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Regional Enforcement of International Criminal Law Post-9/11

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Regional Enforcement of International Criminal Law Post-9/11

Professor Tim McCormack

International crimes, particularly war crimes and crimes against humanity, have been, regrettably, all too common across the Asia-Pacific region. Ongoing violence and widespread civil unrest continue in numerous situations including in Kashmir, Sri Lanka, Nepal, Myanmar, East Timor, Papua New Guinea, the Solomon Islands, The Philippines and across the Indonesian archipelago in Aceh, Ambon, Kalimantan and Sulawesi. Despite regular allegations of war crimes and crimes against humanity in many of these situations, those responsible for atrocities have rarely faced justice. With a substantially increased risk of further terrorist attacks within the region in the aftermath of the September 11th terrorist attacks and the Bali bombings, the development of appropriate legislative and institutional responses to international crimes has acquired a new urgency.

The prevalence of impunity for international crimes in our part of the world is not unique. For more than four decades after the establishment of the Nuremberg and Tokyo tribunals the enforcement of international criminal law remained an exclusively national responsibility and the report card is appalling. The abject failure of an exclusive reliance on national courts and legal processes to rein in impunity for the perpetration of atrocities is the single most compelling argument for an effective international criminal law regime. This is not to suggest that the international community needs an effective international regime to replace or supplant national courts and processes. Rather, the suggestion here is for an effective international supplement to national structures and processes – a multilateral institutional framework to hold some key individuals to account while simultaneously providing a catalyst for more effective national enforcement of international criminal law.

Just as our regional experience of past impunity for atrocity is not unique in the world, it is naïve to assume that the Asia-Pacific Region will remain immune from the influence of global trends in the enforcement of international criminal law. It is well known that our region has the lowest participation rate of any geographic region in the world in the principal international human

rights and humanitarian law treaties (apart from the four Geneva Conventions of 1949).

Despite this, we are already witness to significant developments in response to the atrocities perpetrated in East Timor in 1999 in the aftermath of the overwhelming vote for independence from Indonesia, some of which are in direct response to increased global expectations of substantive legal responses to atrocity. In these circumstances, the recent establishment of the new International Criminal Court has a unique potential to effect the enforcement of international criminal law in our part of the world in the following ways:

States in the Asia-Pacific region have the lowest rate of participation in the Rome Statute of any region in the world (with the possible exception of the Middle East). Many regional governments seem to be under the misapprehension that non-participation in the Statute will guarantee immunity from the Court's jurisdiction in relation to their own nationals. This is fallacious thinking because it misses the potential scope of the Court's jurisdiction – particularly on the basis of UN Security Council Resolutions adopted pursuant to Chapter VII of the UN Charter (and acknowledged explicitly in Article 13(b) of the Rome Statute);¹

The creation of the new International Criminal Court will prove a catalyst for States to take the national enforcement of international human rights law much more seriously than has hitherto been the case. Many States, recognising the potential scope of the International Criminal Court's jurisdiction – particularly in relation to the so-called 'principle of complementarity' – have already enacted broad-ranging criminal legislation to ensure that all the crimes within the Rome Statute are covered by domestic penal law. The overwhelming motivation for this unprecedented criminal law reform is to maximise the potential benefits of the principle of complementarity in the event of allegations against a State's own nationals. It is likely that other States in the Asia-Pacific Region will follow this emerging trend;

The advent of a new era of global terror on the scale of the attacks of September 11 poses new challenges for national and regional security as well as for criminal justice. National courts will always have the legal capacity to try those allegedly responsible for terrorist attacks perpetrated within their respective territorial jurisdictions (and, in some instances, for attacks perpetrated outside their territorial jurisdictions but against their own nationals in foreign territory). The definition of Crimes Against Humanity in Article 7 of the Rome Statute is broad enough to cover the September 11 attacks or the Bali

bombings. It is, however, also not difficult to conceive scenarios in which governments may prefer to have individuals tried in The Hague by the International Criminal Court rather than proceed with a trial in their national courts. US opposition to the International Criminal Court and preoccupation with war as the instrument for responding to terror misses key opportunities afforded by the establishment of the new Court.

