

## INTERNATIONAL LAW AND DIPLOMACY: THE ART OF THE POSSIBLE

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I wish to thank Sarah, Houston and Ashley for inviting me to give the *Melbourne Journal of International Law's* Annual Lecture. I would also like to thank the Global Law Students Association and the Asia-Pacific Centre for Military Law for their support for this event. It is a pleasure to be here this evening at the Melbourne Law School ('MLS') whose staff, students and alumni have made, and are continuing to make, such a significant contribution to Australia's engagement in the consolidation, development and promotion of international law.

I am very conscious that there are others here tonight who have had a longer, more continuous involvement in international law than I have had. I have, however, had the privilege, through the diversity of experiences and opportunities that a career in the Department of Foreign Affairs and Trade ('DFAT') offers, of working on international legal issues, both in Canberra and overseas, and I have been witness to a number of key developments in international law over those years.

It is some of those reflections gained from that experience and involvement that I would like to mention this evening from a practitioner's perspective, for so much of my international law knowledge has been acquired through being engaged 'on the front line'. I wish to demonstrate that the interaction of diplomacy and the law can produce significant results, particularly when there is widespread commitment to achieving a substantive outcome and the international context is optimal for doing so. It is then that the negotiators do have real scope to practice the 'art of the possible'.

Looking back, I am struck by how many members of the Australian public service, especially in DFAT, the Attorney-General's Department ('AGD') and the Department of Defence, are these days so strongly qualified in international law through having majored in the subject area in their law degree or having done postgraduate degrees in Australia and overseas. Many have gained practical experience through having worked at the United Nations, and in international courts and tribunals and with other bodies.

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There is so much more focus on international law at universities today compared to when I studied law in the 1960s, when it was just one subject taught among many others. When I joined the then Department of External Affairs in the early 1970s, although there were lawyers with a sound knowledge of international law in the Department and in the AGD at that time, they were not numerous — the respective legal areas being relatively small.

One bonus, though, was being in the presence, so to speak, of Sir Kenneth Bailey (a very distinguished alumnus of MLS) in the old Administrative Building in Canberra, which housed External Affairs at one end and the AGD at the other.

Sir Kenneth was, at that time, Special Adviser in International Law to the AGD and to the Department of External Affairs and we quickly became aware of the key role he had played at the San Francisco Conference in the committees working on the drafts of the *Charter of the United Nations* ('*UN Charter*') and of the *Statute of the International Court of Justice*.

Other significant international legal figures who were inspirational to me and others in those early years were Sir Eli Lauterpacht who was Legal Adviser in DFAT from 1975–77 (and whose legal assistant at that time was another distinguished graduate from MLS, Erika Feller); the legendary Pat Brazil in AGD; and, in a later period, Professor Ivan Shearer, who was a Special Adviser in DFAT in 1991, as well as a member of Australian Delegations to the UN Sixth Committee and Law of the Sea meetings; Dr Dominique De Stoop, a MLS graduate; and, over many years, Bill Campbell QC who is now General Counsel (International Law) in the AGD.

In addition, international lawyers in Australian capitals have all benefited from their interactions over the years with a truly great Australian international lawyer, Professor James Crawford, a candidate for election to the International Court of Justice ('ICJ') at this year's UN General Assembly ('UNGA') and who has represented Australia before the Court. If, as we ardently hope given his outstanding qualifications, James is elected, he will be the second Australian to have served as a member of the Court (the previous one being, of course, Sir Percy Spender from 1958 to 1967).<sup>1</sup>

In referring to the ICJ, I also wish to recognise that two very distinguished graduates of MLS, Sir Ninian Stephen and Professor Hilary Charlesworth, have sat on the Court as judges ad hoc in cases concerning Australia.<sup>2</sup>

Just as the pool of lawyers qualified in international law within DFAT and AGD has grown significantly since the 1970s so too has the collaboration and consultation between those departments, and with the Defence Force Legal Service, on international law issues (as well as with other departments in relation to sectoral issues). The close relationship between the principal departments in Canberra to which international law is tied under the government's Legal Services Directions has been necessary and inevitable — both to respond to the demands of globalisation and through Australia being involved in international

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<sup>1</sup> Professor James Crawford was elected as a judge of the International Court of Justice on 6 November 2014.

