to displace national court processes but to supplement them and, in some cases, to galvanise them into action.

Importantly, the establishment of the two *ad hoc* tribunals for the Former Yugoslavia and for Rwanda has led to a proliferation of new international criminal institutions: the Special Court for Sierra Leone, the Serious Crimes Unit in East Timor, the Extraordinary Criminal Chambers for Cambodia, the Iraqi High Tribunal, the Lebanon Tribunal to try those allegedly responsible for the assassination of Rafik Hariri, the former Lebanese Prime Minister, and of course the ICC itself. The proliferation of new criminal courts and tribunals represents a spectacular period of international criminal institution building. The ICC, as the first permanent international criminal court - not limited *ad hoc* to specific conflicts – is the culmination of this relatively recent commitment to accountability for atrocity.

V. THE CONTRIBUTIONS OF THE INTERNATIONAL CRIMINAL COURT

I earlier identified the two contributions I believe the ICC has already made. The first of these I characterised as the raising of global expectations that impunity for atrocity is no longer acceptable. The International Criminal Tribunals for the Former Yugoslavia and Rwanda demonstrate unequivocally that the concept of individual criminal responsibility for war crimes, crimes against humanity and acts of genocide is eminently attainable. No delegate could have intervened at the Diplomatic Conference in Rome to challenge the viability of the concept. Instead, the five-week Diplomatic Conference was replete with references to Nuremberg, to Tokyo, to The Hague and to Arusha – all as precedents for the principle of individual criminal responsibility for international crimes and all as important precursors to a new permanent international criminal court.

The establishment of the ICC represents the pinnacle of the international criminal institution-building exercise and, in that position, the ICC and all it stands for has provided a catalyst for some extraordinary developments. The judicial proceedings against General Augusto Pinochet in London are a prominent example. Pinochet was not on trial before the House of Lords. Rather, he had been arrested in response to the issuance of a warrant by a Spanish magistrate requesting his arrest and extradition to face

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[34] See Timothy L.H. McCormack, 'Their Atrocities and Our Misdemeanours: The Reticence Of States to Try Their Own Nationals for International Crimes' in Mark Lattimer and Philippe Sands (eds) *Justice for Crimes Against Humanity*, Hart Publishing (2003), 127-134.

trial in Spain for multiple counts of torture allegedly perpetrated in Chile during Pinochet's military rule in that country. General Pinochet had travelled to England for medical treatment and was then subjected to legal proceedings to determine whether or not the charges against him constituted extraditable offences under UK law. The legal proceedings were highly contentious. Pinochet's legal team argued that the General, as the former Head of a foreign State, enjoyed immunity from legal proceedings in the courts of the UK. Others were of the view that even if no immunity applies, there is no legal basis in UK law for trying a foreign national for alleged crimes perpetrated outside the UK against victims with no connection of nationality to the UK. If there is no basis for trying such alleged offences there is also no basis for extraditing a foreign national to a third State to face trial for such charges. The argument here was that any decision to allow an extradition in such circumstances would constitute a classic case of judicial activism – judges creating law that does not exist.

Intriguingly, the *Criminal Justice Act* had been part of UK law since 1988 but Section 134 had never been utilised since its enactment. Pursuant to Section 134 an individual of any nationality can be prosecuted in the UK for crimes of torture wherever those alleged crimes occurred in the world and irrespective of the nationality of the victims. The extraordinary potential scope of application of the legislation is an obligation imposed on all States Parties to the UN Convention Against Torture. Australia is also a State Party to the UN Convention Against Torture and we have similar legislation, the *Crimes (Torture) Act*, enacted into Australian domestic law in 1988. Because the Convention Against Torture of 1984 explicitly obligates States Parties to enact criminal legislation on such a broad basis, the UK, Australia and many other States Parties to the Convention, have implemented their treaty obligation through legislative enactment. Like the UK prior to Pinochet, the Australian Government has never utilised its torture legislation and most people, including those in Government, were probably blissfully unaware of the existence of the Act – at least until General Pinochet was arrested and subjected to judicial proceedings. Now, of course, many more are aware of the legislation and the broad scope of its potential application.

In the Pinochet Case there were two judgments by the House of Lords. Following the first of the two decisions, Pinochet's lawyers successfully argued that the judgment must be set aside on account of Lord Hoffman's connections to Amnesty International – a party to the proceedings. Consequently, the case was re-heard before a new panel of judges and a second consecutive majority decided that Pinochet could be extradited – that as a former foreign Head of State General Pinochet no longer enjoyed immunity from proceedings in the UK for allegations of criminal responsibility for torture. In both decisions, various judges referred extensively to the recent developments in International Criminal Law – particularly the opening for signature of the Rome Statute for the ICC – as evidence of the need to effectively enforce this body of law – not only at the international level but also at the national level.[35].

[35] For a detailed analysis of the reasoning of the House of Lords see: Nehal Bhuta, 'Justice Without Borders?: Prosecuting General Pinochet' (1999) 23 *Melbourne University Law Review* 499-532. For a personal account of the legal proceedings against Pinochet see Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules*, Allen Lane (2005), 29-42.