The Australian government faces policy choices in relation to each of these potential influences of the new International Criminal Court and this paper will identify some of the relevant policy options. However, before turning to a narrower focus on the regional potential of the International Criminal Court, it is important to acknowledge that criminal trials are not the sole means, and in some cases perhaps not even the desirable means, of responding to atrocity.ⁱⁱ Much attention has focussed on the apparent choice between exposing the truth and a retributive approach to justice to advance the cause of reconciliation within a society deeply wounded by atrocity. My intention is to briefly discuss this issue and then to concentrate in greater detail on the potential contributions of the new International Criminal Court.

Exposing the Truth versus Retribution for Past Wrongs

The South African decision to respond to decades of apartheid rule by first establishing a Truth and Reconciliation Commission in preference to multiple criminal prosecutions is one of the most familiar examples of an alternative national response to the perpetration of systematic crimes against humanity. The South African model represents an acknowledgement of the fundamental importance of exposing the truth as a precondition for the society as a whole moving forward in a spirit of true reconciliation. Many victims of apartheid have testified to the effect that hearing the perpetrators of atrocity publicly acknowledging their acts as well as the effects of their acts and then publicly apologising to the victims of their acts was, for the victims and their families themselves, much more important than the imposition of any prison sentence. The South African Truth and Reconciliation Commission did not have the power to grant blanket amnesties in South Africa – although amnesties from criminal prosecution were granted in some limited circumstances. In other circumstances, however, South African trials have been conducted and have been seen to be consistent with the philosophical basis for the Commission.

South Africa is not the only State to have instituted a Truth and Reconciliation Commission process in the aftermath of serious human rights violations. Sierra Leone, Guatemala, El Salvador and East Timor have all

established similar institutions. The East Timor example is important as the only Asia-Pacific regional example to date. President Gusmao has repeatedly asserted his view that, while it is important for the East Timorese to know the truth about the atrocities perpetrated in East Timor from the end of Portuguese colonial rule in 1974 right through until independence from Indonesia in 1999, true reconciliation in the context of a positive bilateral relationship with Indonesia will be hindered by a commitment to punitive trials in East Timor – particularly trials of Indonesian military officials.

East Timor has recently established the Commission for Reception, Truth and Reconciliation with a mandate to call witnesses and expose the truth of what occurred in the territory of East Timor from 1974 to 1999. President Gusmao has also personally denounced the Chief Prosecutor's issuance of indictments against high-ranking Indonesian military officers as unhelpful for East Timor's future.

Interestingly, however, President Gusmao has not opposed a retributive form of justice in principle – rather his position is that such an approach should not be undertaken by the courts of East Timor itself. If the international community demands justice for international crimes perpetrated in East Timor, President Gusmao would prefer the international community also to take responsibility for the administration of that justice.

It is easy to sympathise with President's Gusmao's position. In purely pragmatic terms East Timor is dependent upon a co-operative relationship with Indonesia to ensure its long-term survival and prosperity. It will be much less threatening for East Timor if the international community pressures Indonesia to ensure that justice is achieved in respect of crimes committed in East Timor rather than if East Timor itself is the source of the retributive initiatives. International monitoring of the Jakarta trials is critical and will be discussed below. In future scenarios, the International Criminal Court may well provide an additional source of pressure. Any State attempting to undertake a *mala fides* approach to prosecution of individuals alleged to be responsible for atrocities in order to protect them from justice faces the possibility of the UN Security Council authorising the International Criminal Court to step in and override an inadequate national approach.

Non-Participation in the Rome Statute

There are currently 90 States Parties to the Rome Statute for the International Criminal Court but only 10 are from the Asia-Pacific region: Australia, Cambodia, East Timor, Fiji, Marshall Islands, Mongolia, Nauru, New Zealand, Republic of Korea and Samoa. Some other key States in the Region may well ratify sometime later in 2003 when they have completed their preparations for implementation (Japan and Singapore, for example). However, if and when those States have joined the growing list of States Parties, the Asia-Pacific Region will remain under-represented among States Parties relative to other geographic groupings of States. The historic election of Ambassador Neroni Slade of Samoa, the first national of a Pacific Island nation State to be elected to the bench of an international court or tribunal, as one of three 'Asian' judges to the new International Criminal Court is explicable in large part by the relative paucity of 'Asian' States to nominate judges for election. Ambassador Slade is an outstanding appointment and he will make an excellent judge but Samoa would not have had the influence to succeed with his election if the 'Asian' Grouping of States had nominated 9 or 10 candidates for election as judges.