<sup>2</sup> *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90; *Whaling in the Antarctic (Australia v Japan) (Judgment)* (International Court of Justice, General List No 148, 31 March 2014) ('*Whaling in the Antarctic*').

law initiatives in both the bilateral and multilateral contexts. All of this is underpinned by Australia's long standing policy commitment to advocating and supporting a rules-based international order through which to both promote and protect our interests.

There has been a lot of activity, and a lot has been achieved, in the international legal area over the past four decades, particularly in the successful negotiation of new instruments, both multilateral and bilateral, which have strengthened the fabric and framework of international interaction between states and have contributed to fostering peace and security and to facilitating trade. For example, in the multilateral field:

- In relation to international humanitarian law: the two 1977 *Additional Protocols* to the 1949 *Geneva Conventions*.<sup>3</sup>
- In relation to the law of the sea: the Third United Nations Conference, which produced the *United Nations Convention on the Law of the Sea* ('*UNCLOS*')<sup>4</sup> — one of the longest (9 years) and most complex law-making negotiations in history; the subsequent *Implementing Agreement on Part XI*<sup>5</sup> (deep seabed mining) of *UNCLOS*; the 1992 *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*<sup>6</sup> and its 2012 *Subsidiary Agreement*;<sup>7</sup> and the 1995 *Straddling Fish Stocks Agreement*.<sup>8</sup>
- In the area of disarmament and arms control: the 1980 *Convention on Certain Conventional Weapons*;<sup>9</sup> the 1992 *Chemical Weapons Convention*<sup>10</sup>; the 1996 *Comprehensive Nuclear Test Ban Treaty*;<sup>11</sup>

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<sup>3</sup> *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); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).

<sup>4</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994).

<sup>5</sup> *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, opened for signature 28 July 1994, 1836 UNTS 3 (entered into force 16 November 1994).

<sup>6</sup> *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, opened for signature 9 July 1992, 32 ILM 136 (entered into force 20 May 1993).

<sup>7</sup> *Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, opened for signature 2 November 2012 (not yet in force).

<sup>8</sup> *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 August 1995, 2167 UNTS 3 (entered into force 11 December 2001).

<sup>9</sup> *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 10 October 1980, 1342 UNTS 137 (entered into force 2 December 1983).

<sup>10</sup> *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, opened for signature 13 January 1993, 1974 UNTS 45 (entered into force 29 April 1997).

the 1997 *Ottawa Landmines Convention*,<sup>12</sup> the 2008 *Cluster Munitions Convention*,<sup>13</sup> and the 2013 *Arms Trade Treaty*.<sup>14</sup>

- In international criminal law: the 1998 *International Criminal Court Statute* ('*Rome Statute*')<sup>15</sup> and the 2010 Review Conference, which adopted articles defining the crime of aggression and on how the International Criminal Court ('ICC') would exercise its jurisdiction in relation to the crime.<sup>16</sup>
- In the area of trade: the establishment of the World Trade Organization ('WTO') and its dispute settlement mechanisms in 1995.<sup>17</sup>
- In relation to Antarctica: the 1991 *Protocol on Environmental Protection to the Antarctic Treaty* ('*Madrid Protocol*').<sup>18</sup>
- In the cyber realm: the affirmation last year, by a UN group of government experts chaired by Australia, that international law applies to states' use of cyberspace.<sup>19</sup>

While this is not an exhaustive list, it is a substantial one. It does not, of course, include the numerous important bilateral agreements that Australia has concluded over that period which are equally significant but too numerous to mention.

I have focused on the multilateral instruments because they represent, from a multi-state perspective, the progressive development and codification of international law — what Sir Daniel Bethlehem QC, the former Legal Adviser in the United Kingdom's Foreign and Commonwealth Office, has referred to as 'the cascading evolution of international law'.<sup>20</sup> Australia has been at the forefront of the negotiations of all of these instruments, fully engaged in working to achieve broad-based, strong and substantive outcomes.

However, to achieve outcomes of this magnitude across such a diverse and complex range of subject areas requires a high degree of common purpose and

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<sup>11</sup> *Comprehensive Nuclear-Test-Ban Treaty*, opened for signature 24 September 1996 (not yet in force).

<sup>12</sup> *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, opened for signature 3 December 1997, 2056 UNTS 211 (entered into force 1 March 1999).

<sup>13</sup> *Convention on Cluster Munitions*, opened for signature 3 December 2008, 2688 UNTS 39 (entered into force 1 August 2010).