Apparently the House of Lords website crashed after the posting of the first Pinochet judgment as thousands of people across the globe attempted to access the site and download the judgment. Pinochet was not on trial for alleged acts of torture. Instead, his legal team were appealing against efforts to extradite him to Spain to face trial. But these successive House of Lords decisions involved judicial pronouncements that a former Head of State *could* be tried in a foreign court for alleged international crimes. That mere possibility represented a huge breakthrough in the national enforcement of international criminal law and the potential implications arising from the decision reverberated around the world. Amnesty International initiated a project to undertake a global stocktake of all the domestic criminal legislation in every country of the world that allowed the prosecution of foreign nationals for alleged international crimes perpetrated in foreign territory against victims of foreign nationality.[36] The motivation for the exercise was to maximise options for the possible trial of perpetrators of international crime otherwise protected from criminal responsibility in their own countries.

The Pinochet proceedings have undoubtedly constituted the most dramatic extradition case in the post-ICC era but those proceedings have certainly not been alone. Governments have been subjected to sustained political pressure to request extradition for those alleged to have perpetrated international crimes and not subject to trial in their current countries of residence. Two individuals in Australia are presently in custody pending the resolution of extradition proceedings. Charles Zentai, an Australian citizen who has lived for many years in Perth, is wanted for trial by the Hungarian Government for the alleged murder of a young Jewish boy in Budapest during World War II. Dragan Vasiljković, an Australian citizen currently in custody in Sydney, is wanted for trial by the Croatian Government for his alleged responsibility for war crimes perpetrated by the Red Berets, the ethnic Serb militia, in the Krajina region in Croatia during the early 1990s. The decisions of the Hungarian and Croatian Governments to request extradition to bring these two Australians allegedly responsible for war crimes to account is indicative of a growing willingness by governments around the world to take more seriously the prosecution of international criminal law at the national level.

Intriguingly, governments are also subject to much greater scrutiny in relation to their policies on national enforcement of international criminal law in the post-ICC era. In the UK, for example, plaintiffs initiated litigation against the Blair Government for the deaths of six Iraqi nationals caused, in different circumstances, by British military personnel in the Basra area. The best known of the six deaths involved an Iraqi man named Baha Mousa who was killed while in British Army detention. The litigation involved argument that the *European Convention on Human Rights* and the UK *Human Rights Act 1998* both applied to the acts of British military forces in Iraq.[37] The British Government, embarrassed by the death of Baha Mousa at the hands of British soldiers, attempted to settle the case by offering the Mousa Family monetary compensation. The military court-

[36] See Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation*, Report No. IOR 53/002/2001, 1 September 2001. Text of report available at: http://www.amnesty.org./en/library/info/IOR53/002/2001/en

[37] *R(Al-Skeini) v. Secretary of State for Defence* [2007] WLR 33.

martials undertaken against various British soldiers were subjected to sustained criticism and one of the soldiers tried became the first person convicted under the UK ICC legislation after pleading guilty to the war crime of 'inhumane treatment'.[38]

In Australia the Howard Government was subjected to litigation in the Federal Court in Sydney as the Attorney-General, the Foreign Minister and the Commonwealth were named as co-respondents by David Hicks in a legal challenge to the Government's indifference to an Australian citizen incarcerated in Guantánamo Bay for more than five years. In that particular case the Howard Government sought summary judgment to dismiss the litigation at first instance on the basis of an argument that there was no reasonable chance of success by the plaintiff. Justice Tamberlin disagreed and refused to dismiss the case. Instead he indicated that he did not accept that the proceedings had no reasonable prospect of success, that the issues involved raised important principles in developing areas of the law and that the case would proceed to trial.[39] The litigation was rendered nugatory and terminated when David Hicks entered his guilty plea before the US Military Commission and was subsequently transferred to Yatala Prison in Adelaide. For present purposes though, it is important that in the post-ICC era, government policy in relation to the prosecution of alleged international crimes is scrutinised and increasingly subject to legal challenge.

The phenomenon of increasing global expectations that impunity for atrocity is unacceptable shows no sign of abatement. Instead, the phenomenon is manifest on multiple levels of human interaction – from the global multilateral to the local domestic – and is likely to only become more pervasive over time. I am not suggesting that every person who commits an atrocity will face justice but I do believe that there will be more demands for justice and a greater commitment to identify alternative mechanisms to hold individuals accountable. This trend ought to be both acknowledged and applauded.

The second contribution of the ICC to increasing respect for international humanitarian law has been to act as a catalyst for national implementing legislation to provide penal sanctions at the domestic level for the perpetration of international crimes. The Australian experience is illustrative of the national experience of many countries. As a consequence of Australian ratification of the Rome Statute, the Commonwealth Government enacted a whole new division, Division 268, in our Commonwealth *Criminal Code Act 1995.*[40] That new Division 268 includes over 100 crimes comprehensively incorporating all the separate crimes in the Rome Statute: five crimes of genocide, 16 crimes against humanity, 72 separate war crimes and some additional offences against the ICC's administration of justice to take the number of new Australian

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[38] For a detailed account of the various legal arguments involved in the case see Gerry Simpson, 'The Death of Baha Mousa' (2007)8 *Melbourne Journal of International Law* 340 – 355.