Some regional governments are under the misapprehension that non-participation in the work of the Court by failure to ratify the Statute will somehow preclude the Court from proceeding with cases emanating from within those non-participating States. The basis of this misapprehension is the fundamental principle of treaty law that States are only bound by the terms of a treaty when they consent to be bound (and that consent is usually expressed either by the act of ratification of the State's signature of the treaty or by the act of accession to the treaty). In the case of the Rome Statute the treaty allows for the prosecution by the Court of the nationals of non-States Parties to the Statute – either on the basis that the State of nationality of the accused gives its consent *ad hoc* for a particular trial to proceed against one or more of its nationals (Article 12(3)); or on the basis that the UN Security Council, acting pursuant to Chapter VII of the UN Charter (the chapter outlining UN Security Council enforcement powers), authorises the Prosecutor of the International Criminal Court to investigate a situation and institute proceedings in respect of alleged crimes, irrespective of the nationality of the accused person(s) (Article 13(b)).

One regional example of how this Security Council power might work in the future arises in the context of East Timor and UN Security Council Resolution 1264. That Resolution, adopted pursuant to Chapter VII of the UN

Charter, authorised the deployment of INTERFET, the multinational peace-enforcement mission under Australian command, to enter East Timor and stop the carnage occurring in the aftermath of the post-independence ballot in September 1999. The first operative paragraph of the Resolution stated that the Council:

Condemns all acts of violence in East Timor, *calls* for their immediate end and *demands* that those responsible for such acts be brought to justice;

The jurisdiction of the International Criminal Court is not retrospective and only takes effect in relation to crimes occurring after the date of entry into force of the Rome Statute – 01 July 2002. The point here is therefore a hypothetical one – if the East Timorese vote for independence occurred in September 2002, for example, instead of in 1999, all the Council would need to add to its first operative paragraph in Resolution 1264 would be:

and the Council *authorises* the Prosecutor of the International Criminal Court to investigate the situation in East Timor and to take any relevant measures to bring the perpetrators of these atrocities to justice.

or words to the same effect. In such circumstances the International Criminal Court would have the jurisdiction to initiate proceedings in the case.

This potential jurisdiction of the International Criminal Court has profound implications for the future enforcement of international human rights and humanitarian law – including in our region of the world – provided that the members of the UN Security Council are prepared to use their authority in this way.

In my view, the willingness of the UN Security Council to authorise the initiation of International Criminal Court proceedings is crucial to the future effectiveness of the new Court. The US, in particular, has consistently voiced its opposition to participation in the Court on the basis of the possibility, however remote, of a US national appearing before the Court against the wishes of the US. As a permanent member of the UN Security Council with the veto power, the US is in the position of ‘having its cake and eating it too’ on the International Criminal Court. The US has the capacity to veto any attempt to bring US nationals to the new Court by way of UN Security Council Resolution while also using the Council’s authority to give the Prosecutor of the Court the capacity to investigate and indict nationals of other States if warranted.

I certainly hope that what I characterise as a US over-reaction to the scope of the Court's jurisdiction from the perspective of US nationals will not translate into virulent US opposition to all International Criminal Court related initiatives. If the US takes a comprehensively critical stance, including in relation to Security Council referrals, the potential benefits of the new Court for more effective enforcement of international human rights and humanitarian law will be significantly – some would argue fatally – curtailed.

The Rome Statute as a Catalyst for More Effective National Enforcement

The establishment of the Nuremberg and Tokyo Tribunals to try many of the most senior political and military leaders of the defeated Axis Powers in the aftermath of World War II was widely seen as a watershed and expected to result in a permanent international criminal tribunal. Regretfully, the promise of Nuremberg and Tokyo failed to materialise for the next 50 years until the successful negotiation of the Rome Statute in 1998.

Throughout those 50 years, the enforcement of international human rights and humanitarian law was exclusively a national responsibility. This era is characterised by impunity and the inconsistent application of the law enabling effective national enforcement. One popular view that the Pinochet proceedings constituted new law (even a new breed of particularly aggressive judicial activism) is instructive here. The 'old' law of universal jurisdiction was so under-utilised that this dramatic and long-overdue application of it had a profound impact on global expectations about the role of law in the enforcement of international human rights and humanitarian law.

