SANCTIONING JUDGES: AUSTRALIAN DOMESTIC LAW AND THE INTERNATIONAL CRIMINAL COURT

Sir Frank Kitto Lecture

The Hon Justice Robert Beech-Jones*

It is a great honour to be invited to deliver the Sir Frank Kitto Lecture at the University at which he served as Deputy Vice Chancellor and then Chancellor with such distinction and to deliver the speech in the city where he spent many years until his death. Service was clearly at the core of Kitto's identity, not the least of which was his 20 years of service as a Justice of the High Court of Australia. That period of service on the High Court is something that I will never reach because the *Constitution* now prohibits it[1] and, to be perfectly frank, I doubt that I would make it even if I was allowed to.

On 9 April 1942 Frank Kitto, a 39-year-old, highly respected junior equity barrister on the verge of taking silk and with a young family, had another form of service in mind. On that day he completed his form to enlist in the armed forces and swore an oath to the King.[2] Kitto's application to enlist was refused and instead he spent two years in the Volunteer Defence Corps. Kitto is reported as saying "how well-advised the Defence Department had been in not accepting his offer to become a soldier".[3]

In fact, Kitto's moment of greatest service to the nation came eight years later when argument commenced in the *Communist Party Case*;[4] only six months after he was sworn in as a Justice of the High Court.[5] *Mabo v Queensland [No 2]*[6] and the *Communist Party Case* are the two most significant judicial decisions in the history of

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* Justice of the High Court of Australia. This is a revised version of the Sir Frank Kitto Lecture delivered at the University of New England at Armidale on 21 August 2025. I am grateful to Emma Jagot, Keagan Lee and Benjamin Durkin for the provision of research materials and assistance with this speech. All errors and opinions expressed are mine and mine alone.

1 *Constitution*, s 72.

2 Connor, *The Right Honourable Sir Frank Walters Kitto* (Unpublished manuscript, 1994, High Court of Australia Library, Canberra) at 7.

3 Connor (n 2) at 7.

4 *Australian Communist Party v The Commonwealth* ("*Communist Party Case*") (1951) 83 CLR 1.

5 Kitto J was sworn in on 16 May 1950: "Current Topics: High Court of Australia" (1950) 24(2) *Australian Law Journal* 45 at 45. The first day of full argument in the *Communist Party Case* (1951) 83 CLR 1 took place on 14 November 1950.

6 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

this country. Justice Kitto was the most junior of the seven Justices that decided the *Communist Party Case*. As we know, the Court held by a majority of 6 to 1 that the *Communist Party Dissolution Act 1950* (Cth), which sought to dissolve the Australian Communist Party, was invalid. As many law students lament, the judgment is 157 pages long and all seven judges wrote separately. However Justice Kitto's masterful exposition of the scope of the defence power is only 14 pages.[7] His judgment is a salutary reminder to me, the seventh and most junior Justice of the High Court, that the attention of even the most devoted reader will be waning by the time they get to my contribution, so it's best if I make it short and snappy. I confess that I failed in that objective with this speech. I apologise for rummaging through the weeds. In my experience, that tends to be where the action is.

The topic of this speech is Australian Domestic Law and the International Criminal Court ("the ICC"). I chose the prism of domestic law to look at the ICC because I am not part of the international law cognoscenti[8] and, even though the domestic law I will describe is almost all statutory, it has some unusual features.

The impetus for this speech is the actions of the United States of America ("the US") in sanctioning the Chief Prosecutor of the ICC and more recently four judges of the ICC,[9] decisions to which I will come back. Nothing in this speech is directed either to defending or to criticising any particular step taken by the ICC in any of its cases, past or present. Like other public institutions that investigate, prosecute and decide, the ICC, including its judges, is open to scrutiny, and can expect to receive its fair share

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7 See also Kirby, "Kitto and the High Court of Australia" (1999) 27(1) *Federal Law Review* 131 at 138-139.

8 See also *Kain v R&B Investments Pty Ltd* [2025] HCA 28 at [1] per Gageler CJ.

9 *Executive Order 14203: Imposing Sanctions on the International Criminal Court*, 90(28) Fed Reg 9369 at 9369-9373 (12 February 2025); Trump, "Imposing Sanctions on the International Criminal Court", *The White House*, (online, 6 February 2025) <https://www.whitehouse.gov/presidential-actions/2025/02/imposing-sanctions-on-the-international-criminal-court/>; US Department of State, "Imposing Sanctions in Response to the ICC's Illegitimate Actions Targeting the United States and Israel" (Press Release, 5 June 2025); see also "The International Criminal Court deplores new sanctions from the US administration against ICC Officials", *International Criminal Court* (online, 5 June 2025) <https://www.icc-cpi.int/news/international-criminal-court-deplores-new-sanctions-us-administration-against-icc-officials>.

On 20 August 2025, two further judges and two further Deputy Prosecutors of the International Criminal Court were made the subject of sanctions from the United States of America: US Department of State, "Imposing Further Sanctions in Response to the ICC's Ongoing Threat to Americans and Israelis" (Press Release, 20 August 2025).

of legitimate criticism[10] and its unfair share of baseless criticism. However, punitive action against ICC officials, including its judges, is of a different order. It is consistent with an escalating pattern of threats and retribution against judges across the world in recent years. Calling attention to that phenomenon is very much the responsibility of those whose function it is to preserve the rule of law, such as judges.

