

WHAT IS GOOD FOR THE GOOSE SHOULD BE GOOD FOR THE GANDER: THE OPERATION OF THE *ROME STATUTE* IN THE AUSTRALIAN CONTEXT

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I INTRODUCTION

Australia signed the *Rome Statute of the International Criminal Court* ('*Rome Statute*')¹ on 9 December 1998; however, it did not ratify it until three and a half years later, on 1 July 2002, after implementing legislation to incorporate the Statute's obligations domestically on 27 June 2002.² Australia follows the dualist approach to international law, meaning that treaty obligations do not become applicable in domestic law unless these obligations are first implemented through domestic federal law. This process is known as transformation.³ Initially, Australia was a strong supporter for the establishment of a permanent institution to deal with the actions of senior leaders and military figures who had, until this time, largely acted with impunity in regard to crimes that seriously offend the international community. However Australia over time began to back away from the *Rome Statute*, taking some time to ratify and upon ratification, submitted a declaration in the following terms:

The Government of Australia, having considered the Statute, now hereby ratifies the same, for and on behalf of Australia, with the following declaration, the terms of which have full effect in Australian law, and which is not a reservation:

1. Australia notes that a case will be inadmissible before the International Criminal Court (the Court) where it is being investigated or prosecuted by a State.
2. Australia reaffirms the primacy of its criminal jurisdiction in relation to crimes within the jurisdiction of the Court.
3. To enable Australia to exercise its jurisdiction effectively, and fully adhering to its obligations under the Statute of the Court, no person will be surrendered to the Court by Australia until it has had the full opportunity to investigate or prosecute any alleged crimes.
4. For this purpose, the procedure under Australian law implementing the Statute of the Court provides that no person can be surrendered to the Court unless the Australian Attorney-General issues a certificate allowing surrender.
5. Australian law also provides that no person can be arrested pursuant to an arrest warrant issued by the Court without a certificate from the Attorney-General.
6. Australia further declares its understanding that the offences in Article 6, 7 and 8 will be

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

² *International Criminal Court Act 2002* (Cth); *International Criminal Court (Consequential Amendments) Act 2002* (Cth).

³ See generally Anne Twomey, *Procedure and Practice of Entering and Implementing International Treaties*, Parliamentary Research Service Background Paper No 27 (1995); 'It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law': *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7 (citations omitted).

interpreted and applied in a way that accords with the way they are implemented in Australian domestic law.⁴

This qualification – largely brought about by the close personal relationship between the then Prime Minister of Australia, Mr John Howard, and his US counterpart, President George W Bush,⁵ and the US reluctance to participate in the new International Criminal Court ('ICC') – presents some serious concerns for Australia's involvement in the ICC.⁶ Mr Howard was quoted in the press as stating:

To enable Australia to exercise its jurisdiction effectively, and fully adhering to its obligations under the Statute of the Court, no person will be surrendered to the Court ... unless the Australian Attorney-General issues a certificate allowing surrender.⁷

The *Rome Statute* works with sovereign states through the principle of complementarity. This essentially means the ICC will not hear a matter:

- 1) over which a state has jurisdiction to investigate and prosecute, unless the state is unwilling or unable to undertake the investigation or prosecution: art 17(1)(a);
- 2) that a state has investigated and decided not to prosecute, unless due to either unwillingness or inability to try the matter: art 17(1)(b);
- 3) for which the person has already been tried by the state for the same conduct: art 17(1)(c) *ne bis in dem* expressed in art 20(3); or
- 4) that is not of sufficient gravity to justify action: art 17(1)(d).

This paper considers the operation of the principle of complementarity in the Australian jurisdiction in light of its declaration made upon ratification of the *Rome Statute*, and investigates the implications for the operation of the ICC in Australia as a consequence of the declaration. Part I introduces the context for the Australian declaration. Part II examines the meaning of the declaration in the context of the *Rome Statute* together with the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*')⁸ and the International Law Commission's ('ILC') Draft Guidelines on the interpretation of the *Vienna Convention*.⁹ Part III discusses how the Australian declaration is to be interpreted under these treaties and the consequences of possible invalidity. Part IV gives particular regard to the principle of complementarity reflected in points 1), 2) and 4), above. Lastly, Part V considers the role of key gatekeepers such as the ICC Chief Prosecutor and the Australian Attorney-General in this process. Australia does not have a proud record in its compliance with international obligations.¹⁰ The paper concludes that the way forward

⁴ Rome Statute of the International Criminal Court Declaration Text: Australia 1 (July 2002) <<http://www.icrc.org/ihl.nsf/NORM/A255319F58A44982412566E100540E5E?OpenDocument> > at 27 April 2009.

⁵ See, Hilary Charlesworth et al, *No Country is an Island: Australia and International Law* (2007) 80–1.

⁶ Alex J Bellamy and Marianne Hanson, 'Justice Beyond Borders? Australia and the International Criminal Court' (2002) 56 *Australian Journal of International Affairs* 417, 422.

⁷ Gideon Boas 'An Overview of Implementation by Australia of the Statute of the International Criminal Court' (2004) 2 *Journal of International Criminal Justice* 179, 180 fn 2.

⁸ *Vienna Convention on the Law of Treaties*, opened for signature 2 May 1969, 1155 UNTS 331, art 19 (entered into force 27 January 1980).

⁹ For all the reports see International Law Commission, *Reservation to Treaties* ≤ http://untreaty.un.org/ilc/guide/1_8.htm ≥ at 20 May 2008.

¹⁰ See, eg, *Polyukhovich v Commonwealth* (1991) 172 CLR 501; See further, Rosalie Balkin, 'International Law and Domestic Law' in Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law: An Australian Perspective*, (2nd ed, 2002) 115; Gillian Triggs, 'Australia's War Crimes Trials: All Pity Choked' in Timothy H L McCormack and Gerry J Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997) 123; Bellamy and Hanson, above n 6.

for the ICC in the Australian context may not be straightforward. While the changes wrought by the implementation of legislation bringing the *Rome Statute* into operation in Australia are largely long overdue and in welcome recognition of human rights standards, the road may not be all smooth.

II THE AUSTRALIAN DECLARATION

An inquiry undertaken by the Joint Standing Committee on Treaties ('JSCOT')¹¹ asserted the need for Australia to maintain its independent and sovereign status. This maintenance of sovereign status was a key concern for those arguing against ratification of the *Rome Statute* and is still the US' main argument against involvement.¹² The JSCOT inquiry was heavily politicised and took much longer than most of its other inquiries.¹³ As a consequence, Australia made the declaration outlined above upon its ratification of the *Rome Statute*. Important considerations arise in relation to the impact of the declaration and it is one aspect that may well make the operation of the ICC less smooth in Australian waters.

The first three paragraphs of the declaration relate to the complementarity principle and tend to reaffirm Australia's concern that it maintains sovereignty over the prosecution of its nationals. It has been argued by Amnesty International¹⁴ that the declaration in this regard is contrary to the 'object and purpose' of the *Rome Statute*, while other commentators have seen these paragraphs of the declaration as adding nothing further than a restatement of the complementarity principle.¹⁵ When Australia first submitted the declaration, legal counsel for the United Nations ('UN') advised that it was in the nature of a reservation. After further discussion the UN Depository conceded to accept the declaration:

Hans Corell, Under Secretary-General for Legal Affairs, declined to accept Australia's ratification, claiming that the declaration constituted a reservation to the treaty, which was prohibited under the treaty's terms. ... The impasse was eventually resolved when the UN depositary gave into a personal plea from Mr Downer to allow the ratification.¹⁶

A Treaty Reservations / Declarations?

¹¹ Joint Standing Committee on Treaties, Parliament of Australia, *Report 45: The Statute of the International Criminal Court* (2002).

¹² See, eg, Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Sydney, 13 February 2001, 109 (Gareth John Kimberley): 'Everyone seems to agree that there is some loss of sovereignty involved and that it is just a matter of degree and whether we are prepared to accept it. Some have actually said that there is no loss of sovereignty but I cannot accept that. It seems to me that this court will indirectly be able to override national governments, and indeed there would be no point in setting up the court if it could not'; Jamie Mayerfeld, 'Who shall be Judge? The United States, the International Criminal Court, and the Global Enforcement of Human Rights' (2003) 25 *Human Rights Quarterly* 93; the reliance by the US on any *principled* argument against the ICC was made much more difficult in March 2005 when the US abstained on the Security Council vote to extend the ICC's jurisdiction to investigate alleged atrocities in Darfur in the Sudan: *Reports of the Security-Council on the Sudan*, SC Res 1593, UN SCOR, 59th Sess, SC 518th mtg, UN Doc S/Res/1593 (2005).

¹³ See especially, Charlesworth et al, above n 5, 71–82, for a full discussion of the politicisation of the implementation of the *Rome Statute* in Australia.

¹⁴ Amnesty International, *International Criminal Court: Declarations amounting to prohibited reservations to the Rome Statute*, 24 November 2005, IOR 40/032/2005, <<http://www.unhcr.org/refworld/docid/45be009d2.html> > at 27 April 2009.

¹⁵ Gillian Triggs, 'Implementation of the *Rome Statute* for the International Criminal Court: A quiet Revolution in Australian Law' (2003) 25 *Sydney Law Review* 507.

¹⁶ Charlesworth et al, above n 5, 80.

As Triggs comments:

In formulating its recommendation, JSCOT was careful to use the word ‘declare’ rather than, for example, ‘reserves’. This was for good reason... With the single exception of [the] transitional clause, the Statute prohibits reservations to the treaty. Any statement by Australia regarding its understanding of the nature of the legal obligations under the Statute could not therefore constitute a formal reservation, prompting the question – what is the legal status of a declaration or understanding at international law?¹⁷

This is a key question and one that may lead to the stormy waters alluded to earlier. As far back as 1951 the International Court of Justice (‘ICJ’) in an advisory opinion clearly laid out that a treaty reservation was permitted, so long as the treaty itself did not prohibit reservations and the reservation did not defeat the object and purpose of the treaty.¹⁸

It follows that it is the compatibility of a reservation with the object and the purpose of the Convention that must furnish the criterion to determine the attitude of the State which makes the reservation and of the State which objects.¹⁹

1 *The Rome Statute*

Article 120 of the *Rome Statute* clearly prohibits the making of any reservations and this is reinforced by art 19(a) of the *Vienna Convention*. Therefore, if the Australian declaration is really in the nature of a reservation it is prohibited and is not something that requires an objection. The only exception, if it can be so called, in the *Rome Statute* to this prohibition on reservations is the transitional provision, introduced at the behest of the French delegation, which relates to war crimes.²⁰ The significance of the prohibition on reservations is reinforced by the nature of the instrument: the *Rome Statute* is referred to as a ‘statute’ because it establishes a new international judicial institution and it is thus not like an ordinary multilateral treaty. It is a constitutive treaty creating what many considered the missing link in the United Nations operations – a permanent international criminal court. The Statute not only deals with the mechanistic provisions of the ICC, but also with substantive crimes, and in this regard can be seen as a hybrid normative human rights treaty, setting out rights for third parties, including victims and witnesses, and importantly also the rights of the accused.