The potential of the Rome Statute to act as a catalyst for States to take far more seriously the national enforcement of international human rights and humanitarian law is already palpable. The Australian experience is illustrative. Until June 2002, neither the international crime of genocide nor crimes against humanity were crimes under Australian domestic criminal law in their own right. Even in relation to war crimes, Australian courts could only try individuals for war crimes committed in Europe between 1939 and 1945; for grave breaches of the Geneva Conventions of 1949 committed in the context of international armed conflicts anywhere in the world after 1957; or for grave breaches of Additional Protocol I of 1977 to the Geneva Conventions committed in the context of international armed conflicts anywhere in the world after 1991. War crimes committed in non-international armed conflicts were simply not part of Australian domestic criminal law.

New Australian Legislation

Even within the limitations of our previous legislation, successive Australian governments have been reticent to initiate criminal proceedings pursuant to the relevant legislative enactments after becoming aware of the presence of alleged perpetrators of these crimes within Australia. Those few proceedings initiated against alleged war criminals have all ended in acrimony and served to convince successive governments to avoid criminal investigations of this kind.

Our national approach to the legislative implementation of international crimes altered dramatically last year with the enactment of the *International Criminal Court (Consequential Amendments) Act 2002*. Schedule 1 of this Act amends the *Criminal Code Act 1995* by enacting an entire new Division (No. 268) entitled 'Genocide, Crimes Against Humanity, War Crimes and Crimes Against the Administration of the Justice of the International Criminal Court'. The Schedule includes 124 new sections in 10 different subdivisions of the new Division – a legislative implementation of international crimes unprecedented in its scope. Consequently, all the crimes within the Rome Statute are now also crimes under Australian domestic criminal law and Australian courts can try individuals alleged to have committed any of these crimes irrespective of: (1) where in the world the alleged offences occurred; (2) the nationality of the accused; and (3) the nationality of the victims. Unlike the bulk of Australia's criminal law, these crimes can be tried in Australian courts without there being a direct link to Australia.

This novel systematic and comprehensive approach is explicable in terms of the Australian government's intention to maximise the benefits of the so-called principle of 'complementarity'. The Rome Statute only allows the International Criminal Court to try an individual where the Court is satisfied that both the Territorial State (where the alleged crime occurred) and the State of Nationality (of the alleged perpetrator) are 'unwilling or genuinely unable to prosecute the person concerned'. The Australian government, like many other governments, does not want to forfeit the opportunity to decide itself whether it wants to prosecute one of its own nationals alleged to have committed one of the crimes within the Statute for lack of applicable Australian Criminal Law.

Of course, the comprehensive enactment of implementing legislation is one thing and political will to apply it is altogether another thing. Our Australian experience of prosecuting alleged World War II war crimes is

testament to that reality. However, the enactment of domestic criminal law more comprehensive than any prior legislation is already a step in the right direction. It is highly likely that in any future case involving an Australian national alleged to have committed an international crime, public expectations that the law will be applied will be higher than ever before. Here 'civil society' may well have a potentially critical role to play to demand that some future Australian government take the 2002 legislation seriously in the face of credible allegations of violations of the law. Even if governments in this country continue to be reluctant to prosecute, we can, at the very least, expect that the existence of the legislation will make it more difficult for future governments to argue that there is no legal basis for initiating proceedings.

The Rome Statute has already made an enormous contribution to more effective enforcement of international human rights and humanitarian law as the catalyst for systematic national criminal legislation. The mere existence of the International Criminal Court with its potential to evaluate the *bona fides* of national investigations and criminal trials may well provide the leverage necessary to encourage States to take seriously even that most politically sensitive issue of discipline of its own military personnel. The mere threat that the International Criminal Court might take control of prosecutions of a State's military may well be the best guarantee to date of national accountability for breaches of military discipline.

Cambodia

There is some regional evidence that this 'spin-off' may well eventuate. In Phnom Penh, for example, Hun Sen's government has worked assiduously to avoid the perceived ignominy of the external imposition of an international criminal tribunal to try former leaders of the Khmer Rouge for their alleged involvement in the Killing Fields of the 1970s. It was recently announced that a new round of discussions have commenced between the UN and the Cambodian government. It seems that the only way for Hun Sen to save face on this issue is for the establishment of a hybrid tribunal with a mix of international and national judges, prosecutors and defence lawyers. To date the UN has steadfastly resisted Cambodian requests for the establishment of an exclusively Cambodian tribunal. It will be intriguing to observe whether Hun Sen finally agrees to the hybrid model as the best he can negotiate to avoid an exclusively international tribunal.