One of Kitto's fellow judges who decided the *Communist Party Case* was Sir William Webb. While serving as a Justice of the High Court, Webb was appointed by General Macarthur to be President of the International Military Tribunal for the Far East. Another of Kitto's colleagues, Sir Owen Dixon was Australian Ambassador to Washington during the Second World War and was close to many of the justices of the Supreme Court of the United States, including Justice Robert Jackson.[11] Justice Jackson took a leave of absence from that Court to become the Chief Prosecutor at the International Military Tribunal trials in Nuremburg.[12] A former Attorney-General of the US was a judge at those trials.[13]

Why Kitto decided to try to enlist on that particular day in 1942 and at that time of his life is not something that my research has revealed but history records that by then the War was closing in on Australia fast.[14] Whatever the reason, by the time of his appointment to the High Court, Kitto was no doubt, like the rest those justices who decided the *Communist Party Case*, very familiar with war and all the horrors it brings, as well as the reasons prosecutors and judges served on international tribunals to try those responsible. I will leave it to your good judgment to consider what Kitto would have made of the sanctioning of prosecutors and judges, like Robert Jackson and Sir William Webb, for performing those duties.

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10 See, eg, Robinson et al, *An Introduction to International Criminal Law and Procedure*, 5th ed (2024) at 159ff; McCormack, "The 2023 Annual Kirby Lecture in International Law: The International Criminal Court and Global Criminal Justice: Are We Making Progress" (2024) 42(1) *Australian Yearbook of International Law* 3 at 29-34.

11 Ayres (ed), *The Washington Diaries of Sir Owen Dixon, 1942-1944* (2020) at 35, 79, 85.

12 See, eg, Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices* (2010) at 275.

13 Francis Biddle.

14 Singapore fell in February 1942 and the Battle of the Coral Sea was about to take place.

Two Bills pass

But now into the weeds.

In June 2002, two Bills — the *International Criminal Court Bill 2002* (Cth) and the *International Criminal Court (Consequential Amendments) Bill 2002* (Cth) — passed both Houses of Federal Parliament on the "voices". Hansard records that only one member of each House voted against the Bills.[15]

The passage of those Bills in that way reflected the fact that they were sponsored by the government of the day and had bipartisan support. Those who can be taken as having supported that legislation include the then Prime Minister,[16] the then Minister for Foreign Affairs,[17] four of the next six Prime Ministers[18] and numerous other existing and future frontbenchers of the two major parties as well as almost all the representatives of the other parties. Like judges delivering judgments, the primary role of legislators is to make laws. Whatever the private or party room misgivings any of those parliamentarians had, this was an emphatic legislative and political statement of support for that legislation and what it embodied by those who governed Australia then and who would do so for the two decades that followed.

Those Bills came into law.[19] They implemented Australia's commitment to "comply with the international obligations that it will incur upon ratification of"[20] the *Rome Statute of the International Criminal Court* ("the Rome Statute").

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15 In the House of Representative, see Australia, House of Representatives, *Parliamentary Debates* (Hansard), 25 June 2002 at 4367-4369; in the Senate, see Australia, Senate, *Parliamentary Debates* (Hansard), 27 June 2002 at 2834, 2833-2834.

16 The Honourable John Howard.

17 The Honourable Alexander Downer.

18 The Honourable Kevin Rudd, Julia Gillard, Tony Abott and Anthony Albanese; the other two future Prime Ministers were yet to join Parliament by that time: The Honourable Malcolm Turnbull and Scott Morrison.

19 *International Criminal Court Act 2002* (Cth); *International Criminal Court (Consequential Amendments) Act 2002* (Cth).

20 Australia, House of Representatives, *International Criminal Court Bill 2002*, Explanatory Memorandum at 1.

The Rome Statute is not a statute in the sense that Australian lawyers understand that term. It is a treaty, specifically the treaty establishing the ICC and defining its jurisdiction, powers and the law governing their exercise.

Leaving aside some irrelevant exceptions,[21] international treaties and agreements like the Rome Statute do not become part of the domestic law of Australia.[22] What altered our domestic law on this topic is the legislation to which I just referred. I will outline the effect of that legislation in further detail but in broad terms those laws brought onshore so-called universal criminal jurisdiction for genocide, war crimes and crimes against humanity,[23] provided for a complementary but integrated means of enforcement of that jurisdiction through both the ICC and the Australian court system[24] and proffered to the ICC recognition and a degree of protection under Australian law.[25]

In the balance of this talk, I will outline what the Rome Statute is, how we entered into it and how we implemented it before coming to its effect on domestic law.

The Rome Statute

So what is this Rome Statute to which Australia is a party?

The Rome Statute establishes the ICC with the seat of the Court to be in The Hague.[26] The Rome Statute is divided into 13 Parts dealing with all the various topics one would expect to be contained within a constituent document for a court with an investigative arm. Those Parts include Articles relating to the composition and administration of the ICC[27] (including provision for the independence of its judges),[28] investigative, pre-trial

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21 See, eg, *Mabo [No 2]* (1992) 175 CLR 1 at 42 per Brennan J.

22 *Dietrich v The Queen* (1992) 177 CLR 292 at 305; and it has been held that a crime under international law does not without more become a crime under Australian law: *Nulyarimma v Thompson* (1999) 96 FCR 153 at 162 [20], 173 [57]-[58].

23 See *International Criminal Court (Consequential Amendments) Act*, sch 1, Ch 8, Div 268, Subdivs B-D.

24 See, eg, *International Criminal Court Act*, Pt 2.

25 See, eg, *International Criminal Court Act*, Pts 10-12.

26 Rome Statute, Art 3(1).

27 Rome Statute, Pt 4.

28 Rome Statute, Art 40.

and trial procedures[29] and enforcement of the ICC's orders[30] as well as the establishment of the Office of the Prosecutor as a separate and independent organ of the ICC.[31]

Part 2 of the Rome Statute deals with the Jurisdiction and Admissibility of investigations and prosecutions for crimes. This Part can be broadly broken down into five components: (i) What crimes can be investigated, prosecuted and tried?[32] (ii) When must the alleged crimes have been committed?[33] (iii) Who must have committed the alleged crimes and where?[34] (iv) Who can initiate an investigation or prosecution?[35] (v) What about domestic legal systems?[36]