2 *The Vienna Convention: Prohibited Reservations: art 19(a)*

The *Vienna Convention* deals with reservations in arts 19–23. The position stated by the ICJ in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*²¹ was adopted in the codification of the customary law by the *Vienna Convention*. Articles 1(d) and 19 are of particular relevance:

Article 1(d). ‘[R]eservation’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty,

¹⁷ Triggs, above n 15, 512–13 (citations omitted).

¹⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 24.

¹⁹ *Ibid.*

²⁰ *Rome Statute* art 124; see also Triggs, above n 15, 512.

²¹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1915] ICJ Rep 15.

whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to the State.

Article 19. A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- a. The reservation is prohibited by the treaty;
- b. The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- c. In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.²²

However, gaps and uncertainties in application exist and are the subject of consideration by the ILC.²³ In 1994 the ILC appointed a Special Rapporteur to investigate and report on reservations to treaties.²⁴ The special rapporteur, Mr Alain Pellet, has so far presented 12 reports on the subject.²⁵ The aim of the ILC is not to change the *Vienna Convention* but rather to provide a guide to practice with respect to reservations. The *Vienna Convention* provides no specific guidance on the distinction between reservations and declarations; however, the general position in relation to reservations and declarations is that the classification by the reserving or declaring state as one or the other is irrelevant:

It is not always easy to distinguish a reservation from a declaration as to a State's understanding of the interpretation of a provision, or from a statement of policy. Regard will be had to the intention of the State, rather than the form of the instrument. If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation.²⁶

Irrespective of the name given to a statement made by a ratifying state, what is important is the declaration's substantive effect as perceived by other parties or the organisation established by the instrument. If another state party or the constituent organ considers a declaration as effectively a reservation, altering the legal effect of the treaty, then it is considered a reservation that is prohibited by art 19 (a) of the *Vienna Convention* and art 120 of the *Rome Statute*. In such a situation no objection from another state party is required.

²² *Vienna Convention* arts 1(d), 19.

²³ 'The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the Commission to include in its agenda the topic "The law and practice relating to reservations to treaties": *Report of the International Law Commission: Fifty-ninth Session*, UN GAOR, 62nd sess, Supp No 10, [34], UN Doc A/62/10, (2007).

²⁴ *International Law Commission on the Work of its Forty-sixth Session*, UN GAOR, 49th sess, Supp No 10, [381], UN Doc A/49/10 (1994).

²⁵ See, ILC, above n 9; See generally *International Law Commission Summaries: Reservations to Treaties* (2005) UN ILC <http://untreaty.un.org/ilc/summaries/1_8.htm> at 27 April 2009.

²⁶ *General Comment No 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, UN HRC, 52nd sess, [3], UN Doc CCPR/C/21/Rev.1/Add.6 (1994) – while this comment is by the Human Rights Committee in relation to human rights treaties it is applicable to treaties generally; see Alain Pellet, *Third Report on Reservations to Treaties: Addendum*, ILC, UN GAOR, 50th sess, UN Doc A/CN.4/491/Add.6 (1998).

The role of the UN depositary is relevant in this regard. The obligations upon the depositary are set out in art 77(2) of the *Vienna Convention* and are considered to be relatively passive in effect.²⁷

In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.²⁸

The role of the depositary – which is the focus of draft guideline 2.1.7²⁹ – has been commented on by the special rapporteur, favouring current practice, 'whereby the depositary refused to accept a reservation prohibited by the treaty itself'. As noted above, legal counsel to the UN at first rejected the Australian declaration as being a reservation, but after further discussions with the then Minister for Foreign Affairs was persuaded to accept the instrument.³⁰ It is unlikely that Australia could successfully argue that its declaration cannot be a prohibited reservation simply by virtue of the depositary's acceptance of the instrument. An international court interpreting the Australian declaration would not, for example, be bound by the depositary's interpretation of the instrument. Of course, if all the parties to the treaty and the depositary interpret the instrument in exactly the same way then it is extremely unlikely that a court would depart from that interpretation.

3 *The ILC Draft Guidelines (Reservations and Declarations)*

In the ILC Draft Guidelines accepted by the Drafting Committee at its 2597th meeting, the following relevant guidelines (set out in full) elucidate what a reservation is (emphasis added):

1.1.1 Object of reservations

A reservation purports to *exclude or modify the legal effect* of certain provisions of a treaty or of the treaty as a whole, *with respect to certain specific aspects in their application to the State* or to the international organization which formulates the reservation.

1.1.5 Statements purporting to limit the obligations of their author

A *unilateral statement formulated by a State* or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty *by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.*

1.1.6 Statements purporting to discharge an obligation by equivalent means

A *unilateral statement formulated by a State* or an international organization when that State or that organization expresses its consent to be bound by a treaty *by which that State or that organization purports to discharge an obligation pursuant to the treaty in a*

²⁷ *International Law Commission: Fifty-ninth Session*, above n 23; some parties considered the depositary has a role with regard to the rejection of an instrument containing a reservation prohibited under art 19(a) of the *Vienna Convention*.

²⁸ *Vienna Convention* art 77(2).

²⁹ *International Law Commission: Fifty-ninth Session*, above n 23, [153].

³⁰ Charlesworth et al, above n 5, 80 fn 36.

*manner different from but equivalent to that imposed by the treaty constitutes a reservation.*³¹

The following guidelines proposed at the same meeting assist in understanding what comprises a declaration (emphasis added):

1.2 Definition of interpretive declarations

‘Interpretive declaration’ means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization *purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.*

1.2.1 Conditional interpretive declarations

*A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subordinates its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretive declaration.*³²

At the very least if the declaration by Australia is not a reservation it is arguably a conditional interpretive declaration. This is distinct from an interpretive declaration, which has no legal consequences. The proposed guidelines distinguish between the two in the different consequences that each entails. Examples of a simple interpretive declaration under the *Rome Statute* include instruments submitted by New Zealand and Sweden in which those states sought to clarify ambiguity with regard to the position of nuclear weapons.³³

The question arises: can a state couch a non-permitted reservation as a declaration? In *Belilos v Switzerland*³⁴ the European Court of Human Rights (‘ECHR’) evaluated an interpretive declaration in relation to art 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*. The Court approached the assessment in the same way as it would for a reservation, requiring a substantive assessment: ‘In order to establish the legal character of such a declaration, one must look behind the title given to

³¹ *Law and Practice Relating to Treaties: Extract from the Yearbook of the International Law Commission*, 2597th mtg, UN Doc A/CN.4/L.575 (1999).

³² *Ibid* [213].

³³ See, eg, ‘Declaration: 1. The Government of New Zealand notes that the majority of the war crimes specified in article 8 of the *Rome Statute*, in particular those in articles 8 (2)(b)(i)–(v) and 8 (2)(e)(i)–(iv) (which relate to various kinds of attacks on civilian targets), make no reference to the type of the weapons employed to commit the particular crime. The Government of New Zealand recalls that the fundamental principle that underpins international humanitarian law is to mitigate and circumscribe the cruelty of war for humanitarian reasons and that, rather than being limited to weaponry of an earlier time, this branch of law has evolved, and continues to evolve, to meet contemporary circumstances. Accordingly, it is the view of the Government of New Zealand that it would be inconsistent with principles of international humanitarian law to purport to limit the scope of article 8, in particular article 8 (2)(b), to events that involve conventional weapons only’: *Rome Statute of the International Criminal Court Declaration Text*: New Zealand, 7 October 1998, <<http://www.icrc.org/ihl.nsf/NORM/6FEC50D1DC1A7371412566BB003AB0E1?OpenDocument>> at 27 April 2009.

³⁴ *Belilos v Switzerland* (1988) 10 EHRR 466 (‘*Belilos*’).

it and seek to determine the substantive content.³⁵ The Court found the declaration to be a reservation.³⁶

The guidelines provide further assistance when considering whether an instrument is a reservation or a declaration (emphasis added):

1.3 Distinction between reservations and interpretative declarations

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to *ascertain the purpose of its author by interpreting the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.*³⁷

Where a statement may present as a declaration or a prohibited reservation, the guidelines state (emphasis added):

1.3.2 Formulation of a unilateral statement when a reservation is prohibited

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization *shall be presumed not to constitute a reservation except when it is established that it purports to exclude or modify the legal effect of certain provisions of the treaty or of specific aspects of the treaty as a whole, in their application to its author.*

1.4.5 Statements concerning modalities of implementation of a treaty at the international level

*A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect the rights and obligations of the other Contracting Parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.*³⁸

In this regard it seems that Australia's intention is that the statement is to be taken as an interpretive declaration and not a reservation. An international judicial body faced with interpretation of the Australian declaration would begin by trying to interpret it consistently with the ICC Statute. This idea was expressed by the ICJ in the *Rights of Passage* case:

It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.³⁹

However, giving the words their ordinary meaning raises significant issues with regard both to legal effect and vagueness (the latter discussed below). The 'purpose of the author' and 'good faith' aspect has to be considered in light of the intentions of the State

³⁵ 'However, the Court must see to it that the obligations arising under the Convention are not subject to restrictions which would not satisfy the requirements of Article 64 as regards reservations. Accordingly, it will examine the validity of the interpretative declaration in question, as in the case of a reservation, in the context of this provision.': *ibid* [49].

³⁶ *Ibid* [60].

³⁷ *Law and Practice Relating to Treaties*, above n 32, [213].

³⁸ *Ibid* [213]–[14].

³⁹ *Right of Passage Case (Portugal v India) (Preliminary Objections)* [1957] ICJ Rep 125, 142.

at the time; this can be assessed from the statements made by the Prime Minister and the JSCOT inquiry.⁴⁰ The effect of guidelines 1.3.2 and 1.4.5, above, are determined by addressing the central question: does the statement affect the rights of other states or the international organisation? In this regard art 21(1) of the *Vienna Convention* is relevant. It provides:

1. A reservation established with regard to another party in accordance with Articles 19, 20 and 23:
 - (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
 - (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.
2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

Article 21(1)(b) raises the question of the meaning of the Australian declaration in relation to the Attorney-General's exercise of discretion. If other signatory states to the *Rome Statute* are taken as accepting the Australian declaration, are they also entitled to determine internally whether an accused can be arrested or surrendered to the ICC? If the Australian declaration achieves this then it seriously undermines the operation of the Statute. Such an interpretation is however unlikely given arts 120 and 124 (transitional provision exception in regard to art 8) of the *Rome Statute*. To effectively alter the operation of the Statute to this extent, allowing states to determine whether they will arrest and surrender alleged criminals pursuant to a request from the ICC, would substantially alter the intent of the *Rome Statute* and the parties would need to clarify this by a clear amendment to the Statute. To this extent it is suggested that the Australian declaration falls under guideline 1.3.2, rather than 1.4.5, in that it modifies the legal effect of certain provisions of the treaty.

The *Rome Statute* could not be clearer in its statement in art 120 that reservations are not permitted. The straightforward argument relies on establishing the declaration as either an instrument that purports to exclude or modify the legal effect of the *Rome Statute*, in which case it is a reservation and is prohibited by art 120, or as one that does not, in which case it is an end to the need to further assess Australia's obligations under the treaty. However, if the declaration is not seen as coming under art 19(a) of the *Vienna Convention*, then in light of the ILC Draft Guidelines, it could arguably still fall under art 19(c) of the *Vienna Convention*. In such circumstances it could be considered to be a conditional interpretive declaration (guideline 1.2.1) and as such incompatible with the 'object and purpose of the treaty,' making it effectively a reservation.