<sup>14</sup> *Arms Trade Treaty*, opened for signature 3 June 2013 (entered into force 24 December 2014).

<sup>15</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

<sup>16</sup> Review Conference of the Rome Statute, International Criminal Court, *Draft Resolution Submitted by the President of the Review Conference: The Crime of Aggression*, ICC Doc RC/10 (11 June 2010).

<sup>17</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).

<sup>18</sup> *Protocol on Environmental Protection to the Antarctic Treaty*, opened for signature 4 October 1991, 30 ILM 1461 (entered into force 14 January 1998).

<sup>19</sup> *Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, UN GAOR, 68<sup>th</sup> sess, Agenda Item 94, UN Doc A/68/98 (24 June 2013).

<sup>20</sup> Sir Daniel Bethlehem, 'The Secret Life of International Law' (2012) 1 *Cambridge Journal of International and Comparative Law* 23, 34.

commitment among states, particularly at the political level. Multilateral agreements cannot be negotiated as a purely legal drafting exercise. There is always a political context reflecting the interests of states and this requires engaging in diplomacy — through dialogue, representations and persuasion, as well as humour at times — and employing all the skills of negotiating, backed by a sound knowledge of the subject matter and international law.

Virtually all the treaties, conventions and agreements I have referred to were negotiated within the UN framework and mandated through UNGA resolutions. The membership of the UN has grown exponentially since 1945: it numbered 51, 127 in 1970 and 193 in 2014. Given the sheer scale of the negotiations in terms of the states involved, Australia has found it very useful, indeed essential, at times to work with other states in coalitions which share common interests or objectives, such as the ‘Like Minded Group’ of nearly 70 countries, from different regions, during the negotiations of the *Rome Statute*.<sup>21</sup> At other times, Australia has played an independent, facilitating role such as, last year, as President of the Final Arms Trade Treaty Diplomatic Conference.

Within the UN context, in addition to the prominent role of the UNGA in relation to international law in supporting the negotiating initiatives I have referred to, the UNSC has progressively become more seized of promoting the rule of law and, importantly, the imperative for states to comply with international humanitarian law in preventing mass atrocity crimes. Australia is strongly supporting both of these objectives during its current membership of the UNSC.

In this regard the UNSC has, on several occasions, endorsed the international security and human rights norm, Responsibility to Protect (‘R2P’), to address the international community’s failure to prevent and stop genocides, war crimes, ethnic cleansing and crimes against humanity.<sup>22</sup> This global norm — with which the Honourable Professor Gareth Evans, yet another distinguished Melbourne alumnus, is so closely associated — was unanimously adopted by heads of state and government at the 2005 UN World Summit.<sup>23</sup> While not a legal norm, R2P is a cornerstone for efforts to build collective international support to prevent mass atrocity crimes, as is the UNSC’s approach to accountability, to ensure that there is no impunity for individuals who commit those crimes.

I have also noted over the years the increased activism and influence of non-governmental organisations (‘NGOs’) and civil society representatives in multilateral negotiations (for instance, at the ICC Conference in Rome, hundreds of NGOs under the aegis of the Coalition for the ICC played a pivotal role in achieving a substantive outcome). An enhanced consultative process has developed in Australia of engaging with these organisations and representatives

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<sup>21</sup> The Like Minded Group was a group of states from different regions committed to the establishment of an independent and effective International Criminal Court. It was drawn from many regions of the world: Latin America, Africa, the Asia-Pacific, Europe and North America (Canada). Australia chaired the Group throughout the Diplomatic Conference.

<sup>22</sup> *2005 World Summit Outcome*, UN GAOR, 60<sup>th</sup> sess, Agenda Items 48 and 121, UN Doc A/60/L.1 (15 September 2005) [138]–[139]; *The Responsibility to Protect*, GA Res 63/308, UN GAOR, 63<sup>rd</sup> sess, 105<sup>th</sup> plen mtg, Agenda Items 44 and 107, UN Doc A/RES/63/308 (14 September 2009).

<sup>23</sup> *2005 World Summit Outcome*, UN Doc A/60/L.1, [138]–[139].

(such as regular meetings held in DFAT with the participation of the Minister for Foreign Affairs) and including their representatives in Australian delegations.