The crimes within the ICC's jurisdiction are genocide, crimes against humanity, war crimes and the crimes of aggression,[37] the meaning of which is described in the Rome Statute.[38] The list of crimes against humanity include the deportation or forcible transfer of a population,[39] being the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present without grounds permitted under international law, when that occurs as part of a widespread or systematic attack directed against any civilian population.[40] Another crime against humanity is committing inhumane acts causing great suffering or serious injury in the course of such an attack.[41] War crimes relating to international armed conflicts include intentionally directing attacks at a civilian population[42] and intentionally launching an attack in the knowledge that the loss of life or injury to civilians would be clearly excessive in relation to the overall anticipated military advantage.[43]

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29 Rome Statute, Pts 5-6.
30 Rome Statute, Pt 10.
31 Rome Statute, Art 42.
32 Rome Statute, Arts 5-8; see also Arts 9-10, 20-21.
33 Rome Statute, Art 11.
34 Rome Statute, Arts 12-13.
35 Rome Statute, Arts 14-16.
36 Rome Statute, Arts 17-19.
37 Rome Statute, Art 5.
38 Rome Statute, Arts 6-8 *bis*.
39 Rome Statute, Art 7(1)(d).
40 Rome Statute, Art 7(2)(d).
41 Rome Statute, Art 7(1)(k).
42 Rome Statute, Art 8(2)(b)(i).
43 Rome Statute, Art 8(2)(b)(iv).

To be within the jurisdiction of the ICC, the crimes must have been committed after the Rome Statute entered into force in July 2002.[44]

The ICC only has jurisdiction in relation to persons over the age of 18 years at the time the alleged crime was committed.[45] Beyond that, the ICC's jurisdiction is best explained by noting that there are three ways it can arise: where there has been a referral by a State party to the Prosecutor;[46] where there has been a referral to the Prosecutor by the United Nations Security Council;[47] or where the Prosecutor has initiated an investigation[48] that has been submitted to and authorised by the pre-trial chamber of the ICC.[49] A referral from the Security Council can be in respect of any territory or national regardless of whether the relevant State concerned is a party to the Rome Statute.[50] In the case of a referral by a State party to the Prosecutor or the Prosecutor's own investigation, the ICC can exercise jurisdiction if the alleged crime was committed by the national of a member State or on the territory of a member State.[51]

The ICC's jurisdiction over crimes committed on the territory of States parties by nationals of States who are not members has been the source of friction. Ever since the Rome Statute commenced the US has been resolutely opposed to the ICC and this aspect of its jurisdiction in particular as it agitated to keep its own citizens out of the ICC's jurisdiction, including its soldiers who served in Afghanistan or other areas of conflict.[52] The recitals to the US sanctions to which I referred earlier asserts that the

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44 Rome Statute, Art 11(1). However, where a State becomes party after that time, the Rome Statute only applies to crimes committed for that State from the time of that ascension unless the State declares otherwise: Rome Statute, Art 11(2).

45 Rome Statute, Art 26.

46 Rome Statute, Art 13(a), Art 14.

47 Rome Statute, Art 13(b).

48 Rome Statute, Art 13(c).

49 Rome Statute, Art 15(3).

50 Robinson et al (n 10) at 139; as in fact occurred through United Nations Security Council referrals to the Prosecutor in relation to matters in Darfur in 2005 and Libya in 2011: McCormack (n 10) at 10-11.

51 Rome Statute, Art 12(2); see McCormack (n 10) at 10-11.

52 Robinson et al (n 10) at 155-157; McCormack (n 10) at 12-15; Triggs, "Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law" (2003) 25(4) *Sydney Law Review* 507 at 510.

ICC has "no jurisdiction" over countries who have not "recognized the ICC's jurisdiction", and who are not States parties to the Rome Statute.[53] Some commentators who should know better say the same thing.[54]

So, what is the significance of domestic legal systems? Under the Rome Statute, where the Prosecutor initiates an investigation by his or her own volition, or following a referral from a State party, the Prosecutor must notify all States parties and any State that would normally exercise jurisdiction over the relevant crimes.[55] A State may then notify the ICC that it is investigating or has investigated its nationals or others with respect to alleged criminal acts, after which time "the Prosecutor shall defer to the State's investigation of those persons", subject to limited exceptions.[56] The ICC is obliged to find that a case is inadmissible if it "*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" or there has been a (genuine) investigation and a decision not to prosecute or a (proper) trial.[57] I emphasise the language of the Rome Statute: "is being investigated",[58] "has been investigated"[59] or "has already been tried".[60] The fact that a crime could or might be investigated by a State does not remove that case from the ICC's jurisdiction.

These parts of the Rome Statute embody the principle which was at the forefront of Australia's accession to the Rome Statute known as "complementarity"; that being the notion that the ICC complements and does not supplant domestic jurisdictions so far as prosecuting and trying allegations of genocide, war crimes and crimes against humanity are concerned.[61] One myth about the ICC is that the existence of a "fully functioning and fiercely independent legal system" within a particular country is

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53 *Executive Order 14203: Imposing Sanctions on the International Criminal Court*, 90(28) Fed Reg 9369 at 9369 (12 February 2025).

54 Downer, "ICC Now Embodies United Nation's contempt for the West", *The Australian* (online, 2 December 2024) <https://www.theaustralian.com.au/commentary/icc-now-embodies-united-nations-contempt-for-the-west/news-story/0163d1a988827e9c433a6fdd9c0580a8>.

55 Rome Statute, Art 18(1).

56 Rome Statute, Art 18(2).

57 Rome Statute, Art 17(1)(a)-(c) (emphasis added).

58 Rome Statute, Art 17, 1(a).

59 Rome Statute, Art 17(1)(b).

60 Rome Statute, Art 17(1)(c); see also Art 20(3).

61 Triggs (n 52) at 511-512.

sufficient to deny the ICC jurisdiction over crimes committed by its nationals.[62] That is not sufficient.