B Object and Purpose

Key questions that arise in assessing whether, as a declaration, the statement offends 'object and purpose' in art 19(c) of the *Vienna Convention* include: 1) how to determine the object and purpose of the treaty; 2) what would be the effect of a decision by the constituent organ of incompatibility of a reservation with the object and purpose of the treaty; and 3) if the reservation/declaration is declared incompatible: is it severable, and does the declaring state retain the status of a contracting party?

⁴⁰ Boas, above n 7; Charlesworth et al, above n 5.

There is agreement in the current work on treaty reservations that the objective criteria and methodology to determine the object and purpose of the treaty has been left ambiguous by the *Vienna Convention*.⁴¹ This is partly due to the need to avoid the rigidity of a system of unanimity and accommodate the greatest possible state accession to multilateral treaties.

With regard to the assessment of object and purpose, the 10th report addendum by the special rapporteur to the ILC acknowledges that it is ultimately a subjective phrase lacking in methodological specification but which nonetheless provides a guideline for resolving most conundrums, much like the term ‘reasonable person’ in domestic law.

At most, one can infer that a fairly general approach is required: it is not a question of ‘dissecting’ the treaty in minute detail and examining its provisions one by one, but of extracting the ‘essence’, the overall ‘mission’ of the treaty...⁴²

The process adopted by the courts (not unlike the common law domestic approach to statutory interpretation) was noted by the special rapporteur:

it may be observed that the Court has deduced the object and purpose of a treaty:

- From its title;
- From its preamble;
- From an article placed at the beginning of the treaty that ‘must be regarded as fixing an objective, in light of which the other treaty provisions are to be interpreted and applied’;
- From an article of the treaty that demonstrates ‘the major concern of each contracting party’ when it concluded the treaty;
- From the preparatory work on the treaty; and
- From its overall framework.⁴³

The special rapporteur acknowledges that this does not amount to a ‘method’ and in fact no suitable ‘method’ has been established. Deducing a treaty’s object and purpose ultimately rests on interpretation as described in arts 31 and 32 of the *Vienna Convention*. A draft guideline was proposed by the special rapporteur as follows (emphasis added):

3.1.5. Definition of the object and purpose of the treaty

For the purpose of assessing the validity of reservations, the *object and purpose of the treaty means the essential provisions of the treaty*, which constitute its *raison d’être*.⁴⁴

⁴¹ *Vienna Convention*, art 19(c); see also Alain Pellet, *Tenth Report of on Reservations to Treaties: Addendum*, ILC, UN GAOR, 57th sess, 2856th mtg, UN Doc A/CN.4/558/Add.1 (2005)..

⁴² *Ibid* [77].

⁴³ *Ibid* [81] (citations omitted).

⁴⁴ *Ibid* [89]; cf ‘In the view of some members of the Commission, the “threshold” has been set too high in draft guideline 3.1.5 and may well unduly facilitate the formulation of reservations. Most members, however, have taken the view that by definition any reservation “purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application” to the author of the reservation and that the definition of the object and purpose of the treaty should not be so broad as to impair the capacity to formulate reservations. By limiting the incompatibility of the reservation with the object and purpose of the treaty to cases in which (i) it impairs an essential element, (ii) [is] necessary to the general thrust of the treaty, (iii) thereby compromising the *raison d’être* of the treaty, the formulation in draft guideline 3.1.5 strikes an acceptable balance between the need to preserve the integrity of the treaty and the concern to facilitate the broadest possible participation in multilateral conventions.’: *Report of the International Law Commission: Fifty-ninth Session*, above n 23, [13] (citations omitted).

Reference to ‘raison d’être’ draws inspiration from the 1951 ICJ Advisory Opinion: ‘none of the contracting parties is entitled to frustrate or impair ... the purpose and *raison d’être* of the convention’.⁴⁵

Looking to the Preamble of the *Rome Statute* and the debates it is clear that its *raison d’être* is to ensure that ‘the most serious crimes of concern to the international community as a whole must not go unpunished’.⁴⁶ This phrase is used twice in the Preamble and again in arts 1 and 5 of the *Rome Statute*. The purpose of the *Rome Statute* is to achieve state cooperation in ensuring the perpetrators of serious crimes, such as genocide, crimes against humanity and war crimes, are dealt with through criminal justice proceedings, preferably at the national level, but, failing this, before the ICC. Article 86 specifies the general obligation on state parties to fully cooperate with the ICC. An essential aspect to the cooperation is the requirement of a state party to arrest and surrender a person ‘immediately’⁴⁷ upon request to do so.

It follows that were Australia to fail to investigate and prosecute an alleged offender, as required by the *Rome Statute*, then a statement that permits a national official, such as the Attorney-General, to determine in their ‘absolute discretion’ not to arrest or surrender such a person when requested by the ICC would clearly defeat the object and purpose – the *raison d’être* – of the *Rome Statute*.

C Vague and Uncertain Reservations/ Declarations

Reservations will offend the object and purpose requirement of art 19(c) of the *Vienna Convention* if they are too general, vague or uncertain. That this applies to declarations too is clear from the observation that:

Thailand’s interpretative declaration to the effect that it ‘does not interpret and apply the provisions of this Convention [the 1966 International Convention on the Elimination of All Forms of Racial Discrimination] as imposing upon the Kingdom of Thailand any obligation beyond the confines of [its] Constitution and [its] laws’ also prompted an objection on the part of Sweden that, in so doing, Thailand was making the application of the Convention subject to a general reservation which makes reference to the limits of national legislation the content of which was not specified.⁴⁸

So the question as to whether a declaration is effectively a reservation also includes an assessment as to the instrument’s legal clarity, so that other contracting states can know the extent of a reservation or declaration’s scope, and its legal effect, to determine whether it is compatible with the object and purpose of the treaty.

The exercise of the Attorney-General’s discretion is not prescribed by any criteria.⁴⁹ While it is ultimately subject to review by the High Court under Australian constitutional

⁴⁵ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 21.

⁴⁶ *Rome Statute* Preamble [4], [9].

⁴⁷ *Rome Statute* art 59(1).

⁴⁸ See *Report of the International Law Commission: Fifty-ninth Session* above n 23, [110] (citations omitted).

⁴⁹ *ICC Act 2002 (Cth)* ss 22, 29.

and administrative law principles,⁵⁰ this provides no clear indication to other state parties, nor to the ICC, as to how and when the Attorney-General may exercise the discretion. This does not enable another state party to the *Rome Statute* to clearly assess the full scope and effect of the Australian declaration.

While it is clear the Australian declaration is referring to the duty to arrest and surrender it can never be clear as to how and when those duties will be carried out in Australia, given it is based on the exercise of an absolute discretion. The extent to which Australia accepts the obligations contained in arts 59 and 86 of the *Rome Statute* are therefore indeterminate. The case of *Belilos*⁵¹ is instructive in this context. Here the interpretative declaration made by the Government of Switzerland was found too vague to comply with art 64 of the *European Convention on Human Rights*:

By 'reservation of a general character' in Article 64 is meant in particular a reservation couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope. While the preparatory work and the Government's explanations clearly show what the respondent State's concern was at the time of ratification, they cannot obscure the objective reality of the actual wording of the declaration. The words 'ultimate control by the judiciary over the acts or decisions of the public authorities relating to [civil] rights or obligations or the determination of [a criminal] charge' do not make it possible for the scope of the undertaking by Switzerland to be ascertained exactly, in particular as to which categories of dispute are included and as to whether or not the 'ultimate control by the judiciary' takes in the facts of the case. ... In short, they fall foul of the rule that reservations must not be of a general character.⁵²

In *Belilos* the ECHR was prepared to find the declaration was effectively a reservation. This was also the case in *Loizidou v Turkey*.⁵³ The ECHR held that Turkey's declaration under art 25 of the *European Convention of Human Rights* was invalid, and that the invalid parts could be severed from the original declaration. The ECHR adopted the following approach:

To determine whether Contracting Parties may impose restrictions on their acceptance of the competence of the Commission and Court under arts 25 and 46, the Court will seek to ascertain the ordinary meaning to be given to the terms of these provisions in their context and in the light of their object and purpose.⁵⁴

The ICJ has noted that the 'laissez-faire' approach of states in both making and objecting, or not, to reservations is not one that the ECHR and the Inter-American Court of Human Rights support in their jurisprudence.⁵⁵ This raises the question: what is the state of Australia's declaration *vis-à-vis* other contracting parties, none of whom have raised an objection to the Australian declaration? While the *Rome Statute* is considered a constitutive treaty setting up a mechanism for trial of individuals for crimes under

⁵⁰ *Ruddock v Vadarlis* (2001) 110 FCR 491, 539–540 ('*Tampa*'); See Chris Finn, 'The Justiciability of Administrative Decisions: A redundant Concept?' (2002) 30 *Federal Law Review* 239; cf, John McMillan, 'The Justiciability of the Government's Tampa Actions' (2002) 13 *Public Law Review* 89; see further, below n 97. It is unlikely the High Court would interfere in the exercise of such a discretionary power.

⁵¹ *Belilos v Switzerland* (1988) 10 EHRR 466.

⁵² *Ibid* [55].

⁵³ *Loizidou v Turkey (Preliminary Objections)* (1995) ECHR A310.

⁵⁴ *Ibid* [73].

⁵⁵ *Armed Activities on the Territory of the Congo (New Application: 2002) (Jurisdiction; Admissibility) (Democratic Republic of the Congo v Rwanda)* [2006] ICJ, joint separate opinion by Higgins, Kooijmans, Elaraby, Owada and Simma JJ (3 Feb), 65, [15].

international law, others have suggested it is a hybrid normative human rights treaty, containing individual's specific rights.⁵⁶

The Human Rights Committee have stated:

Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto.⁵⁷

Furthermore, in relation to human rights treaties the argument can be made that objection or not by contracting parties is irrelevant to the outcome of a reservation.

D Special Considerations in Relation to Human Rights Treaties

The Human Rights Committee has commented that human rights treaties hold a different position to that of other multilateral treaties under the *Vienna Convention*:

State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties ... are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. ... And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. Objections have been occasional, made by some States but not others, and on grounds not always specified; when an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party none the less does not regard the Covenant as not in effect as between the parties concerned. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable.⁵⁸

The position with regard to an invalid reservation to a human rights treaty is that it is of no effect: it is null and void. Some argue that an invalid reservation is not something that states can choose to accept nor to which they can object.⁵⁹ This position leads to the same result as the argument made above regarding a reservation under art 19(a) of the *Vienna Convention*, and it reinforces the prohibition of reservations under art 120 of the *Rome Statute*.

While reservations to human rights treaties ought to be avoided, state practice does not observe this in all cases. The ILC Draft Guidelines acknowledge the special difficulties surrounding reservations to human rights treaties but do not believe state practice supports the blanket invalidity of any reservation to a human rights treaty and so provide:

3.1.12 Reservations to general human rights treaties

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility,

⁵⁶ Amnesty International, above n 14, 8.

⁵⁷ *General Comment No 24*, above, Pellet n 42 [113].

⁵⁸ *General Comment No 24*, above Pellet n 42 [17].