East Timor

In the aftermath of the East Timor atrocities in 1999, demands were repeatedly made for the establishment of an *ad hoc* international criminal tribunal to try those responsible for the atrocities. The UN Security Council responded positively to Jakarta's expressed desire to take national responsibility for trying those allegedly responsible for the atrocities. It is widely believed Jakarta protected General Wiranto and other Indonesian military leaders from prosecution and serious questions have been raised about the conduct of the trials and the convictions recorded to date.

The UN Serious Crimes Unit in Dili has recently caused controversy with the issuance of indictments against General Wiranto and others who have not faced justice for their alleged involvement in the atrocities. The UN Secretary-General has indicated his disapproval of the conduct of the Jakarta trials on advice from the UN High Commission for Human Rights and, with the recent initiative of the Serious Crimes Unit in Dili, Indonesian authorities may well be forced to accept that the establishment of institutions and processes and the conduct of the trials as a means of protecting key individuals from justice will not stand up to scrutiny. Indonesia implemented the trials in the first place to avoid the imposition of an *ad hoc* international criminal tribunal. It could hardly be argued that there is a serious international appetite for such a new tribunal particularly because of the groundswell of international support for the Indonesian government to foster and maintain political stability across the archipelago. However, persistence with a *mala fides* approach to national trials in respect of the East Timor atrocities may certainly result in stronger and more persistent calls for justice and Jakarta risks losing control of the trial process in the longer term.

This entire national experience could well constitute a regional case study for similar future scenarios with one crucial difference: the existence of the International Criminal Court, which will have jurisdiction over future atrocities – wherever they occur.

The Rome Statute and the 'War on Terror'

One of the most disappointing aspects of the US reaction to the attacks of September 11 is the exclusive characterisation of the attacks as acts of war, thus justifying an overwhelming military response. Some opportunities exist to develop an unprecedented global multilateral coalition to enforce the rule of

law against international terror – including by military means – but on the basis that the acts constitute international crimes, not acts of war.

It must be conceded that to date there are no signs of any political will for an approach of this kind. The US seems fully committed to war as the means of achieving its understandable determination to prevent a repeat of the kind of attacks we have witnessed. It is thereby missing some very important opportunities to build a true ‘coalition of the willing’ – those willing to commit to a global police enforcement action against terror. The potential role of the International Criminal Court is central to a different kind of approach: an approach that characterises the World Trade Centre attacks or the Bali bombings as crimes against the whole of humanity – as crimes that deserve and require a ‘whole of humanity’ response, including the trial of those responsible for such crimes before a Court that represents the whole of humanity more than any other criminal forum.

Article 7 of the Rome Statute defines the threshold requirements for a crime against humanity as ‘a widespread or systematic attack against a civilian population pursuant to a State or organisational policy’. It is surprising, and a little disappointing, that in the aftermath of the Bali bombings no reports in the Australian media characterised the bombings as a crime against humanity on the basis of the Article 7 definition.

This is not to suggest that the bombings were not also domestic crimes in both Indonesia and in Australia – our own government rushed to enact new legislation to extend Australia’s criminal law extra-territorially to cover crimes perpetrated in foreign territory against Australian nationals in order to allow for the possibility of trying one or more of the suspected bombers in Australian courts. However, the exclusive national focus on this possibility seemed to preclude Australian government officials considering the possible utilisation of the International Criminal Court. The criminal investigation of the bombings did, however, constitute an unprecedented level of mutual co-operation between Indonesian and Australian police – one positive outcome from the disaster resulting in new levels of mutual trust and respect that become crucial ground work for future co-operation.

As Paul Dibb suggested in the inaugural *Melbourne Asia Policy Paper*, the Australian government’s rush to join the US in its determination to rid Iraq of Saddam Hussein risks alienating Indonesia and other important regional partners whose co-operation may be essential to our own protection from terrorist attacks.