Instead, the inquiry is fact specific and, as I said, depends on whether there is or has been a genuine investigation, decision to prosecute or trial. You cannot have a trial without an investigation and the bringing of a prosecution. Australia has a functioning independent legal system of which I have been part as a judge for over 13 years. In that time, I have not conducted or caused to be commenced any investigation into anyone or authorised any prosecution. For many countries, this country included, a functioning and independent judiciary is not of itself sufficient to ensure that crimes of the kind covered by the Rome Statute allegedly committed by members of the armed forces, senior government officials or others are properly investigated and, if appropriate, prosecuted. Instead, executive agencies perform the whole or part of that function.[63] However in some countries the investigative agencies are inadequate, compromised or at least are simply not engaged in relation to a particular person or class of person.

Part 3 of the Rome Statute deals with the general principles of criminal law to be applied by the ICC. Any immunity enjoyed by a head of state or member of government is abolished, and does not "exempt a person from criminal responsibility under this Statute".[64] Military commanders and other superiors bear criminal responsibility for crimes committed by forces under their effective command or control in certain circumstances.[65] The fact that a person acted under superior orders does not relieve that person of criminal responsibility unless he or she was under a legal obligation to obey the order, did not know the order was unlawful and the order was not manifestly unlawful.[66]

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62 Downer (n 54).

63 In Australia, the decision as to who is to be prosecuted and for what is a decision of the executive, insusceptible to judicial review: *Maxwell v The Queen* (1996) 184 CLR 501 at 534; *Likiardopoulos v The Queen* (2012) 247 CLR 265 at 280 [37].

64 Rome Statute, Art 27(1).

65 Rome Statute, Art 28(1).

66 Rome Statute, Art 33.

Australia's entry into the Rome Statute

So, when and how did Australia become a party to the Rome Statute?

A history of international criminal tribunals is well beyond the scope of this lecture, and so I will just pick up the story in December 1996 when the relatively new Howard Government declared the establishment of the ICC to be one of its "prime multilateral and human rights objectives".[67]

By then the work on a preparatory draft of a treaty that was to become the Rome Statute was well under way. Between June and July 1998, the United Nations Diplomatic Conference in Rome finalised and adopted the Rome Statute.[68] A delegation from the Australian government attended.[69] Australia signed the Rome Statute later that year but did not ratify it until well over three years later after the passage of the Bills to which I have referred. Australia's ratification of the Rome Statute occurred on the same day as the Statute came into effect in July 2002.[70]

Prior to ratification, the Rome Statute and the draft legislation implementing it was subject to a thorough process of review by the Joint Standing Committee on Treaties ("JSCOT"), which conducted public hearings around the country.[71] By 11 April 2002, a sufficient number of countries had signed and ratified the Rome Statute to enable it to come into force on 1 July 2002[72] and so the clock was running if Australia wanted to become an original State party.[73] Between then and 1 July 2002, JSCOT reported

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67 Williams, "The International Criminal Court – The Australian Experience", paper delivered at The International Society for the Reform of Criminal Law, Canberra, 30 August 2001 at 5, quoted in La Seur, "Implementing the Rome Statute: The Australian Experience" (2004) 1(1) *Eyes on the ICC* 204 at 204.

68 Called the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, occurring in Rome between 15 June 1998 and 17 July 1998. See Triggs (n 52) at 509.

69 McCormack (n 10) at 7.

70 Collins, "What Is Good for the Goose Should Be Good for the Gander: The Operation of the Rome Statute in the Australian Context" (2009) 32(1) *University of New South Wales Law Journal* 106 at 106.

71 Joint Standing Committee on Treaties, Parliament of Australia, *The Statute of the International* Criminal *Court* (Report No 45, May 2002) at 97-102 (Appendix B).

72 See Rome Statute, Art 126(1).

73 McCormack (n 10) at 8.

to Parliament ("the JSCOT Report"),[74] those Bills were passed and Australia notified its ratification.

I note three points about the process of Australia's entry and implementation of the Rome Statute.

First, in 1998 the Australian Foreign Minister addressed the Rome Diplomatic Conference.[75] His speech expressed Australia's strong support for the ICC and outlined Australia's position on a number of key issues, including complementarity and the means by which the ICC's jurisdiction would be enlivened. On complementarity the speech articulated what was ultimately reflected in the Rome Statute that I outlined earlier, namely the primacy of domestic jurisdiction but the capacity of the ICC to act where those systems do not address alleged crimes "by way of investigation" as well as prosecution. The Minister also expressed Australia's support for the Prosecutor of the ICC to be able to "directly initiate investigations", a feature that was incorporated into the Rome Statute and remains.[76]

Second, consistently with the JSCOT Report,[77] upon ratification, the Australian government submitted a "Declaration" which, amongst other things: reaffirmed the primacy of Australia's domestic criminal justice system in relation to crimes within the jurisdiction of the ICC; stated that no person would be surrendered to the ICC by Australia until Australia had the full opportunity to investigate or prosecute any alleged crimes; and stated that, under Australian law, no one would be surrendered or arrested without a certificate of the Attorney-General of the Commonwealth.[78]

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74 Joint Standing Committee on Treaties (n 71). The legislation was passed and Australia's instrument of ratification was delivered on the weekend before the Rome Statute came into force. McCormack (n 10) at 8.

75 Downer (Minister for Foreign Affairs), "The International Criminal Court: Out Commitment to Future Generations" (Speech, Diplomatic Conference on the Establishment of an International Criminal Court, Rome, 15 June 1998) at 3; United Nations, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, UN Diplomatic Conferences Official Records, UN Doc A/CONF183/13, Volume II at 65 [10].

76 Ibid; cf Downer (n 54): "A state that has accepted the statute can refer a case to the court but only a state can".

77 See Triggs (n 52) at 512-513; Joint Standing Committee on Treaties (n 71) at 77 [3.36]-[3.37].

78 Collins (n 70) at 106-107.

There has been debate amongst international lawyers about the effect of such a declaration as opposed to a reservation to a treaty.[79] The consensus appears to be that the Declaration has no real effect; the Rome Statute operates as it says.[80] For domestic law the answer is probably the same, save that the Declaration is an historical fact that may provide some context to the interpretation of the two Bills that were passed.[81] The capacity of the Declaration to inhibit the exercise by the Attorney-General of the discretions conferred on him or her by those Bills is tenuous.