⁵⁹ Alain Pellet, *Meeting with Human Rights Bodies*, ILC, 59th sess, UN Doc ILC (LIX)/RT/CRP.1 (2007).

interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.⁶⁰

Bodies charged with monitoring such treaties, or established by the instrument, are competent to decide whether a reservation is compatible with the object and purpose of the treaty.⁶¹ An ICJ Advisory Opinion in 1949 found that where a group of states establish an international organisation by multilateral treaty, the organisation has independent legal personality in relation to the states.⁶² With human rights treaties the question of objection to a declaration or reservation is really one for the body established by the instrument – in this case the competent organ under the *Rome Statute* – to determine based on objective criteria.⁶³ In relation to the *Rome Statute*, its very nature is such that the position concerning the requirement of objections by other states is largely irrelevant. The *Rome Statute* is a treaty that not only establishes an international court, setting out its organisational structure and operational provisions, but that also contains the substantive provisions setting up the specific material obligations of state parties, the organisation and rights of the accused, victims and witnesses. The special rapporteur has argued therefore that art 20(3) of the *Vienna Convention* should not apply because of the hybrid nature and presence of the material provisions in the Statute.⁶⁴ It can be argued that the fact a number of states have objected to Uruguay's 'declaration'⁶⁵ under the *Rome Statute* does not mean other States' declarations are therefore accepted. In human rights treaties, unlike a multilateral treaty, states' reciprocal rights are not directly threatened and often in practice no objection is made even if a state may see the reservation or declaration as objectionable.⁶⁶

⁶⁰ *Reservations To Treaties*, ILC, UN GAOR, 59th sess, 3, UN Doc A/Cn.4/L.705 (2007); see also the recent ICJ decision, *Armed Activities on the Territory of the Congo (New Application: 2002) (Jurisdiction; Admissibility) (Democratic Republic of the Congo v Rwanda)* [2006] ICJ (3 Feb), 55, [64]–[70].

⁶¹ *International Law Commission: Report on the Work of its Fifty-eighth Session*, UN GAOR, 61st sess, Supp No 10, [152] UN Doc A/61/10 (2006): 'The Special Rapporteur had noted with satisfaction that no member had disputed the principle that States or international organizations had competence to assess the validity of a reservation.'

⁶² *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, [1949] ICJ Rep 174, 179.

⁶³ Pellet, *Meeting with Human Rights Bodies*, above n 61, [21]: 'Nevertheless, in practice it was generally considered that even invalid reservations were subject to the general regime of reservations and could therefore be accepted by other contracting States.'

⁶⁴ Alain Pellet, *Twelfth Report on Reservations to Treaties*, ILC, UN GAOR, 59th sess [251]–[256] UN Doc A/CN.4/584 (2007).

⁶⁵ See, eg, Germany stated: 'The Government of the Federal Republic of Germany considers that the Interpretative Declaration with regard to the compatibility of the rules of the Statute with the provisions of the Constitution of Uruguay is in fact a reservation that seeks to limit the scope of the Statute on a unilateral basis. As it is provided in article 120 of the Statute that no reservation may be made to the Statute, this reservation should not be made.': *Rome Statute of the International Criminal Court: Germany: Objection to the Interpretative Declaration Made by Uruguay Upon Ratification*, Depositary Notification, UN Doc CN.784.TREATIES-7 (2003); Denmark, Finland, Ireland, Norway, Sweden, the Netherlands and the United Kingdom objected on similar grounds.

⁶⁶ In *Belilos*, the Court stated with respect to the lack of objections from other state parties, '[t]he silence of the depositary and the Contracting States does not deprive the Convention institutions of the power to make their own assessment': *Belilos* (1988) 10 EHRR 466, [47]; see also *Armed Activities on the Territory of the Congo (New Application: 2002) (Jurisdiction; Admissibility) (Democratic Republic of the Congo v Rwanda)* [2006] ICJ (3 Feb), joint separate opinion by Higgins, Kooijmans, Elaraby, Owada and Simma JJ, 65, [10]: 'the vast majority of States, who the Court in 1951 envisaged would scrutinise and object to such reservations, have failed to engage in this task.'

The *Advisory Opinion on the Effect of Reservations on the Entry into Force of the American Convention on Human Rights* in the Inter-American Court of Human Rights declared the following in relation to human rights treaties and the *Vienna Convention*:

[The] object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the states can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction.⁶⁷

A final consideration is the position of reservations made in relation to rules of *jus cogens* or pre-emptory norms.

E Reservations to *Jus Cogens* and Preemptory Norms

Jus cogens refer to fundamental principles of international law that no state may ignore or abrogate by contract, for instance through reservation to treaties dealing with such principles. While no definitive list of *jus cogens* principles exist it is generally accepted that the prohibition of genocide is one such principle.⁶⁸ The *Vienna Convention* introduces *jus cogens* in art 53:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The special rapporteur in his 10th report on reservations provides the following guidelines in relation to such reservations:

3.1.9. Reservations to provisions setting forth a rule of *jus cogens*

A State or an international organization may not formulate a reservation to a treaty provision which sets forth a peremptory norm of general international law.

3.1.10 Reservations to provisions relating to non-derogable rights

A State or an international organization may formulate a reservation to a treaty provision relating to non-derogable rights provided that the reservation in question is not incompatible with the essential rights and obligations arising out of that provision. In assessing the compatibility of the reservation with the object and purpose of the provision in question, account must be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.⁶⁹

Article 5 of the *Rome Statute* should override the exercise of an absolute discretion by the Attorney-General, who should not be in a position to refuse to issue a certificate arresting or surrendering a person who is accused of genocide. Such a crime attracts universal

⁶⁷ *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Advisory Opinion)* [1982] ICAHR A2, UN Doc OC-2/82, [29].

⁶⁸ M. Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' Law and Contemporary Problems, (1996) 59, 63; Hilary Charlesworth and Christine Chinkin, 'The Gender of *Jus Cogens*', *Human Rights Quarterly*, (1993)15, 63.

⁶⁹ Pellet, above n 42, [146].

jurisdiction and is one that Australia along with all other states should hold as a *jus cogens* principle. In this context Australia ratified the *Convention on the Prevention and Punishment of the Crime of Genocide*⁷⁰ (on 8 July 1949) and passed the *Genocide Convention Act 1949*.⁷¹ Notwithstanding this it was held in the Federal Court that genocide was not part of the law in Australia due to the failure of incorporation by the legislature.⁷² This has now been rectified by ratification of the *Rome Statute* and the enactment of the implementing legislation.⁷³ If the Attorney-General refused to surrender a requested accused, the ICC would be entitled to activate the complementary principle under art 17(1) of the Statute regarding ‘unwillingness’. The effect of this is that the person would be protected from prosecution as long as they remained on Australian territory. If the accused moved outside Australia they would be subject to either universal jurisdiction in relation to *jus cogens* crimes such as genocide, or the jurisdiction of the ICC if present in states party to the *Rome Statute*. It is to be noted the recent expression of concern by the ICJ in relation to states evading accountability for genocide:

It is a matter for serious concern that at the beginning of the twenty-first century it is still for States to choose whether they consent to the Court adjudicating claims that they have committed genocide. It must be regarded as a very grave matter that a State should be in a position to shield from international judicial scrutiny any claim that might be made against it concerning genocide. A State so doing shows the world scant confidence that it would never, ever, commit genocide, one of the greatest crimes known.⁷⁴

The Attorney-General’s refusal to issue a certificate would achieve the very antithesis of the *Rome Statute’s* ambitions, namely impunity for perpetrators of the serious crimes covered by art 5.

⁷⁰ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, (1951) 78 UNTS 277, (entered into force 12 January 1951).

⁷¹ *Genocide Convention Act 1949* (Cth).

⁷² *Nulyarimma v Thompson* [1999] FCA 1192, [18], [20], (Wilcox J): ‘I accept that the prohibition of genocide is a peremptory norm of customary international law, giving rise to a non-derogable [sic] obligation by each nation State to the entire international community. This is an obligation independent of the Convention on the *Prevention and Punishment of the Crime of Genocide*. It existed before the commencement of that Convention in January 1951, probably at least from the time of the United Nations General Assembly resolution in December 1946. I accept, also, that the obligation imposed by customary law on each nation State is to extradite or prosecute any person, found within its territory, who appears to have committed any of the acts cited in the definition of genocide set out in the Convention. It is generally accepted this definition reflects the concept of genocide, as understood in customary international law. ... However, it is one thing to say Australia has an international legal obligation to prosecute or extradite a genocide suspect found within its territory, and that the Commonwealth Parliament may legislate to ensure that obligation is fulfilled; it is another thing to say that, without legislation to that effect, such a person may be put on trial for genocide before an Australian court. If this were the position, it would lead to the curious result that an international obligation incurred pursuant to customary law has greater domestic consequences than an obligation incurred, expressly and voluntarily, by Australia signing and ratifying an international convention. Ratification of a convention does not directly affect Australian domestic law unless and until implementing legislation is enacted. This seems to be the position even where the ratification has received Parliamentary approval, as in the case of the *Genocide Convention*’; see also Melinda Walker, ‘Upholding the Law v Maintaining Legality: *Nulyarimma v Thompson*’ (1999) *Indigenous Law Bulletin*, 81.

⁷³ *International Criminal Court Act 2002* (Cth); *International Criminal Court (Consequential Amendments) Act 2002* (Cth).

⁷⁴ *Armed Activities on the Territory of the Congo (New Application: 2002) (Jurisdiction; Admissibility) (Democratic Republic of the Congo v Rwanda)* [2006] ICJ (3 Feb) Joint Separate Opinion by Judges Higgins, Kooijmans, Elaraby, Owada and Simma JJ, 65 [25].

F Position with Regard to Objections

It remains to clarify the position in relation to objections to reservations and declarations. No objection has been made to the Australian declaration to the *Rome Statute*. The question is what is the significance of this? Under the general law of treaties the position with regard to objections is set out in arts 20–23 of the *Vienna Convention*. In regard to the acceptance of a reservation the *Vienna Convention* establishes that a state or international organisation has 12 months to raise an objection after which it is deemed to have accepted it.⁷⁵ This gives some certainty to the status of the reserving party at the same time as permitting the objecting state or international organisation to consider the reservation and their position in regard thereto.⁷⁶ A state that ratifies a treaty subsequent to a reservation or declaration of another signatory is taken to have accepted the reservation or declaration if it does not raise an objection at the time of ratification.⁷⁷

Article 20(3) of the *Vienna Convention* and draft guideline 2.8.7 of the ILC establish the position in relation to treaties that are constituent instruments establishing international organisations, such as the ICC:

Article 20(3) When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

The *Vienna Convention* does not elucidate what is a constituent instrument or what effect acceptance by a competent organ has on states.⁷⁸ The special rapporteur in the 12th report concludes that art 20(3) of the *Vienna Convention* requires the constituent instrument of the organisation to expressly accept a reservation or declaration by ruling on the question⁷⁹ but goes on to note that ‘[i]t is possible, however, to imagine cases in which the organ implicitly accepts the reservation and allows the candidate country to participate in the work of the organisation without formally ruling on the reservation.’⁸⁰ Where the constituent organ is yet to be established at the time of the reserving state’s ratification, draft guideline 2.8.10 proposes in relation to art 20(3) that in such a situation the reservation requires ‘the acceptance of all the States and international organizations concerned.’⁸¹

The ICC came into effective operation on 1 July 2002, the date of Australia’s declaration and ratification. As stated above it is possible to argue that if it is a reservation under art 19(a) then it is not something that can be objected to or that requires an objection, it is simply prohibited. If, however, it is taken as something other than a prohibited reservation it may come within *Rome Statute* art 19(c) in which case art 20(3) of the *Vienna Convention* applies. The special rapporteur has stated in his 10th Report on reservations to treaties that art 19(c) only applies in cases where the treaty itself does not resolve the position on reservations and in cases not covered by arts 20(2) and (3) of the

⁷⁵ *Vienna Convention on the Law of Treaties*, opened for signature 2 May 1969, [1974] ATS 2, art 20(5) (entered into force 27 January 1980); see also Pellet, *Twelfth Report*, above n 66, [216].