Equally there has been an increase — although there is still room for more — in interaction with academia, and the inclusion of academic representatives in Australian delegations such as occurred at the ICC Conference, where Professors Tim McCormack and Gerry Simpson from this University provided expert advice and contributed significantly to reaching agreement on some key issues, as well as being very convivial members of the team!

Over the years I have also noted the enhanced role of Parliament in relation to the scrutiny of treaties following the 1995 report by the Senate's Legal and Constitutions References Committee *'Trick or Treaty'? Commonwealth Power to Make and Implement Treaties*<sup>24</sup> and the action taken by the government in 1996 to give effect to the recommendations in the report. These reforms aimed at removing the perceived 'democratic deficit' in treaty making, led, inter alia, to the establishment of the Joint Standing Committee on Treaties ('JSCOT')<sup>25</sup> and the formation of the Treaties Secretariat in DFAT, which is headed, as it has been for a number of years, by David Mason and previously by Jonathan Thwaites, both graduates of MLS.

Australia has also demonstrated over the period its strong commitment to the peaceful settlement of disputes, and to work to resolve disputes in conformity with statute and treaty provisions and mechanisms — including the ICJ (as exemplified by the recent *Whaling in the Antarctic* case between Australia and Japan, New Zealand intervening),<sup>26</sup> the International Tribunal for the Law of the Sea and in the WTO context (such as the plain packaging tobacco matter).

I also note the increased interaction bilaterally between Australian legal officials engaged in international law with their counterparts in other countries, not only in our immediate region but more widely, and on a regular basis, in both formal and ad hoc contexts. The meetings of the Sixth (Legal) Committee at the UN General Assembly and the annual International Law Week held during the General Assembly session provide ideal fora for this interaction which, of course, occurs daily in multilateral capitals such as at the UN in New York, Geneva and Vienna. Regionally, at both the bilateral and multi-state level, we engage in seminars and meetings on international law issues, including in the Association of South East Asian Nations Regional Forum context.

As a particular example of the 'art of the possible' where international law and diplomacy has interacted in bringing about a significant outcome, I would single out the *Rome Statute* and the process leading to its adoption.

Professor William Schabas has written:

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<sup>24</sup> Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1995).

<sup>25</sup> The Hon Alexander Downer, 'Treaty Scrutiny: A Ten Year Review' (Speech delivered at The Lobby Restaurant, Canberra, 30 March 2006) <[http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=jsct/treatyscrutiny/report/appendixd.pdf](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsct/treatyscrutiny/report/appendixd.pdf)>. JSCOT considers treaties tabled in the Parliament, enquires into whether proposed treaty action is in Australia's interests and reports to Parliament.

<sup>26</sup> *Whaling in the Antarctic* (International Court of Justice, General List No 148, 31 March 2014).

The International Criminal Court is perhaps the most innovative and exciting development in international law since the creation of the United Nations. The *Statute* is one of the most complex international instruments ever negotiated, a sophisticated web of highly technical provisions drawn from comparative criminal law combined with a series of more political propositions that touch the very heart of State concerns with their own sovereignty.<sup>27</sup>

Much has been written since 1998 about the significance of the outcome of the Rome Conference: the achievement of something that had been long envisioned and sought after; the establishment of a permanent international judicial body, ‘the missing link’, that would deal with individuals criminally responsible for the most serious crimes of concern to the international community (genocide, crimes against humanity and war crimes as well as the crime of aggression); a court which would replace the prevalent culture of impunity with the culture of accountability.

The road to Rome was a long one — there was no fast lane on the autostrada!

I do not intend to traverse all the stages but by way of context I would mention that, although some academics trace the origins of the Court back to 1874, it was not really until the 1907 Hague Peace Conference and the Versailles Peace Conference in 1919 that there was considered discussion on establishing such a court. During the life of the League of Nations further attempts were made to raise the issue but the Second World War overtook the process. The Nuremberg and Tokyo Tribunals gave impetus to the proposal and, under the auspices of the newly created UN, the International Law Commission (‘ILC’) was requested to prepare a draft statute, which it did by 1953. Thereafter, for the ensuing three decades no further progress on the ICC was achieved as the project was thwarted by the pack ice of the Cold War.