Third, one recent newspaper article accepted a description of Australia's accession to the Rome Statute as a "burst of idealism".[82] The process of accession and implementation was no "burst". Instead, it was enthusiastically yet carefully pursued by the Australian government over six years culminating in emphatic support from almost the entire legislature. When both the executive and the legislature cooperate in the establishment of a body, confirm its independence, arm it with powers and accept that it can be called a "court", then they must also accept that from time to time that "court" will make decisions with which they disagree.

The domestic legislation

So, what were the two Bills that passed and came into our domestic law?

First, there was the *International Criminal Court Act 2002* (Cth), which was intended to fulfil Australia's obligations under the Rome Statute but, consistent with the Declaration, was also expressed not to affect the "primacy of Australia's right to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC".[83]

The *International Criminal Court Act* addressed such matters as: dealing with requests for arrest and surrender of persons to the ICC;[84] the issue of search warrants and

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79 Collins (n 70) at 132-133; Triggs (n 52) at 513-514.

80 See generally Collins (n 70) at 132-133; Triggs (n 52) at 513-514.

81 *Acts Interpretation Act 1901* (Cth), s 15AB.

82 "We should never have signed up to the train wreck that is the ICC", *The Australian* (online, 25 May 2024) <https://www.theaustralian.com.au/inquirer/signing-up-to-the-train-wreck-that-is-the-icc/news-story/d2290c6540bfac5e3d38ec8bbd4ae2f0>.

83 *International Criminal Court Act*, s 3(2).

84 *International Criminal Court Act*, Pt 3.

arrest of persons wanted by the ICC;[85] the freezing of proceeds of crimes within the jurisdiction of the ICC;[86] and the enforcement of sentences imposed by the ICC in Australia, including sentences of imprisonment.[87] That Act enables the Prosecutor of the ICC to conduct investigations in Australia and the ICC to conduct hearings in this country.[88] The Rome Statute itself is an appendix to that Act.

Consistent with the Declaration, the obligations to assist the ICC embodied in that legislation were qualified by reposing in the Attorney-General of the Commonwealth of the day various powers, including what is described as an "absolute discretion" to issue a warrant for the arrest[89] and subsequent surrender of a person to the ICC.[90]

The other Bill became the *International Criminal Court (Consequential Amendments) Act 2002* (Cth) ("the Consequential Amendments Act"), which inserted Div 268 of Ch 8 into the *Criminal Code* (Cth). The Attorney-General described the effect of these amendments as making every crime under the Rome Statute also a crime under Australian law so that "Australia will always be able to prosecute a person accused of a crime under the [Rome] Statute in Australia rather than surrender[ing] that person for trial in the ICC".[91]

Division 268 achieves this aim by codifying into domestic law criminal offences for genocide, crimes against humanity and war crimes. Although some counterpart crimes invoking universal jurisdiction had been on the statute books for many years, the definition of those crimes was expanded and modified.[92] Thus the provisions of Div 268 make the crime against humanity of deporting or forcibly transferring one or more persons as part of a widespread or systematic attack directed against a civilian population a crime under Australian law punishable by a maximum term of

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85 *International Criminal Court Act*, Pt 6.

86 *International Criminal Court Act*, Pt 4, Div 14.

87 *International Criminal Court Act*, Pt 12.

88 *International Criminal Court Act*, Pt 5.

89 *International Criminal Court Act*, s 22.

90 *International Criminal Court Act*, s 29. As well as the power to refuse requests in various circumstances, including where disclosure of information or documents would prejudice Australia's national security interests: see s 51(2)(a); Pt 8.

91 Australia, House of Representatives, *International Criminal Court (Consequential Amendments) Bill 2002*, Explanatory Memorandum at 4.

92 See generally Triggs (n 68) at 518-519.

imprisonment of 17 years.[93] Similarly the crime against humanity of causing great suffering by means of an inhumane act as part of an attack against a civilian population[94] is made a crime punishable by 25 years imprisonment. Division 268 also makes war crimes of the kind I mentioned earlier including attacks upon civilian populations[95] and displacing civilian populations for reasons other than their safety or military necessity[96] crimes under Australian law.

Division 268 makes similar provision for command responsibility and superior orders as the Rome Statute.[97] Unlike the Rome Statute, Div 268 does not expressly address head of state immunity and the immunity of other officials of a foreign state, instead leaving that issue to be addressed as a matter of statutory construction and by case law as occurred in the United Kingdom in *Pinochet's Case [No 3].*[98]

Three particular points should be noted about Div 268.

First, all the provisions of Div 268 designating genocide, crimes against humanity and war crimes to be offences invoke universal criminal jurisdiction; that is, they apply to all conduct engaged in anywhere in the world and regardless of whether any result of the conduct constituting the offence occurs in Australia.[99] Somewhat ironically in view of the various criticisms of the ICC for exceeding its jurisdiction, these provisions have a wider application than the Rome Statute, which can only extend to the conduct of nationals of countries that are not parties to the Rome Statute in the circumstances I described earlier. As I will come to, provisions of Div 268 have been held to apply to the *actions* of US officials on US territory in civil proceedings in a domestic Australian

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93 *Criminal Code* (Cth), s 268.11(1).

94 *Criminal Code*, s 268.23.

95 *Criminal Code*, s 268.77.

96 *Criminal Code*, s 268.89.

97 *Criminal Code*, ss 268.115, 268.116.

98 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 3]* [2000] 1 AC 147. The *Foreign States Immunities Act 1985* (Cth) does not confer any immunity from criminal prosecution: see ss 3(1) (definition of "proceeding"), 9. The *Diplomatic Privileges and Immunities Act 1967* (Cth) does confer such an immunity: s 7(1); Vienna Convention on Diplomatic Relations [1968] ATS 3, Art 31(1).