⁷⁶ Pellet, *Twelfth Report*, above n 66, [214]–[216].

⁷⁷ *Ibid* [219]–[222].

⁷⁸ *Ibid* [249].

⁷⁹ *Ibid*.

⁸⁰ *Ibid* [251] (citations omitted).

⁸¹ *Ibid* [265]; states may still take a position on a reservation but it will have no legal effect: *ibid* [267]–[9].

Convention.⁸² He goes on to state that a reservation expressly prohibited by a treaty cannot be validated on the basis of compatibility with the object and purpose.⁸³

As reservations to the *Rome Statute* are prohibited, then no objection to a declaration determined to be effectively a reservation is required. Article 120 of the *Rome Statute* would exclude art 20(3) of the *Vienna Convention* and acceptances of reservations. The *Rome Statute* did envisage reservations and clearly aimed to prohibit them. However, when it comes to reservations in the form of disguised declarations the position is ambiguous. To consider the alternative: as neither the Assembly of States, the ICC nor the preparatory commission for the ICC have taken a position in regard to the Australian declaration (nor in respect of many of the declarations submitted by other states), and certainly they have not expressly accepted it, it can be argued the declaration has implicitly been accepted. That still would leave any states yet to ratify the Statute in a position to object,⁸⁴ but because it is ultimately the competent organ's position to decide then it is possible that Australia's declaration has impliedly been accepted.

In any event it would seem that given the position with regard to state practice and the lack of an explicit acceptance by the ICC, the state of Australia's declaration is not as clear as is desirable. This is to be considered alongside the fact that the position in relation to treaties that set up international institutions – as is the case with the *Rome Statute* – and that have obligations affecting individual rights – such as human rights treaties – have been argued by the Human Rights Committee and others to have different consequences when it comes to objections to reservations.

III APPLICATION TO AUSTRALIA'S DECLARATION

In applying the criteria discussed above and to answer the question 'what is the legal status of the declaration made by Australia,' one must first look to the substance of the declaration to determine whether it changes the legal effect of the *Rome Statute* and thus is prohibited as effectively a reservation (Art 19(a) of the *Vienna Convention* and art 120 of the *Rome Statute*). If the conclusion to this is negative, it may still be appropriate to consider whether it undermines the 'object and purpose' of the *Rome Statute*. On this point paragraphs 4, 5 and 6 of the Australian declaration present the greatest concern. As argued above the fact that no other state, or the ICC explicitly, given the nature of the Statute, have sought to object to the declaration does not mean it is acceptable. The *Rome Statute* requires that a state party 'cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'⁸⁵ and 'immediately take steps to arrest the person in question.'⁸⁶ Paragraphs 4 and 5 of the declaration by Australia assert the right of the Attorney-General to issue certificates, before a person can be arrested⁸⁷ and surrendered to the ICC.⁸⁸

⁸² Pellet, *Tenth Report*, above n 42 [57].

⁸³ Ibid [58].

⁸⁴ *Vienna Convention* art 20(5); Pellet, *Twelfth Report*, above n 66, [216].

⁸⁵ *Rome Statute* art 86.

⁸⁶ *Rome Statute* art 59.

⁸⁷ *ICC Act 2002 (Cth)* s 22.

⁸⁸ *ICC Act 2002 (Cth)* s 29.

The legal effect and obligations of Australia are modified by the Attorney-General's exercise of an absolute discretion⁸⁹ with the correspondent interpretation attributed to this under Australian law.

The need for cooperation to be smooth and effective is vital to the function of the ICC, as it relies on states to perform the arrest, detention and enforcement aspects of the criminal process, having no direct enforcement powers itself. Part 9 of the *Rome Statute* deals with international cooperation and judicial assistance:

Article 86 states:

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Article 88 states:

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

Further cooperation provisions include arts 93 and 54, the latter requiring that a state party act 'immediately' to arrest and surrender a person in relation to whom they may receive a request for provisional arrest. The amount of explicit detail in the Statute means that great consideration was given to the circumstances surrounding arrest and surrender and the operation of national law in this regard. Two examples are instructive:

Article 89(2) provides:

Where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

This envisages that surrender may be objected to but only on specific grounds, namely *ne bis in idem* and admissibility. If admissibility has been determined then the State shall proceed with the request; postponement of the request is only contemplated if the admissibility determination has not been made.

Again in the *Rome Statute* art 91(2) provides:

In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

(c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

⁸⁹ *ICC Act 2002 (Cth)* ss 22, 29

It can be seen that steps required by national law should not be ‘burdensome’, given the nature of the Statute; if anything they should be less cumbersome than requests for extradition. It is instructive then to consider briefly what the position in Australia is in relation to extradition. The *Extradition Act 1988* (Cth) provides for determination to be made by a Magistrate under s 19, which provides for detailed considerations:

Section 16(2) provides:

The Attorney-General shall not give the notice:

- (a) unless the Attorney-General is of the opinion:
 - (i) that the person is an extraditable person in relation to the extradition country; and
 - (ii) that, if the conduct of the person constituting the extradition offence, or any of the extradition offences, for which surrender of the person is sought, or equivalent conduct, had taken place in Australia at the time at which the extradition request was received, the conduct or the equivalent conduct would have constituted an extradition offence in relation to Australia; or
- (b) if the Attorney-General is of the opinion that there is an extradition objection in relation to the extradition offence, or all of the extradition offences, for which surrender of the person is sought.

Nowhere in the Act does the Attorney-General have an absolute discretion. The *Extradition (Commonwealth Countries) Regulations 1998* provide in reg 7 for some ability of the Attorney-General to intervene, but the basis on which the discretion is exercised is delineated and not left to an absolute discretion:

Reg 7... a person shall not be surrendered in relation to such an offence if the Attorney-General is satisfied that by reason of ...

- (b) the accusation against the eligible person not having been made in good faith or in the interests of justice; or
- (c) any other sufficient cause ... it would, having regard to all the circumstances, be unjust or oppressive or too severe a punishment to surrender the eligible person.

It can be seen that any decision of the Attorney-General must be justifiable within the constraints of the *Extradition Act 1988* (Cth). This is not the case with the absolute discretion granted the Attorney-General under the *International Criminal Court Act 2002* (Cth) (*ICC Act*) – by which Australia implemented the *Rome Statute* at a domestic level – and the attempt at the limiting of review by the Courts. It is to be noted that the High Court in reviewing the exercise of an absolute discretion by ministers in the area of migration has taken the discretion to be wide and while not unfettered the Court will always consider jurisdictional error – it is not one to which natural justice or review is readily applicable.⁹⁰ In view of this it is unlikely that the High Court would interfere with

⁹⁰ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, holding *Migration Act 1958* (Cth) s 474 valid. Section 474 of that Act is similar in breadth to the provision in the *ICC Act* (Cth) s 181 setting out the circumstances of an appeal. Section 474(1) provides that:

- (1) A privative clause decision:
 - (a) is final and conclusive; and
 - (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
 - (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

In the result, the Court unanimously rejected the ‘literal’ interpretation, affirming that the section would be invalid if, on the construction contended for by the plaintiff, it attempted to oust the jurisdiction of the High Court. All the judges held that the constitutional writs of prohibition and mandamus are available for jurisdictional error. It followed that s 474 could not be read as protecting from review decisions involving jurisdictional error, if only because any other interpretation would be in conflict with s 75(v) of the

the Attorney-General's exercise of an absolute discretion. Further, the High Court in Australia will provide relief where an administrative decision is wrong in law,⁹¹ but has been reluctant to interfere in what are considered purely political decisions and ones that involve our relations with other nations.⁹²

The Attorney-General's exercise of an absolute discretion is entrenched in the implementing legislation, the *ICC Act*, and is not circumscribed by any criteria for the exercise of the discretion: it remains an absolute discretion.⁹³ The *ICC Act* asserts the ultimate authority of the Attorney-General in s 181, which specifies:

Attorney-General's decisions in relation to certificates to be final
181(1) Subject to any jurisdiction of the High Court under the Constitution, a decision by the Attorney-General to issue, or to refuse to issue, a certificate under s 22 or s 29:
(a) is final; and
(b) must not be challenged, appealed against, reviewed, quashed or called in question; and
(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari.
Any jurisdiction of the High Court referred to in subsection (1) is exclusive of the jurisdiction of any other court.

The discretion given to the Attorney-General under s 181 appears unconscionably broad. In *Gerlach v Clifton Bricks Pty Ltd* Kirby and Callinan JJ, referring to all Australian Parliaments, stated: 'Absolute discretions are a form of tyranny.'⁹⁴ The rule of law requires certainty in the law which is not provided by the legislature's dispensation to one of its members a wide and apparently arbitrary discretionary authority. The broad discretion given to the Attorney-General is compounded when considered in the context of Australian judges being loathe to review matters pertaining to national security or matters involving political sensitivity.⁹⁵ It seems the only constraints on s 181 are those imposed by s 75 of the *Constitution*.⁹⁶ For s 75 to apply there must be a justiciable 'matter' and a party must have standing. Naturally a person in relation to whom the Attorney-General exercises his discretion to arrest or surrender has an interest and therefore standing. However, were the Attorney-General to refuse to arrest or surrender a person, who would have standing then? Would there be a justiciable 'matter' for the High

Constitution; see also *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, 88 (Spender J): 'Faulty or illogical reasoning does not amount to jurisdictional error'; *R v Mackellar; Ex parte Ratu* (1977) 137 CLR 461; cf *Kioa v West* (1985) 159 CLR 550.

⁹¹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 72.

⁹² *Gerhardy v Brown* (1985) 159 CLR 70, 138–9.

⁹³ *ICC Act 2002* (Cth) ss 22, 29.

⁹⁴ *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478, 69–70.

⁹⁵ See, eg, *Minister for the Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; *Church of Scientology Inc v Woodward* (1982) 154 CLR 25; *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 374; *A-G (UK) v Heinemann Publishers (Australia) Pty Ltd* ('*Spycatcher Case*') (1988) 165 CLR 30; *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354.

⁹⁶ Section 75 of the *Australian Constitution* provides: 'Original jurisdiction of High Court

In all matters ...