[39] *David Matthew Hicks v.The Honourable Philip Ruddock MP, Attorney-General for the Commonwealth of Australia, The Honourable Alexander Downer MP, Minister for Foreign Affairs and the Commonwealth of Australia* [2007] FCA 299 (8 March 2007)

[40] See Schedule 1 of the *International Criminal Court (Consequential Amendments) Act 2002* which incorporates the amendment to the *Criminal Code Act 1995* resulting in the insertion of the new Division 268.

national offences over 100. There is nothing magical about reaching triple figures for the number of new offences in Australian criminal law. The more telling aspect of this new legislation is that in its scale and breadth the legislation is simply unprecedented in the history of our country. Prior to this new legislation Australia had the *Geneva Conventions Act 1957* (criminalising grave breaches of the Four Geneva Conventions of 1949 and of Additional Protocol I of 1977), the *Crimes (Torture) Act* 1988 (criminalising acts of torture), the *Crimes (Hostage-Taking) Act 1988* (criminalising acts of hostage-taking) and the *War Crimes Act 1945* amended in 1989 (criminalising war crimes committed in Europe during World War II) when the Reverend Professor Michael Tate was then Senator for Tasmania and Minister for Justice and, in that latter capacity, responsible for the passage of the legislation through the Senate. Each of those different legislative enactments only covered part of one category of international crime and constituted collectively a somewhat piecemeal approach to the national implementation of international criminal law.[41]

Some will recall the sustained public debate in this country about the fact that genocide as such was not a crime under Australian law – a reality exposed by the representatives of the Stolen Generation who attempted to argue before Australian courts that their personal experiences of forcible removal from their indigenous families was a form of genocide.[42] The new ICC legislation rectifies a substantial gap in Australian criminal law by criminalising genocide (although not retrospectively to cover the experiences of the Stolen Generation). Genocide, crimes against humanity and war crimes as defined in the Rome Statute have now all become offences under Australian criminal law effective from 1 July 2002.

It is important to acknowledge that the motivation for this new comprehensive legislation is an ignoble one. The motivation for the legislation is to ensure that any future Australian Government has the first option on the decision to try an Australian citizen, particularly a member of the Australian Defence Force, allegedly responsible for the commission of a war crime, crime against humanity or act of genocide, under Australian law rather than having that person tried by the ICC. The argument is that as long as Australia has comprehensive implementing legislation to cover all ICC crimes it would not be possible for the ICC to claim that Australia is 'genuinely unable' to try the person for want of effective domestic legislation. In other words, the motivation for comprehensive implementing legislation is to maximise the benefits of the so-called 'complementarity formula' in the Rome Statute – that the ICC can only try a case where the relevant States are unwilling or genuinely unable to try the case themselves.[43] It is

[41] For a more detailed analysis of Australia's implementing legislation for various international crimes prior to the 2002 ICC legislation see: Katherine L. Doherty and Timothy L.H. McCormack, 'Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation' (1999) 5 *University of California, Davis Journal of International Law and Policy* 147-180.

[42] See particularly the judgments in *Kruger v. Commonwealth* [1997] HCA 27, (1997) 190 CLR 1; and *Nulyarimma v. Thompson* [1999] FCA 1192.

[43] For a more detailed discussion of States desiring maximisation of the benefits of the complementarity formula see Doherty and McCormack, above note 30.

because the motivation constitutes an avoidance strategy that I characterise it as an ignoble motivation.

Australia is not alone in pursuit of this ignoble motivation for comprehensive implementing legislation. Many other States Parties to the Rome Statute have also comprehensively criminalised all the offences in the Rome Statute for precisely the same reasons as Australia. It seems unrealistic to expect any alternative motivation and naïve to criticise the desire to protect national self-interest. The drafters of the Rome Statute acknowledged as much in explicitly characterising the ICC as only a 'complement to', and certainly not a substitute for, effective national courts. The fact remains that Australia has this new legislation which can be utilised by any future Australian Government that chooses to utilise it. The example of General Augusto Pinochet taking tea with his friend Baroness Thatcher is telling. The *Criminal Justice Act* had existed in the UK since 1988 and was simply not utilised for the next ten years after its enactment. Our Australian legislation could sit dormant for many years without utilisation but the legislation is there in a more comprehensive form than it has ever been previously.

The mere existence of the legislative framework is fundamental because there can be no utilisation of that framework in circumstances where it does not exist. Of course the existence of the legislative framework does not guarantee its utilisation. However, my hope is that, as a consequence of the ICC coming into existence, many States such as Australia will take more seriously the importance of enforcement of international criminal law at the domestic level. The ICC will never be able to cope with all the war crimes, all the crimes against humanity and all the acts of genocide that are tragically and unfortunately perpetrated around the world with all-too-familiar regularity. The ICC needs States to be acting proactively in the enforcement of international criminal law and one of the key consequences of the ICC's establishment is that many States have enacted unprecedented domestic legislative frameworks. It may well be that this wholesale and widespread domestic implementation of international criminal law will yet prove to be the most significant contribution of the ICC in its early establishment phase.