99 *Criminal Code*, ss 15.4, 268.117(1).

Court,[100] even though those officials themselves may not be amenable to the jurisdiction of our civil courts.[101]

Second, consistent with the Declaration, criminal proceedings for offences under Div 268 cannot be commenced without the written consent of the Attorney-General of the Commonwealth.[102] However, as will become clear, the existence of the Attorney-General's consent is not necessarily the final word on the legal significance of these provisions.

Third, it is important not to lose sight of other provisions of the *Criminal Code* that extend criminal responsibility to those who aid, abet, counsel or procure the commission of such crimes[103] and, I emphasise, those who "urge[]" the commission of such crimes.[104] It may be that at one time we conceived of genocide, war crimes and crimes against humanity as arising out of a "quarrel in a far away country between people of whom we know nothing".[105] However in the current age these atrocities are packaged, repackaged and sometimes sanitised for us in ways that can blend reporting, commentary and outright propaganda and that occasionally get close to "urg[ing]" the conduct on. The effect of these provisions of the *Criminal Code* is that, under the law of Australia, when it comes to genocide, war crimes and crimes against humanity, no one, anywhere, gets to barrack that conduct on from the sidelines.

Crimes against the administration of justice by the ICC

So far I have only referred to those parts of Div 268 that concern genocide, war crimes and crimes against humanity, but there was another set of crimes introduced by the Consequential Amendments Act; namely, "[c]rimes against the administration of the

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100 See *Habib v The Commonwealth* (2010) 183 FCR 62.

101 See *Foreign States Immunities Act*; *Diplomatic Privileges and Immunities Act*.

102 *Criminal Code*, s 268.121.

103 *Criminal Code*, s 11.2.

104 *Criminal Code*, s 11.4.

105 "How horrible, fantastic, incredible, it is that we should be digging trenches and trying on gas masks here because of a quarrel in a far away country between people of whom we know nothing": radio address by UK Prime Minister Chamberlain, 27 September 1938: "1938: Chamberlain addresses the nation on peace negotiations", BBC (online, 11 June 2024) <https://www.bbc.com/videos/c999nrjj8jgo>.

justice of the [ICC]".[106] This set of crimes includes conduct that is often proscribed when a court is established such as perjury,[107] corrupting[108] and threatening witnesses,[109] and preventing witnesses or interpreters from attending at a proceeding before the ICC as such.[110] These provisions are all consistent with Parliament's recognition of the ICC as a forum for justice sitting alongside our domestic courts.

Of present significance is the protection given by Div 268 to officials of the ICC, including its judges. Thus, it is a crime under Australian law punishable by a maximum of 5 years imprisonment to "cause[] or threaten[] to cause any detriment" to an official of the ICC because of their actions as such[111] or the actions of another official of the ICC.[112] This provision does not have precisely the same width of application as the other crimes I have mentioned but its operation is still vast.[113] I will not survey its precise metes and bounds but it suffices to state that this provision does not render criminal the conduct of a foreign government or official who is not an Australian citizen carried out in a foreign country that is not an offence under the laws of that country.[114] However, at the very least the provision applies to the conduct of all Australian citizens no matter where they are,[115] including their actions in, say, urging or assisting a foreign government to impose detriments on ICC officials, including judges.[116] For those Australian citizens working for foreign governments the question of their amenability to the jurisdiction of our civil courts and tribunals is complex.[117] No such difficulties apply to Australian citizens working here and overseas for foreign owned media organisations. The point is that no Australian citizen, no matter who they are and no matter where they are, can involve themselves in punishing or threatening ICC officials, including its judges, or in urging others to do so.

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106 *Criminal Code*, ss 268.2(4), 268.102-268.113.
107 *Criminal Code*, s 268.102.
108 *Criminal Code*, s 268.106.
109 *Criminal Code*, s 268.107.
110 *Criminal Code*, s 268.108.
111 *Criminal Code*, s 268.111(1).
112 *Criminal Code*, s 268.111(2).
113 *Criminal Code*, ss 268.117(2), 15.3.
114 *Criminal Code*, ss 15.3(2), 15.4(4).
115 *Criminal Code*, ss 15.3(1), (2)(b), (4)(d)(i), 268.117(2).
116 See *Criminal Code*, s 15.3(4).
117 See *Foreign States Immunities Act*; *Diplomatic Privileges and Immunities Act*.

Domestic law since enactment: *Habib v The Commonwealth* (2010) 183 FCR 62

It has now been 23 years since the ICC came into being and the Bills that I have described came into law. Over that time, the ICC has commenced a number of investigations (most of which have been completed), many persons have been tried and some have been convicted.[118] Much has been written and said in the law journals and the media about those cases, the ICC and its personnel. However, my concern is with domestic law. That has been quieter but not without its developments.

In terms of domestic steps that satisfy Australia's obligations under the Rome Statute there have been and continue to be special inquiries into the actions of various Australian army personnel in Afghanistan. To my understanding, there is a prosecution of an Australian service member under the provisions of Div 268 that is currently before the courts and nothing in this speech bears on that case. The inquiries to which I have referred reflect the proper understanding of the complementarity principle. In the absence of a proper investigation into alleged war crimes, the ICC's jurisdiction would have been potentially triggered regardless of how functional and independent the Australian judicial system is considered to be.[119]

However, one particular judgment in a civil case raises some significant issues about the potential for Div 268 of the *Criminal Code* to bite and bite hard, regardless of whether or not the Attorney-General of the day thinks anything should be done about it. At the outset, I should disclose that for a period I was Counsel for the applicant in the case in question. What follows is derived from the law report of that judgment.