The US focus on war as the response to terror – war irrespective of UN Security Council sanction; war on the basis of a unilateral right to determine the circumstances justifying pre-emption; war based on Secretary of State Powell’s own claim to ‘our sovereign right to invade’ – is, in reality, only part of the story. On one hand the US reserves the right to deny prisoner of war status to detainees from the conflict in Afghanistan and doubtless will do so again in relation to Iraq. If a US serviceman or woman was taken into custody in Afghanistan or Iraq, would the US refrain from insisting that that person be given all the protections of prisoner of war status forthwith and without qualification? And if the war on terror really is a war, why is there no discussion in the US currently about the legal status of Khalid Shiekh Mohammed? Lawyers would be ridiculed for making the suggestion that he might be a prisoner of war – or at least an ‘unlawful combatant’, as the inmates at Guantanamo Bay are known – purely on the basis of the insistence of the US on characterising its own actions as a legitimate war on terror.

In my view the US opposition to the International Criminal Court represents missed opportunities. The preoccupation with ensuring that US nationals are never subject to the jurisdiction of a foreign court without US permission blinds the Administration to the possibilities of building and leading a global, multilateral coalition to subject terrorists to the rule of law. It is similarly ironic that the US is prepared to go to war to prevent the possible spread of biological and chemical weapons from Iraq while simultaneously scuttling years of effort to develop an effective verification regime for compliance with the Biological Weapons Convention – a regime designed to help prevent the spread of biological weapons and a regime to which Iraq could have been subject as a State Party to the Biological Weapons Convention.

It is to be hoped that, in time, the US will come to see that the International Criminal Court is not simply out to ‘get’ Americans and that it represents enormous potential for the effective enforcement of international human rights and humanitarian law. I hope that a future US Administration will recognise that the International Criminal Court represents a golden opportunity for international US leadership in the struggle to eradicate the crime against humanity of terror and that the only way to maximise that potential is to enthusiastically embrace participation in the Court. Australia is one of the closest allies of the US. Will our own government commit itself to encouraging the US to see the opportunities the International Criminal Court represents?

Policy Options for the Australian Government

Promoting Increased Regional Participation in the Rome Statute

The Australian government could make a significant contribution towards increased regional understanding of the Rome Statute leading to greater levels of participation amongst regional States if it chose to commit itself to this work. In the South Pacific Region, the Australian government could work with other States Parties to the Statute – New Zealand, Fiji, Marshall Islands, Nauru and Samoa – particularly through the auspices of the inter-governmental Pacific Forum. The historic election of Ambassador Neroni Slade of Samoa as a foundation judge of the new Court will automatically raise interest in the new institution within the membership of the Forum and create an ideal opportunity to explain the rationale for the new Court and the implications for increased membership. Australia and New Zealand are well placed to provide technical assistance for the preparation of implementing legislation in South Pacific States and to help train regional militaries and police forces to understand any new legislation and the implications arising from it for their members, as well as for their societies in general.

In the Southeast, East and North Asian Regions, the Australian government could work with the existing States Parties to the Rome Statute – Republic of Korea, Cambodia, Mongolia and East Timor – in the context of existing multilateral bodies including, for example, the ASEAN Regional Forum (ARF). ARF exists to facilitate discussion on regional security issues and has already undertaken a number of seminars and workshops on the Law of Armed Conflict. It would be a relatively easy and straightforward option to raise the issue of implications of the Rome Statute for military forces in the region in the context of one such ARF Seminar. Assistance to Cambodia, Mongolia and East Timor may well be similar to that required by Pacific Island States. However, the Republic of Korea represents a potential Asian partner for the Australian government with the capacity to play a role akin to that of New Zealand in the Pacific context. The appointment of the Korean Judge Song as a foundation member of the bench of the new Court will inevitably raise some regional interest in the Court in East Asia and provides another opportunity for Australia to proactively promote increased awareness of and participation in the Rome Statute.

The type of regional outreach envisioned here is a low cost option in economic terms and could be presented diplomatically and in non-threatening

terms to those regional States not yet party to the Rome Statute. Appropriate inter-governmental fora in which to raise the issues already exist. The structural or institutional obstacles for Australia to pursue a policy of regional outreach and promotion are therefore minimal.