Following the establishment of the Yugoslav and Rwanda Tribunals by the UNSC in the early 1990s the ILC was again (as it had been in the early 1950s) requested to prepare a draft statute, which it did under the leadership of Australia’s Professor James Crawford as Special Rapporteur. The draft was submitted to the UNGA in 1994. The ILC recommended that an international conference be convened to finalise a treaty. The UNGA established a preparatory committee to consider the issues contained in the ILC draft and to prepare a consolidated text of a statute for consideration at a Diplomatic Conference. That preparatory work was conducted, intensively, between 1994 and 1998 and a Diplomatic Conference to adopt a statute establishing an international criminal court was convened in Rome over five weeks in June–July 1998.

One might think that with so much having been done in the way of preparatory work that it would have been fairly straight forward to reach agreement on a clean text over that period. However, the draft statute text which was submitted to the Conference following the preparatory process reflected a considerable challenge for the negotiators of the 160 states that participated. For a start, the ILC draft had only 60 articles, whereas the Preparatory Committee’s text contained 116. In that text there were a very large number of bracketed elements which remained to be resolved. This reflected the fact that most of the

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<sup>27</sup> William A Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 4<sup>th</sup> ed, 2011) 61.

major issues as well as many others of a more technical nature had been rolled-over to the Conference for negotiation and decision.

These issues included:

- the scope of application of the statute and the definitions of the crimes to be included;
- the trigger mechanisms to activate the Court's jurisdiction, including the role and independence of the prosecutor;
- the relationship between the Court and national jurisdiction (the complementarity principle);
- the role of the UNSC in relation to the Court;
- whether there should be automatic, inherent jurisdiction for state parties or an opt-in approach for specific crimes;
- the blending of common and civil law approaches to general principles of criminal law, investigation and prosecution, conduct of the trial etc; and
- the approach to international cooperation and judicial assistance.

It was, by any means, a daunting task, particularly given the strong political self-interests at play — exemplified by the Security Council–General Assembly tension regarding prerogatives and competences — as well as the technical legal challenges. Despite the widespread commitment to working to achieve a substantive outcome, there was also scepticism that, in reality, all that might be possible at the end of the five weeks would be a lowest common denominator statute. That was not Australia's approach. We were committed to working for the strongest possible statute. Foreign Minister Alexander Downer had made this clear on Human Rights Day in 1996 when he had said that the ICC's establishment was one of the government's primary multilateral and human rights objectives.<sup>28</sup>

At the opening Plenary of the Conference Mr Downer identified four fundamental issues that Australia wanted the Conference to address:<sup>29</sup>

1. The need to strike a balance between the jurisdiction of the ICC and the jurisdiction of national criminal justice systems. We favoured a system whereby national jurisdictions took precedence over the ICC where a state was considered able and willing to deal effectively with the alleged crime. That is, primary investigation and responsibility for investigation and prosecution should remain with the state (the concept of complementarity). The ICC should be a court of last resort.
2. The need to agree on appropriate mechanisms for triggering the ICC's jurisdiction. Mr Downer noted that Australia had long supported initiation of the Court's jurisdiction through complaint by

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<sup>28</sup> The Hon Alexander Downer, 'Strengthening Australia's Human Rights Credentials' (Speech delivered at the Forum on Australia's Human Rights Obligations for Human Rights Day, National Press Club, 10 December 2006).

<sup>29</sup> The Hon Alexander Downer, 'The International Criminal Court: Our Commitment to Future Generations' (Speech delivered to the Diplomatic Conference on the Establishment of an International Criminal Court, Rome, 15 June 1998).



a state party or by the UNSC under its *UN Charter* Chapter VII powers.

3. A workable relationship needed to be achieved between the ICC and the UNSC which recognised the primacy of the UNSC in matters relating to the maintenance of international peace and security.
4. There needed to be agreement about the specific crimes to be within the jurisdiction of the ICC. While there was widespread agreement, based on the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*<sup>30</sup> on what constituted ‘genocide’, there was much less agreement about how crimes against humanity and war crimes should be defined in the *Rome Statute*.

The Foreign Minister also said that Australia believed that the crimes of ethnic cleansing and systemic rape and torture were of such gravity that they had to be included in the ambit of the ICC’s jurisdiction.