(v) In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth ... the High Court shall have original jurisdiction.'

court to review? These hurdles aside it is improbable with such a wide discretion to conceive of grounds that would enable the decision to be reviewed.⁹⁷

It is not the role of a national court to determine whether a declaration is in fact a reservation under a treaty. As a matter of international law the Australian legislature cannot, and is presumptuous to attempt to, exclude the ability of the ICC from exercising the right to determine whether the *Rome Statute* is being complied with by virtue of s 181(1)(b) and (3). This section looks like an attempt to dictate the operation of the Statute in relation to Australia's domestic implementation in a way that is utterly inconsistent with its international obligations by virtue of ratification of the Statute, particularly art 27. This fact is likely to bring the High Court of Australia into an unenviable position if s 181(3) ever has cause to be activated.

The consequence of the Attorney-General exercising their discretion in regard to senior members of the government or the military has to be considered. Of considerable significance, as stated in the preamble of the *Rome Statute*, is the object of putting 'an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.' Article 27, which prohibits immunity for heads of government and other members of government which would attempt to exclude liability based on their official capacity, is a major object of the Statute. The ICC is concerned only with 'the most serious crimes of concern to the international community.'⁹⁸ This is reinforced by the chief prosecutor's statement: 'The policy decision of the Office to focus its resources on the investigation and prosecution of those who bear the greatest responsibility for serious crimes has attracted strong support.'⁹⁹

In relation to the aspect of gravity, art 8(1) of the *Rome Statute* sets out the limits of the ICC's jurisdiction 'in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'. The ICC office of the prosecutor has indicated that the prosecutor will decline to open a case that is not of sufficient gravity. In this regard the deaths of thousands of civilians not hundreds or less is the likely target.¹⁰⁰ In fact the ICC reinforces the *Rome Statute* preamble in setting out the mandate of the prosecutor's office: 'by conducting investigations and prosecutions, the Office contributes to the overall objective of the Court – to end impunity for the perpetrators of the most serious crimes of concern to the international community...'¹⁰¹

With regards to the question of gravity, the Pre-Trial Chamber I of the ICC in *Prosecutor v Thomas Lubanga Dyilo* divided the issue of admissibility into consideration of two aspects: complementarity and gravity. With respect to gravity under art 17 the Pre Trial Chamber I has set a three part test:

⁹⁷ See *Spycatcher Case* (1988) 165 CLR 30, 46–7 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron J): 'the right or interest asserted in the proceedings is to be classified as a governmental interest. As such, the action falls within the rule of international law which renders the claim unenforceable'.

⁹⁸ *Rome Statute* art 5(1).

⁹⁹ *Summary of recommendations received during the first Public Hearing of the Office of the Prosecutor*, UN ICC OTP (2003) <http://wwwold.icc-cpi.int/library/organs/otp/ph/ph1_conclusions.pdf> at 28 April 2009.

¹⁰⁰ See also, *Update on Communications Received by the Office of the Prosecutor* (10 February 2006) <http://www.icc-cpi.int/organs/otp/otp_com.html> at 10 July 2008.

¹⁰¹ International Criminal Court Office of the Prosecutor <<http://www.icc-cpi.int/organs/otp.html>> ICC at 28 April 2009.

- 1) the conduct was of either a ‘systematic or large-scale nature’ (‘social ... alarm to the international community’ is here an important factor); and
- 2) the person subject to prosecution was one of the ‘most senior leaders of the conduct under investigation.’
- 3) the third limb of the test pertains to determining who is a ‘most senior leader’. Here, the court will have regard to:
 - i) the role played by the relevant person through acts or omissions when the State entities, organisations or armed groups to which he belongs commit systematic or large-scale crimes within the jurisdiction of the Court, and
 - ii) the role played by such State entities, organisations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation.¹⁰²

At the JSCOT hearings the question was raised as to why the Australian implementing legislation failed to mention art 27.¹⁰³ It is significant that the Australian legislation is unlike any of its western state counterparts, such as the United Kingdom, New Zealand and Canada. These states have implemented the *Rome Statute* with minimal legislation, adopting the Statute and *Elements of Crime*¹⁰⁴ as they are. Australia is unique in its specificity in addressing each crime in detail, along with the elements of each offence, in line with paragraph 6 of the Australian declaration. The *ICC Act* runs to some 189 sections and yet no mention is made of art 27. JSCOT in recommendation 8 suggested ‘the Attorney-General review the legislation to ensure the responsibilities required under Article 27 of the Statute are fully met’.¹⁰⁵ The Australian government response was only to note this recommendation, stating that Australian law makes no special provision for immunity of persons based on official capacity, excepting for those required under international law, such as the *Vienna Convention on Diplomatic Relations*. The government response also drew attention to art 98 of the *Rome Statute* and immunity given to persons from third states, which it had reflected in s 12 of the *ICC Act*.¹⁰⁶ Notwithstanding this interpretation, the importance of art 27 to the *raison d’être* of the Statute demands a statement to this effect in the implementing legislation, given the thoroughness the implementing legislation accorded to every other aspect of the *Rome Statute*.

¹⁰² *Situation in the Democratic Republic of Congo: Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58 (Pre-Trial Chamber I)*, ICC, [64] Un Doc ICC-01/04-01/07 (2006).

¹⁰³ ‘That provision is not reflected in the draft Australian legislation and so a question arises whether, by virtue of its omission, an official could claim immunity in Australian proceedings. Amnesty International Australia believes no official should be immune from criminal responsibility for acts contravening the statute and that article 27 should be embodied in Australian legislation. ... The government, in omitting article 27 from the legislation, may take the view that, because the statute renders the crimes specified in it enforceable, they could not be characterised as official acts. This may be so but it is undesirable for that aspect to be left in doubt – but it would, in any event, leave an official immune by virtue of his status and thus exempt from liability whilst he remains an official. ... so far as Australian legislation is concerned, we are troubled by the omission of any provision along the lines of art 27’: John Greenwell, *Reference: Statute for an International Criminal Court*, JSCOT Official Committee Hansard: JSCOT (April 27 2002) 272, 273–6.

¹⁰⁴ *A Guide to the report of the Preparatory Commission*, ICC, [10] – [11] UN Doc PCNICC/2000/1/Add.2 (2000).

¹⁰⁵ JSCOT, Commonwealth Parliament, *Report 45: The Statute of the International Criminal Court*, Recommendation 8 (2002) 84.

¹⁰⁶ See ‘Recommendation 8’ in: *Government Response to the Joint Standing Committee on Treaties Inquiry into the Statute of the International Criminal Court*, Federal Parliament, <<http://www.aph.gov.au/house/committee/jsct/governmentresponses/45th.pdf>> at 28 April 2009.

It is suggested that not only does the declaration amount to a hindrance to the smooth cooperation with the ICC, but it changes the *Rome Statute*'s legal effect, resulting in vagueness; at the very least it is an unnecessary obstacle, inconsistent with the object and purpose of the Statute. As such it carries the possibility of being construed by the ICC (which would have power to form a view on this as a *competence de la competence* issue), as a reservation prohibited by art 120.¹⁰⁷ The interpretation of the Australian declaration as in fact a reservation has also been made by Amnesty International:

Amnesty International considers that although the Australian unilateral statement has been incorporated into domestic law, it is contrary to some provisions of the Rome Statute and is therefore inconsistent with Australia's obligations under the Statute. Amnesty International considers that this statement amounts to a prohibited reservation and Australia should, therefore, withdraw it.¹⁰⁸

While the principle of complementarity means the domestic jurisdiction maintains dominance it cannot be forgotten that ultimately it is for an assessment at the international level to determine complementarity – particularly if the Attorney-General refuses consent under s 22 or s 29 of the *ICC Act*. Section 15 of the *ICC Act* reminds the Attorney-General of the power under art 87(7) of the *Rome Statute* to refer 'unwillingness of parties to investigate, prosecute or try an offender to the Assembly of States Parties or to the Security Council', and while it looks to support the operation of the ICC it seems inconsistent with the power given to the Attorney-General to prevent arrest or surrender under the Statute.

Commentators have noted the importance of ensuring the effective operation of the ICC through appropriate and workable state implementing legislation:

It is of little assistance to humankind for states to pay lip service to global ideals by becoming parties to international treaties and then being unable to give effect to their provisions because of technical reasons.¹⁰⁹

Katz¹¹⁰ has noted that in the South African implementing legislation¹¹¹ there appears to be a technical oversight in regard to the arrest and surrender requirements. In Australia there is a clear indication from the JSCOT hearings and the declaration that some 'reserve' exists in the outright support for the smooth and efficient operation of the ICC by the imposition of the unnecessary hurdle of the Attorney-General's exercise of an absolute discretion.

A The Consequences of Invalidity

So what then is the effect of the declaration, if it really is in the nature of a prohibited reservation? In a desire to encourage participation in the *Rome Statute* and in fact generally by states in multilateral treaties where there is an invalid reservation, the usual practice is to consider the reservation (declaration) as null and void while the state is still

¹⁰⁷ Triggs, above n 15, states: 'While these provisions appear to be valid under the Constitution, it remains open to the judgment of the ICC itself whether a State party "is unwilling or unable genuinely to carry out the investigation or prosecution" under Article 17 of the *Rome Statute*' at 16.

¹⁰⁸ Amnesty International, above n 14, 30.

¹⁰⁹ Anton Katz, 'An Act of Transformation. The incorporation of the *Rome Statute* of the ICC into national law in South Africa', (2003) 12(4) *African Security Review* 27, 29.

¹¹⁰ *Ibid.*

¹¹¹ *Implementation of the Rome Statute of the International Criminal Court Act (2002) South Africa.*

taken to be a party to the treaty.¹¹² In fact this was spelt out by those states objecting to the ‘effective reservation’ by Uruguay to the *Rome Statute*.¹¹³

If the Australian declaration were invalid, whether as a reservation prohibited by art 120 of the *Rome Statute*, or as a conditional interpretative declaration, or as conflicting with the object and purpose of the *Rome Statute* pursuant to art 19(c) of the *Vienna Convention*, there are a number of possible outcomes. The 18th meeting of chairpersons of the Human Rights Treaty Bodies reported on reservations in paragraph seven as follows:

The consequence that applies in a particular situation depends on the intention of the State at the time it enters its reservation. This intention must be identified during a serious examination of the available information, with the presumption, which may be refuted, that the State would prefer to remain a party to the treaty without the benefit of the reservation, rather than being excluded.¹¹⁴

The latter was the approach adopted by the ECHR in *Belilos*,¹¹⁵ in which the court decided that Switzerland’s desire to remain a party to the convention was stronger than its desire to maintain the reservation. Another approach is to follow the Human Rights Committee in its General Comment No 24, whereby such invalid reservations are severable and of no effect. It is important in this context that the invalid declaration is severable from the consent to be bound by Australia. This could raise considerable debate in the Australian political context given the submissions before JSCOT and the perceived threat to sovereignty caused by the ICC jurisdiction: if the declaration were invalid, this would alter the operation in Australia of the *Rome Statute*, and would demand substantial changes for the implementing legislation, altering the whole scheme of operation. In such a case it may be argued that respect for state sovereignty would enable Australia to reconsider its position, with possible withdrawal as an option.¹¹⁶ In the unlikely event that this position arose the outcome would be determined by Australia’s political climate at the time. In any event the overwhelming desire to encourage universal state participation is likely to result in the ICC taking a pragmatic approach that encourages Australia’s continued participation in the ICC.