These realities, of course, will not automatically ensure that the current Australian government takes up the policy challenge. Given overwhelming Australian support for US government policy and its implementation in the post-September 11 era, any such proactive regional outreach initiative on the International Criminal Court (ICC) seems unlikely in the light of the strength of US opposition to the new Court.

Responding to US Opposition to the Court

The current US Administration has gone to extraordinary lengths to protect itself from the remote possibility of any US national appearing before the ICC against the wishes of the US Government.

In the UN Security Council, for example, the US has insisted upon a 12 month extension of the immunity of peacekeepers on UN authorised missions from ICC jurisdiction despite UN Secretary-General Kofi Annan's view that the purported granting of such blanket immunity is *ultra vires*. The immunity was backed however by the *US Servicemen's Protection Act*, colloquially dubbed the 'Hague Invasion Law', passed by Congress in 2002. This legislation empowers the President to authorise the deployment of the US military to The Hague to forcibly retrieve custody of any US national held by the ICC without US government permission. This legislation was enacted despite the fact that the US and The Netherlands are NATO allies.

Finally, the US Administration has attempted to sign bilateral agreements with as many States Parties to the ICC as possible, to the effect that those States Parties will not transfer custody of a US national to the ICC without US consent. These agreements are commonly referred to as Article 98 Agreements – on the basis that Article 98(2) of the Rome Statute envisages pre-existing or subsequent agreements (particularly 'Status of Forces' Agreements although Article 98(2) does not identify such agreements by name) which recognise the primacy of one party's national jurisdiction over the other party to the agreement.

The Australian government has conceded that it has been approached and asked to sign an 'Article 98 Agreement'. The approach the Australian government takes to this issue will be a crucial litmus test. One extreme option

is for the Australian government to reject the signing of any agreement at all – although that option seems highly unlikely (and unnecessary). Instead the Australian government can sign an open-ended agreement granting a blanket immunity to any US national from transfer to the ICC, or the government can insist upon surrender of any US national to US authorities in preference to the ICC, on condition that the US undertakes a *bona fide* investigation of the allegations against the individual in question and agrees to try them if appropriate.

If such a pre-condition is included in any text of an Article 98 agreement, the agreement itself will not be inconsistent with the Rome Statute’s so-called principle of complementarity which recognises the primacy of national jurisdictions in the investigation and trial of those alleged to have committed violations of the Rome Statute.

As one of the strongest supporters of US policy, the position Australia as a State Party to the Rome Statute takes in its bilateral relationship with the US is of fundamental importance. If Australia is seen to compromise its own participation in the Rome Statute by supporting US opposition to the new Court without qualification, it will be impossible for the Australian government to play any meaningful role in raising awareness of and increasing participation in the Rome Statute. If, however, the Australian government uses its close relationship with the US – perhaps supported in this by the UK government, which is also Party to the Rome Statute – to seek to discourage US opposition to the Court, any such positive influence would constitute a significant contribution to the viability of the Court in its infancy. Furthermore, this sort of influence would surely enhance perceptions of Australian authenticity in a national policy of advocacy in support of the Court.

Improving National Enforcement of International Criminal Law

The legislative enactment of the *International Criminal Court (Consequential Amendments) Act (2002)* represents a revolution in the implementation of international criminal law into Australian Domestic Criminal Law. At no previous stage in the history of Australian Criminal Law have war crimes, crimes against humanity or genocide been comprehensively incorporated as part of the penal law of this country. However, the mere existence of comprehensive legislation has never ensured the existence of concomitant political will. The piecemeal and inconsistent domestic legislation dealing with international crimes pre-dating the new 2002 legislative implementation of the Rome Statute has never been systematically applied in Australia – even in

situations of alleged violators clearly falling within the scope of one or other legislative provision.

One key challenge for Australia, as for other States Parties to the Rome Statute, is to translate the political rhetoric of support for the Court and its ideals into a more systematic and comprehensive commitment to the enforcement of international criminal law at the national level as a necessary corollary to international efforts.

Notes

- 1 A copy of the Rome Statute and other documentation related to the International Criminal Court can be located on the web at www.un.org/law/icc/
- 2 I wish to thank my colleague Alison Duxbury for her helpful suggestions on alternatives to criminal trials in response to atrocity.

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Head of the Strategic and Defence Studies Centre in the Research School of Pacific and Asian Studies, The Australian National University (6 December 2002)

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