Mr Mamdouh Habib, a dual Australian and Egyptian citizen, was captured and then detained in Pakistan during October 2001. He claimed that he was, to use the language of those times, the subject of an extraordinary rendition to Egypt by US

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118 See, eg, *Prosecutor v Lubanga (Judgment)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012); *Prosecutor v Bemba (Judgment)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08, 21 March 2016); *Prosecutor v Ongwen (Trial Judgment)* (International Criminal Court, Trial Chamber IX, Case No ICC-02/04-01/15, 4 February 2021); *Prosecutor v Al Hassan (Trial Judgment)* (International Criminal Court, Trial Chamber X, Case No ICC-01/12-01/18, 26 June 2024).

119 See McCormack (n 10) at 30-31.

personnel. He was then transported to Guantánamo Bay where he remained until his release in 2005 without charge.

Mr Habib sued the Commonwealth for the tort of misfeasance in public office. He alleged that Commonwealth officers were involved in his interrogation in Pakistan, Egypt, Afghanistan and Guantánamo Bay. He alleged that those Commonwealth officers, in doing so, aided and abetted the commission of criminal offences by Pakistan, Egyptian and US officials, specifically breaches of the *Crimes (Torture) Act 1988* (Cth) as in force until June 2002 and then in effect re-enacted in Div 268. All these provisions invoked universal jurisdiction; that is, they proscribed torture committed by public officials or persons acting in an official capacity anywhere, irrespective of their citizenship and the identity of their home government. It is important to note that Mr Habib's complaints were only allegations. The proceedings ultimately resolved and no trial was had.

Prior to that resolution, the Commonwealth moved to strike out the case and a question was referred to the Full Court of the Federal Court of Australia as to whether the proceedings were non-justiciable or otherwise not maintainable because of the operation of the act of state doctrine. The act of state doctrine is a common law doctrine which precludes the courts of one state passing judgment on the legality of the actions of another state or its officials at least on the territory of that other state. Mr Habib's pleaded case required findings about whether US, Egyptian or Pakistan officials acted unlawfully in their own or one another's countries when they allegedly tortured Mr Habib.

The Full Court unanimously held that the act of state doctrine did not preclude Mr Habib's action. There was no application for special leave to appeal to the High Court filed against the decision and thus the Court of which I am a member has not considered the matters the case raises. What follows is not the expression of any view by me one way or another on those issues. Instead, what is significant is the conclusions reached on those issues by an intermediate court of appeal.

There were two paths of reasoning of the Full Court but it is sufficient to note that all members of the Court held that the act of state doctrine does not prevent a court

mentioned in Ch III of the *Constitution*, and which is exercising the judicial power of the Commonwealth, from determining an allegation that Commonwealth officials acted beyond the bounds of their authority under Commonwealth law.[120] Justice Jagot explained that, irrespective of whether the consent of the Attorney-General has been obtained, provisions such as those in Div 268 establish a legal standard by which Parliament considered that conduct, including the conduct of foreign officials acting outside Australia, can be the subject of judicial determinations by Australian courts.[121] Her Honour concluded that those provisions limit the power of Australian officials who might have assisted those foreign officials in that, "[w]hatever else the Commonwealth and its officers might do in exercising their powers, they may not act in breach of Commonwealth statutory proscriptions".[122]

When we take this aspect of *Habib* and look at the provisions of Div 268 that I have outlined, it can be seen how legislative statements of what constitutes a crime can transcend any restriction that may be placed on the prosecution of those crimes by requiring the consent of the Attorney-General. According to *Habib*, the substantive provisions of Div 268 operate as a limit on executive power, including the power and authority of government ministers, officials and the military. On that view, they have no power or authority to assist or urge anyone, including a foreign state or official, to engage in conduct that amounts to genocide, a war crime, a crime against humanity or to impose a detriment on ICC officials, including its judges, for doing their jobs. The executive and its officers, including minsters, officials and the military are, one way or another, all amenable to the jurisdiction of the Courts mentioned in Ch III of the *Constitution*.

Beyond that, a statement of what constitutes these types of crimes is also a statement of a normative standard; and that is so regardless of whether the Attorney-General has or has not consented to a prosecution. All of us should comply with the law regardless of whether we agree with it and regardless of whether we think the Attorney-General will or will not consent to us being charged. Some classes of

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120 *Habib* (2010) 183 FCR 62 at 65 [1] per Black CJ, 72-74 [24]-[29] per Perram J, 100 [129]-[132] per Jagot J.

121 *Habib* (2010) 183 FCR 62 at 98 [123].

122 *Habib* (2010) 183 FCR 62 at 98 [124]; see also at 72 [24], 73-74 [28]-[29] per Perram J.

professionals have particular obligations to uphold the law, such as lawyers admitted to practice.[123] They are answerable to their professional bodies and the courts that admitted them to practice. The oath or affirmation that young lawyers take before the Supreme Court of their respective States and Territories has meaning.

So, where are we? Sanctioning Judges

As I previously said, criticism of a body like the ICC, including its judges, is one thing; punitive actions against court officials, including judges, is another altogether.

In February 2025, the US government imposed sanctions on the ICC's Chief Prosecutor.[124] On 5 June, that government did the same against four judges of the ICC being judges from Benin, Uganda, Peru and Slovenia.[125] Each of them was either an experienced lawyer, a prosecutor or a judge prior to their appointment as a judge of the ICC.[126] The sanctions preclude those judges and their families from travelling to the US; the sanctions freeze any of the judges' assets in the US or in the possession or control of a "United States person"; the sanctions prohibit all "United States

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123 See *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279 at 284-285 [20]-[28], 291 [67].

124 *Executive Order 14203: Imposing Sanctions on the International Criminal Court*, 90(28) Fed Reg 9369 at 9369-9373 (12 February 2025); Davies and Dunbar, "Trump imposes sanctions on ICC, accusing it of targeting US and Israel", *The Guardian* (online, 7 February 2025) <https://www.theguardian.com/us-news/2025/feb/06/trump-sanction-icc>.

125 US Department of State, "Imposing Sanctions in Response to the ICC's Illegitimate Actions Targeting the United States and Israel" (Press Release, 5 June 2025).