This preliminary perspective on the importance of Australia’s declaration has significance when it comes to consideration of the operation of the complementarity principle. If the Attorney-General acts in a manner inconsistent with Australia’s

¹¹² *Vienna Convention* art 21(3); see also Pellet, *Meeting with Human Rights Bodies* above, n 61 [8], [13].

¹¹³ See, eg, Germany above n 67. Typical of the objections is Denmark’s:

"This objection does not preclude the entry into force of the Statute between Denmark and the Eastern Republic of Uruguay. The Statute will be effective between the two states, without the Eastern Republic of Uruguay benefiting from its reservations", CN.695.2002.TREATIES-30 of 9 July 2002 (Uruguay: Ratification).

¹¹⁴ *Report of the Meeting of the Working Group on Reservations*, UN HRI, 18th mtg of chairpersons of HR treaty bodies [7] UN Doc HRI/MC/2006/5 (2006).

¹¹⁵ See *Belilos* (1988) 10 EHRR 466 [60]: ‘In short, the declaration in question does not satisfy two of the requirements of Article 64 (art. 64) of the Convention, with the result that it must be held to be invalid. At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration. Moreover, the Swiss Government recognised the Court’s competence to determine the latter issue, which they argued before it. The Government’s preliminary objection must therefore be rejected.’

¹¹⁶ *Rome Statute* art 127.

obligations under the *Rome Statute* then that will involve Australia's responsibility under international law even if the Attorney-General is acting consistently with the declaration.

IV COMPLEMENTARITY – UNWILLINGNESS AND INABILITY

The complementarity principles contained in art 17(1)(a) and (b) have two main aspects – 1) unwillingness and 2) inability, to investigate, prosecute or try an offender.

The *Situation in Darfur: Prosecutor's Application* under art 58(7) of the *Rome Statute* provided the first test of the complementarity principle.¹¹⁷ The military in Sudan are given immunity from prosecution for crimes. The authorities in Darfur say they are ready and willing to investigate and prosecute the two individuals of concern, pointing to the fact that one of the individuals has been charged. Of significance, despite the breakdown of the court system in Sudan, inability has not been a ground relied on by the prosecutor. Rather, the fact the State of Sudan has failed to prosecute the individuals has made unwillingness the basis of the application:

The investigations being carried out by the relevant Sudanese authorities do not cover the same persons and the same conduct which are the subject of the Prosecution's case. ... Although investigations in the Sudan do involve Ali Kushayb, they are not in respect of the same incidents and they encompass a significantly narrower range of conduct. Having analysed all of the relevant information, the Prosecutor has concluded that the Sudanese authorities have not investigated or prosecuted the case which is the subject of the Application. On this basis, the Prosecution has concluded that the case is admissible. This assessment is not a judgement on the Sudanese justice system as a whole.¹¹⁸

The Pre-Trial Chamber I of the ICC in *Prosecutor v Thomas Lubanga Dyilo* divided the issue of admissibility into consideration of two aspects: complementarity and gravity.¹¹⁹ In relation to complementarity the Court emphasised the need to find a positive 'unwillingness' or a genuine 'inability' to carry through with a matter. For a matter to be inadmissible the state proceedings must cover both the person and the conduct of concern to the Court.¹²⁰ Charges must therefore reflect the true nature of the specific conduct. In the US, for instance, commentators have argued that military personnel often do not have the extent of conduct reflected in the nature of the charges laid before military courts-martial.¹²¹

If 'unwillingness' or 'inability' provide possible grounds for ICC intervention, there are a number of stringent processes that must be exhausted before the matter is admissible for trial. The prosecutor of the ICC has to first bring the matter before a pre-trial chamber of three judges who have to decide by a majority¹²² that there is a reasonable basis for the prosecutor to undertake further investigations in the matter and that it falls within the

¹¹⁷ *Situation in Darfur, the Sudan: Prosecutor's Application under Article 58(7) (Pre-Trial Chamber I)*, ICC, [251], [253]–[67] UN Doc ICC-02/05-56 (2007).

¹¹⁸ ICC Office of the Prosecutor, 'Prosecutor Opening Remarks: Situation in Darfur' (Press Release, 27 February 2007).

¹¹⁹ *Situation in the Democratic Republic of Congo: Decision on the Prosecutor's Application for Warrants of Arrest, Article 58 (Pre-Trial Chamber I)*, ICC, [29] Un Doc ICC-01/04-01/07 (2006).

¹²⁰ *Ibid* [31].

¹²¹ Thomas Wayne Pittman and Matthew Heaphy 'Does the United States Really Prosecute Its Service Members for War Crimes? Implications for Complementarity before the International Criminal Court' (2008) 21 *Leiden Journal of International Law* 165, 167.

¹²² *Rome Statute* art 57(2).

Court's investigative jurisdiction.¹²³ A refusal by the pre-trial chamber to authorise the investigation does not prevent the prosecutor presenting new facts or evidence at a latter date for reconsideration.¹²⁴ The Security Council has the ability to step in and prevent an investigation or prosecution from proceeding for a period of 12 months by a resolution under Chapter VII of the *Charter of the United Nations* and this can be ongoing through repetition of the process.¹²⁵

Upon the prosecutor's initiation of an investigation he may confidentially inform the state, and a state within one month of this notification can inform the Court that it is undertaking or has undertaken the investigation, in which case the prosecutor can defer to the state's investigation with the opportunity for ongoing review of the progress, or the prosecutor can request the pre-trial chamber to authorise his investigation.¹²⁶ An appeal against the pre-trial chamber's decision can be made by the state or the prosecutor in accordance with art 82 of the *Rome Statute*.¹²⁷ Once the prosecutor's investigations are complete, if the prosecutor decides there are sufficient grounds to continue he may seek a ruling from the trial chamber regarding questions of admissibility or jurisdiction.¹²⁸ Any challenges to jurisdiction or admissibility prior to the confirmation of charges are heard by the pre-trial chamber; after the accused is charged they are heard by the trial chamber and must be raised by a state at the earliest opportunity.¹²⁹ A challenge can only be made once, although there is a right of appeal to the appeals chamber.¹³⁰ The trial chamber has the ability under art 19(1) to satisfy itself regarding jurisdiction and admissibility before hearing a case. It is to be noted in regard to the pre-trial chamber that judges are appointed through an independent process and are not from the same pool of 18 judges that are selected to sit on the trial chamber.¹³¹

A Unwillingness

The first aspect of complementarity (unwillingness) presents greater concerns than the second (inability) in relation to the Australian declaration as it is largely determined by the political will of the national state. The submissions before JSCOT indicate a degree of nervousness about the admissibility of a case before the ICC on the basis of the subjective term 'unwillingness'. Some assistance as to what actions are likely to be interpreted as 'unwillingness' is given by art 17(2)(a)-(c). These include: proceedings undertaken in a way that would be interpreted by the ICC as being inconsistent with an intent to bring the person to justice, include attempting to 'shield' a person; unjustified delays consistent with an attempt to avoid justice; lack of independent or impartial dealing. Thus where the Australian authorities have undertaken normal legal investigations and proceedings with a view to prosecute a person for breach of a crime with which the *Rome Statute* deals and there is found to be no prima facie case, or if tried the person is found not guilty, the matter is likely to end there. However, if Australia did not proceed through the national channels in dealing with an alleged suspect and the charges did not cover the person or the conduct of concern and the Attorney-General

¹²³ *Rome Statute* art 15.

¹²⁴ *Rome Statute* art 15(5).

¹²⁵ *Rome Statute* art 16.

¹²⁶ *Rome Statute* art 18.

¹²⁷ *Rome Statute* art 18(4).

¹²⁸ *Rome Statute* art 19(3).

¹²⁹ *Rome Statute* art 19(5).

¹³⁰ *Rome Statute* art 19(6).

¹³¹ *Rome Statute* art 36(1).

employed the absolute discretion to protect senior government officials or military from arrest and surrender to the ICC then unwillingness would be an issue for the ICC.

B Inability

The second aspect of complementarity, inability, relates to situations where legal rather than political obstacles prevent Australia prosecuting. Article 17(3) of the *Rome Statute* suggests that inability arises ‘due to a total or substantial collapse or unavailability of a national judicial system.’ This could include such procedural concerns as inability of the investigative arm to function effectively due to issues with investigative powers or personnel. It may also include domestic state laws that provide immunity. However, it appears to relate mainly to failure of institutions, such as courts, due to internal state conflicts or other crises. In this event ‘inability’ is not as likely to be a major concern in the Australian context as is the concept of ‘unwillingness’.¹³²

C Australia’s Willingness

Notwithstanding the hurdle of the prosecutor, if a case were considered to be admissible after hearing by the pre-trial chamber and the Attorney-General refused to issue a certificate for the person, or persons, to be arrested under s 22 of the *ICC Act* then he or she is equally unlikely to issue a certificate for surrender under s 29. Professor McCormack’s statement in response to a question from Senator Bartlett during the JSCOT hearings is indicative:

Mr Bartlett – What if it came to a real showdown and they insisted that there was a case against an Australian who we were unwilling to prosecute? What happens in the case of a stand-off if any party simply refuses to hand over someone for prosecution?

Prof. McCormack – The critical question is who has custody, isn’t it? If we have custody of the individual and we say, ‘You can all go and get stuffed,’ then we will be criticised by the international community, and that is not an utterly uncommon experience in our case at the moment.¹³³

The object of the *Rome Statute* is to have states undertake at the national level the prosecutions of crimes covered by the Statute and it is only if and when this is not done that the ICC steps in as a back up to ensure there is no escape for such offenders and no longer impunity internationally. The cooperation of the state in this process is essential to the success of the ICC. The *ICC Act* gives the Attorney-General the prime role of liaising with and facilitating the ICC in its interactions within the domestic jurisdiction of Australia. There is an assumption, implicit in the operation of the *ICC Act* that it would never be the Attorney-General who would be the person of interest to the ICC and yet it is with leaders of states and organisations that the ICC, by its explicit agenda, is concerned.¹³⁴

¹³² Inability would not include situations referred to in the *ICC Act* where Australia may be duty bound by bilateral or other international agreements with a foreign state in which a conflict of interest may occur. Section 12 of the *ICC Act* refers to the need for the Attorney-General to ‘postpone the execution of the request unless and until the foreign country has made the necessary waiver or given the necessary consent’. To this extent Australia is not free to determine our position if we have obligations to a foreign country under international law; see also *Rome Statute* art 98.

¹³³ JSCOT, *Reference: Statute for an International Criminal Court*, Official Committee Hansard (9 April 2002) 257.

¹³⁴ *Prosecutor v Thomas Lubanga Dyilo*, above n 104, [63]: the Court affirmed the prosecutor’s policy of pursuing ‘those who bear the greatest responsibility’.