Accordingly the Australian delegation — comprising officers from DFAT, AGD, and Defence, representatives from the Australian Red Cross, the Office of the New South Wales Director of Public Prosecutions, and, as I have mentioned, Professors Tim McCormack and Gerry Simpson — focused on these areas in particular, and contributed to shaping the outcomes on, for example:

- acceptance of ‘complementarity’ as the cornerstone of the *Rome Statute*;
- negotiating a definition of ‘crimes against humanity’ which did not require a nexus with armed conflict for the crime to occur;
- extending the definition of ‘war crimes’ to cover non-international armed conflicts;
- expanding lists of acts constituting ‘war crimes’;
- securing recognition of a range of gender-specific sexual offences as ‘crimes against humanity’ and ‘war crimes’ (a particularly significant outcome);
- formulating the articles on international cooperation and judicial assistance;
- negotiating the articles on cooperation and administration of the ICC; and
- successfully opposing the inclusion of the death penalty.

All of the priorities enumerated by the Foreign Minister were satisfactorily covered in the text that was adopted so dramatically on the final day of the Conference.

But of course these outcomes were not achieved alone, nor were they the result of a purely legal, technical approach. All of these issues were considered in a political context where states’ national interests heavily influenced their position in the negotiations. It was essential, therefore, for the Australian delegation to work closely with many different delegations on different issues,

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<sup>30</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

including the United States delegation which had very serious concerns about how the ICC, and particularly the Prosecutor, might exercise its jurisdiction.<sup>31</sup>

Above all, however, it was our membership of the Like Minded Group of countries, numbering 67 of the 160 participating states, which facilitated the achievement of our objectives. Not least because we fully supported the principles which the Group had elaborated as ‘cornerstones on fundamental issues’ and which accorded with our own priorities. The Group’s endorsement — following hours of discussion in a meeting on the final day of the Conference — of the Chair’s package of proposals was a dynamic which provided the momentum for the adoption of the *Rome Statute*. This was an outcome which owed as much to diplomacy and constructive interaction between representatives of states, as to the legal expertise which was collectively expended during the five weeks of the Conference.

Although there were points during the Conference when it seemed that agreement on a substantive statute might not be possible, there was a sense, which we shared, that a strong outcome was achievable. We therefore worked to that end, together with our Like Minded colleagues, particularly in supporting the Chair of the Committee of the Whole, Philippe Kirsch of Canada, whose courage and decisiveness in putting forward a package of proposals on the key outstanding issues was determinative of the successful outcome. Kirsch, rightly, saw that there was an opportunity to adopt a credible statute and acted decisively. He was a true practitioner of the art of the possible!

Of course, from Australia’s perspective, the story of the *Rome Statute* has two more chapters, with a third in the wings — the ratification process, the adoption, at the 2010 Review Conference of articles defining the crime of aggression and on how the ICC would exercise jurisdiction in relation to the crime and, in the wings, ratification of the crime of aggression amendments. But those are stories for another time.

Suffice it to say this evening, that MLS alumni and academics played a critical role in the decision that Australia should ratify the *Rome Statute*. Who would have thought that it would even have been an issue! This was successfully achieved in time for Australia to become an original state party before the *Rome Statute* entered into force.

Sometimes, however, it is not possible to secure the desired outcome from multilateral negotiations despite general commitment to the objective. This was the case in late 2001 when, following the terrorist attacks on the World Trade Center in New York in September of that year, there was a concerted effort to

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<sup>31</sup> Speaking about the past and future of the United States’ position vis-a-vis the International Criminal Court following the 2010 ICC Review Conference, the State Department’s Legal Adviser Harold Koh said: ‘After 12 years, I think we have reset the default on the US relationship with the Court from hostility to positive engagement. In this case, principled engagement worked to protect our interest, to improve the outcome, and to bring us renewed international goodwill’: Harold Hongju Koh, ‘US Engagement with the ICC and the Outcome of the Recently Concluded Review Conference’ (Briefing delivered at the US Department of State, Washington DC, 15 June 2010).

conclude the *Comprehensive Convention on International Terrorism* ('CCIT')<sup>32</sup> which had been under negotiation in the UN since 1996 but which was 'stuck'.

Australia coordinated that process<sup>33</sup> which was conducted with great intensity at the UN in New York. Many articles were agreed on a preliminary basis. However, the sticking points related to the definition of the crime of terrorism and the scope of the *CCIT* (including whether it would apply to the armed forces of a state and to national liberation movements, and whether there should be a reference to 'foreign occupation'). These were difficult issues, not least from the political standpoint of key delegations, but there was a sense in the negotiations — indeed a sense of urgency — that they could be and needed to be resolved. As states we had a responsibility to conclude the *CCIT* now!