126 Second Vice-President Reine Adelaide Sophie Alapini Gansou spent 12 years working at the African Commission on Human and Peoples' Rights, including some years as its Chair: "Judge Reine Alapini-Gansou", *International Criminal Court* (Web Page) <https://www.icc-cpi.int/judges/judge-reine-alapini-gansou>.

Judge Solomy Balungi Bossa held numerous judicial roles, including as a Judge of the Court of Appeal of Uganda, a Judge of the East African Court of Justice, and a Judge of the High Court of Uganda: "Judge Solomy Balungi Bossa", *International Criminal Court* (Web Page) <https://www.icc-cpi.int/judges/judge-solomy-balungi-bossa>.

Judge Luz del Carmen Ibáñez Carranza was a Senior National Prosecutor in Peru's specialized system for the prosecution of crimes such as terrorism, grave violations of human rights, and crimes against humanity: "Judge Luz del Carmen Ibáñez Carranza", *International Criminal Court* (Web Page) <https://www.icc-cpi.int/judges/judge-luz-del-carmen-ibanez-carranza>.

Judge Beti Hohler was a Trial Lawyer in the Office of the Prosecutor of the ICC, amongst having other international law-focused roles: "Judge Beti Hohler" *International Criminal Court* (Web Page) <https://www.icc-cpi.int/judges/judge-beti-hohler>.

See also n 9 above.

person[s]"[127] from providing funds, goods or services to the judges, including donating any food, clothing or medicine "intended to be used to relieve human suffering", and preclude any such person from receiving funds, goods or services from the judges.[128] The penalties for breach of these sanctions can be severe. The definition of "United States person" is very wide but it is sufficient to note that it includes any US citizen, permanent resident or entity organised under the laws of the US, including an employee of such an entity. Heaven help any of these judges if they are taken to a hospital that employs an American doctor, tries to buy pharmaceuticals from an American pharmaceutical company or even attends a restaurant that employs an American waiter. The position becomes ridiculous if the doctor or waiter happens to be a dual citizen of the US and Australia, or the pharmaceutical company has an Australian branch. They may be faced with a choice to comply with the US sanctions or Div 268.

Similar sanctions have been imposed by the US government on a Brazilian judge.[129] The evidence suggests that was done as a response to judicial acts performed by that judge in Brazil.[130] Threats have been made to impeach judges of US domestic courts for injuncting various actions of the US government.[131] Given that context, I will leave

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127 Meaning "any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including a foreign branch, subsidiary, or employee of such entity), or any person lawfully in the United States": *Executive Order 14203: Imposing Sanctions on the International Criminal Court*, s 8(c), 90(28) Fed Reg 9369 at 9371 (12 February 2025).

128 *Executive Order 14203: Imposing Sanctions on the International Criminal Court*, ss 1-4, 90(28) Fed Reg 9369 at 9370-9371 (12 February 2025); 50 USC § 1702(2)(b); Galbraith, "U.S. Sanctions on the International Criminal Court: The Details and The Pattern", Verfassungsblog (Web Page, 7 June 2025) <https://verfassungsblog.de/u-s-sanctions-on-the-international-criminal-court/>.

129 US Department of State, "Sanctioning Brazilian Supreme Court Justice Alexandre de Moraes for Serious Human Rights Abuse" (Press Release, 30 July 2025); *Executive Order 13818 Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption*, 82(246) Fed Reg 60839 (26 December 2017).

130 Wells and Yousif, "Trump hits Brazil with 50% tariffs and sanctions judge in Bolsonaro case", *BBC* (online, 31 July 2025) <https://www.bbc.com/news/articles/crlzn72eg25o>; Magalhaes and Araujo, "Brazil's Justice Moraes ignores US sanctions, says he will continue doing his job", Reuters (online, 2 August 2025) <https://www.reuters.com/world/americas/brazils-justice-moraes-ignores-us-sanctions-says-he-will-continue-doing-his-job-2025-08-01/>.

131 Robins-Early, "Elon Musk lashes out at US judges as they rule against Doge" (online, 22 March 2025) <https://www.theguardian.com/technology/2025/mar/22/elon-musk-doge-judges-usaid>; New York City Bar, "Statement Condemning Threats to Impeach Federal Judges Based on Disagreement with Rulings" (Press Release, 31 March 2025); "US chief justice pushes back on Donald Trump's call to impeach federal judge", *ABC News* (online, 19 March 2025) <https://www.abc.net.au/news/2025-03-19/us-chief-justice-clashes-with-donald-trump/105069748>.

it to you to consider whether the sanctioning of the ICC is something peculiar to that institution or whether it reflects a larger strategy or at least a trend directed to the courts and to judges.

The decisions of sovereign states such as the US are matters for them. However, exacting vengeance on judges with whose decisions we disagree is anathema to our constitutional arrangements and, in the case of the ICC, is contrary to our law. As I have sought to explain, that law has a long reach and extends to at least Australian citizens who urge on vengeance against the ICC including its judges and not just those who impose it. Those laws are binding on (at least) all Australian citizens regardless of where they are, regardless of what they do and who they work for and regardless of the attitude of the Attorney-General of the day. Based on the reasoning in *Habib*, even absent any consent of the Attorney-General, those laws restrict the power of all arms of the executive government and may also have consequences for those with professional obligations, most notably Australian lawyers, admitted to practice even if they are not practising as lawyers.

But this aspect of the lecture is not about the weeds of the law that I have travelled through, it is not about high-minded principles of constitutional or international law and it is not a discussion that is limited to any particular lawyer or particular judge. In the end it reduces to a simple question that can arise every Saturday during the winter across this country: do you accept the umpire's decision, perhaps through gritted teeth or with a grumble, or do you take it further and hunt down the umpire after the game?

That question is not particularly difficult. But, as we say to juries, the answer in the end is entirely a matter for you.

Thank you for listening.