Consensus was generated around a text, crafted to take account of the political dimension through legal drafting, which Australia, as coordinator, proposed, and in the final hours of the negotiation process there were very intense diplomatic efforts to secure support for it. We came, as was reported at the time, tantalisingly close to concluding the *CCIT* but news of an incident in the Middle East deflated the political goodwill which had been carefully nurtured and the opportunity was lost — and has not been revived since. Thirteen years on, the negotiations on these key provisions remain deadlocked.

Looking forward, while there have been many positive developments in international law over recent decades, challenges do inevitably remain and will arise in the future. Just to mention some:

- In international humanitarian law ('IHL'): strengthening the legal protection of victims of armed conflicts, particularly in situations of non-international armed conflicts where non-state actors are involved, and also in strengthening compliance — the observance and implementation — of IHL. Important work on this is being led by the International Committee of the Red Cross and the Swiss Government. Australia is closely engaged in this process, including through the valuable work being undertaken by the Asia-Pacific Centre for Military Law led by Professor Bruce Oswald.
- Determining the relationship between IHL and international human rights law particularly in situations of armed conflict.
- Whether to develop an international instrument under the *UNCLOS* on the conservation of marine biodiversity beyond national jurisdiction.
- International law issues relating to cyberspace.

It is striking and encouraging that there now exist a range of fora, both official and more informal, in which these challenges and issues can be addressed, including:

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<sup>32</sup> The draft *Comprehensive Convention on International Terrorism* has been under negotiation since 1996 in the United Nations General Assembly's Ad Hoc Committee, which was established by a resolution of the General Assembly: *Measures to Eliminate International Terrorism*, GA Res 51/210, UN GAOR, 51<sup>st</sup> sess, 88<sup>th</sup> plen mtg, Agenda Item 151, UN Doc A/Res/51/210 (16 January 1997).

<sup>33</sup> The author was the Coordinator of that process.

- Events organised by law schools and here in Melbourne by the Asia-Pacific Centre for Military Law.
- The Australian and New Zealand Society of International Law, whose President, Professor Anne Orford, is here at MLS, which annually brings together practitioners from academia, government, the legal profession, international organisations and civil society, to discuss contemporary international law issues.
- The Asian Society of International Law.
- From a Canberra perspective: a seminar series organised by the Australian National University's Centre for International and Public Law which is headed by Professor Kim Rubenstein, in which DFAT, AGD and Defence Legal are engaged, as well as similar events organised by DFAT and the annual AGD International Law Colloquium in which MLS staff have been regular participants, to name but a few.

To those of you here this evening who are studying international law and would like to become a practitioner working in government there are, and will continue to be, many opportunities to pursue your interests, particularly given the dynamic nature of international law. It is certainly not static!

One of my senior colleagues in the Legal Division, Amanda Gorely, who is a graduate of MLS, who I have worked with on several occasions in Canberra during my career, is a case-in-point. Amanda, who is currently Head of the Corporate Legal Branch, and has worked in the Trade Law area of the Department, has been Director of the International Law Section in the past where she had responsibility for dealing with a diverse range of subject areas and contemporary issues, applying and developing the knowledge she acquired at law school.

Another of my colleagues in the Legal Division, Dr Carrie McDougall, is also a graduate of MLS and joined DFAT as a Legal Specialist four years ago. Carrie's particular area of responsibility within the Division is currently matters relating to the use of force as well as the ICC on which she is an expert (she has written a book on the crime of aggression).<sup>34</sup> Recently Carrie played a key role, working with colleagues in AGD, Defence and the Australian Federal Police, in the drafting and negotiation of the legal framework necessary to facilitate the deployment of Australian personnel to Ukraine and the Netherlands in response to the tragic downing of Malaysian Airlines flight MH17. Another MLS graduate, Chris Moraitis, has also been the Senior Legal Adviser in DFAT.<sup>35</sup>

As a lawyer in government you can be, as I have illustrated, involved in vitally important work, combining diplomacy and international law — where you can definitely engage in 'the art of the possible' and, mostly, succeed!

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<sup>34</sup> Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2013).

<sup>35</sup> Chris Moraitis PSM was appointed Secretary of AGD in September 2014.