Provision should have been made in the *ICC Act* for an independent authority, such as the Commonwealth director of public prosecutions (DPP), to liaise with the ICC in situations where high level members of government are under investigation.¹³⁵ By giving the role to the Attorney-General it cannot help but give the operation of the *ICC Act* a political flavour. The office of the Attorney-General is not independent of the government of the day in the way that the office of the DPP is. It has been noted by one commentator that:

While it is highly improbable that an Attorney-General would permit prosecutions against members of his own government or officers of the defence forces, it becomes possible, for example, for any subsequent government to prosecute those who were responsible for any war crimes that might have been committed in the recent conflict in Iraq.¹³⁶

Given the position in Australia, which mirrors that of the USA,¹³⁷ with respect to the desire to maintain control over its own national military members and a policy of not subjecting them to prosecution in a foreign jurisdiction, it is unlikely any Australian Attorney-General would consent to such prosecution. Refusal by an Attorney-General to issue a certificate in such a case may be exactly the type of “unwillingness” that art 17 of the *Rome Statute* is designed to address. When it comes to senior political leaders, irrespective of party political persuasions, government members will always be slow to subject one of their number, even if from the opposition party, to such prosecutions, on the basis of a desire of reciprocity; to not be so subject themselves when in opposition.

It is submitted that what the *ICC Act* means for willingness then is that the very subjective non-contestable discretion of the Attorney-General will mean the ICC can never bring to account the senior leaders of both the government and the military of Australia, the very type of persons to whom the Statute is intended to cover, while they remain within Australian territory, Article 27 of the Statute enunciates this position clearly, and stresses that immunities attaching to the official position of a person, both under national and international law, will not prevent the exercise of jurisdiction by the ICC. It is of significance that this point was raised in the hearings before the JSCOT and the lack of provision in the implementing legislation addressing art 27 was noted but not addressed as discussed previously.¹³⁸ Perhaps the observations of Professor McCormack best summarise the realities of the Australian position:

The fact is that the International Criminal Court will be as subject to international political reality as any other multilateral institution in existence at the moment. By that I mean that it will be almost impossible for the court to prosecute an individual national of one of the five permanent members of the Security Council. The prospect of the court

¹³⁵ The Commonwealth Director of Public Prosecutions (‘DPP’) is an independent prosecuting agency established under the *Director of Public Prosecutions Act 1983* (Cth) (‘*DPP Act*’) and the director is appointed for seven years. The office is independent of the Attorney-General and the political processes. The Attorney-General is responsible to Parliament for the Commonwealth criminal justice system and decisions made by the director of public prosecutions. Under s 8 of the *DPP Act*, the Attorney-General has power to issue guidelines and directions to the DPP. However, that can only be done after there has been consultation between the Attorney-General and the DPP.

¹³⁶ Triggs, above n 15, 523.

¹³⁷ See generally, Remigius Chibueze, ‘United States Objection to the International Criminal Court: A Paradox of “Operation Enduring Freedom”’ (2003) 9 *Annual Survey of International & Comparative Law* 19, 36–46.

¹³⁸ JSCOT, above n 105.

being able to try Chinese officials for the one-child policy or US service men and women for alleged violations of the statute committed in Europe, or wherever else in the world, is extremely remote because of the political realities. It would be naive of me as an international lawyer to try and suggest that all we look at is legal technicalities. The court is not going to be able to deal with everything because it is going to be subject to that.¹³⁹

This political reality creates an unhappy bedfellow for an instrument that attempts to gain respect as an impartial international judicial organ. The role of gatekeepers such as the chief prosecutor of the ICC and the Attorney-General of Australia are pivotal to the effectiveness of the ICC. In this regard the chief prosecutor's role is somewhat unenviable and was certainly the subject of a great deal of contention during the Rome negotiations.¹⁴⁰

V GATEKEEPERS

A The ICC Chief Prosecutor's Role

One of the major concerns of states in the establishment of the ICC was the power given to the prosecutor. To be a legitimate and powerful institution the prosecutor needs to be independent. Alexander Downer, former Australian Foreign Minister, was concerned that the ICC's jurisdiction not be triggered other than by the Security Council under Chapter VII of the *Charter of the United Nations* or a state party.¹⁴¹ Ultimately this was not to be. At the Rome negotiations the Security Council permanent members, except for the United Kingdom,¹⁴² saw the prosecutor's power to initiate an investigation as giving away too much power and something that could politicise the office of the prosecutor. It is hard to see how this argument sustains itself, given that the purpose of the ICC is to prosecute senior political and military leaders, amongst others, for the most serious breaches of international law: an inherently politicised role. The relationship between the ICC and the Security Council was resolved during the Rome negotiations as a result of a compromise suggested by the Singaporean delegates. This compromise enables the Security Council to maintain a degree of control by passing a resolution to suspend a prosecution for 12 months.¹⁴³

It was perhaps fortunate that the position of the permanent members of the Security Council was overridden, providing a greater legitimacy for the ICC before the international community by enabling three possible avenues for matters to be brought

¹³⁹ JSCOT, above n 135, 252.

¹⁴⁰ Bellamy and Hanson, above n 6.

¹⁴¹ Ibid 418; see also Lamberto Dini, (Speech delivered at the Conference organised by '*Non c'è pace senza giustizia*' on the occasion of the opening of the United Nations Diplomatic Conference for the Establishment of the International Criminal Court, Rome, 11 June 1998): 'Moreover, it is necessary to oppose all those proposals that can compromise the action of the Prosecutor, restricting his autonomy excessively and dangerously. Another issue is whether the exercise of the Court's jurisdiction must be submitted to the prior consensus of the State. But the future of an international criminal Court is linked first and foremost to the preliminary acceptance of its competence and not to a subsequent acceptance; a choice in this sense would risk compromising the action of the jurisdictional body. Moreover, it is necessary to find a balanced solution to the problem of the relations with the Security Council, in order to prevent the Court from acting exclusively upon its authorisation. Finally, the obligations of juridical cooperation and assistance which rest with the States constitute another element on which the future Court's capability to operate lies. It is on this very collaboration that we must insist, in order to prevent this exercise of jurisdiction from lacking effectiveness.'

¹⁴² Bellamy and Hanson, above n 6, 429.

¹⁴³ *Rome Statute* art 16; see also Bellamy and Hanson, above n 6, 430.

before the court. These are: at the recommendation of the Security Council,¹⁴⁴ State parties,¹⁴⁵ or the prosecutor¹⁴⁶ (if the pre-trial chamber is satisfied that the prosecutor's investigations establish a serious and impartial case). Even individuals can make referrals to the prosecutor for consideration and the prosecutor can exercise his *proprio motu* powers in relation thereto.¹⁴⁷ In May 2008, the prosecutor received 1732 such communications from 103 different countries, 16 of which originated in Australia.¹⁴⁸

B The Australian Attorney-General's Role

The role of the Attorney-General as gatekeeper has to be considered seriously in the context of Australia's declaration regarding the required approval of the Attorney-General. The Attorney-General is a senior member of government and as such is at least technically someone to whom the *Rome Statute* could apply. While the Attorney-General is a member of the executive and legislative branch, and a person held in high regard, as are most senior military and civil leaders of Australian society, he or she is subject to the rule of law and needs to be seen to be so. In this regard some commentators do not see an issue - if such persons were to breach the laws of the Commonwealth they would be subject to those laws.¹⁴⁹ Others, however, remain unconvinced. The possibility of senior political figures breaching the laws that form the jurisdictional basis of the ICC is not a farfetched possibility when one considers this commentary of senior Australian QC Julian Burnside:

As part of the process of implementing the International Criminal Court regime, Australia has introduced into its own domestic law a series of offences which mirror precisely the offences over which the International Criminal Court has jurisdiction. So, for the first time since Federation, the Commonwealth of Australia now recognises genocide as a crime and now recognises various war crimes. The Australian Criminal Code also recognises various acts as constituting crimes against humanity.¹⁵⁰

Burnside then referred to s 268.12¹⁵¹ of the *Criminal Code* (Cth) 1995, which establishes as a crime against humanity imprisonment or severe deprivation of liberty under certain circumstances in violation of arts 9, 14 and 16 of the International Covenant on Civil and

¹⁴⁴ *Rome Statute* art 13(b).

¹⁴⁵ *Rome Statute* art 14(1).

¹⁴⁶ *Rome Statute* art 15.

¹⁴⁷ *Rome Statute* art 15.

¹⁴⁸ See, eg, Update On Communications Received By The Office Of The Prosecutor Of The ICC The Office of Prosecutor, < http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf> at 20 May 2008.

¹⁴⁹ 'It is inconceivable that the Australian government would forbid its own law enforcement agencies from investigating crimes covered by the *Rome Statute*. ... Such a situation would only come about if the Australian government chose to disregard entirely its own domestic legal obligations – an unlikely development': Bellamy and Hanson, above n 6, 431.

¹⁵⁰ See speech reported by Margo Kingston, 'Australian Crimes Against Humanity', *Sydney Morning Herald* (Sydney), 8 July 2003.

¹⁵¹ *Criminal Code Act 1995* (Cth) s 268.12: Crime against humanity – imprisonment or other severe deprivation of physical liberty:

(1) A person (the perpetrator) commits an offence if:

(a) the perpetrator imprisons one or more persons or otherwise severely deprives one or more persons of physical liberty; and

(b) the perpetrator's conduct violates art 9, 14 or 15 of the Covenant; and

(c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 17 years.

Political Rights (ICCPR). He proceeded to argue that the practice of mandatory detention as carried out by the Howard Government breached the elements of s 268.12:

Australia's system of mandatory, indefinite detention appears to satisfy each of the elements of that crime. Australia imprisons asylum-seekers. The United Nations Working Group on Arbitrary Detention has found that the system violates Article 9 of the ICCPR. Their conduct is intentional, and is part of a systematic attack directed against those who arrive in Australia without papers and seek asylum. They can readily be regarded as a 'civilian population'.

A simple analysis of the criminal code therefore suggests that senior ministers of the Australian government, specifically Mr Ruddock, senator Vanstone before him, Mr Andrews, and Mr Howard are guilty of crimes against humanity by virtue of their imprisonment of asylum-seekers. The prospect of their being prosecuted is remote, because the federal Attorney-General (presently Mr Ruddock) is the only person who can bring charges under these provisions.¹⁵²

This is not the first time in Australia that accusations of genocide or other serious crimes have been directed at senior government leadership. In the case of *Nulyarimma v Thompson*,¹⁵³ a case brought before the Australian Federal Court, the facts alleged that the Prime Minister, the deputy Prime Minister, a senator and member of the House of Representatives, acting in their official capacities, in supporting the Commonwealth Government's 'Ten Point Plan' and the Native Title Amendment Bill 1997 (Cth) had committed the criminal offence of genocide. The matter was eventually heard by a Full Court of the Federal Court. The claim alleged that the actions of the named government officials relating to native title and the listing of World Heritage sites were an act of genocide towards the Aboriginal people of Australia. The applicants contended, unsuccessfully, the universal crime of genocide had been incorporated as part of the common law of Australia and so without the need for legislation gave rise to criminal liability for acts of genocide (wherever committed), which could be tried in a national court of Australia.¹⁵⁴

Other serious accusations of genocide have been made against Australian public officials for their actions in forcibly removing Aboriginal children from their parents. While the newly elected Labor Government, as one of its first official actions in 2008, apologised to what has been labelled 'The Stolen Generation', the government is denying any wrongdoing that would entitle the people affected to compensation. Despite this in 2007 the South Australian Supreme Court in a landmark case was the first Court to award compensation.¹⁵⁵ A major national inquiry resulted in the 'Bringing them Home' Report produced in 1997; it found that many members of government had practised a culture of denial and that the forcible removal of indigenous children was a gross violation of human rights and an act of genocide contrary to the *Convention on Genocide*.¹⁵⁶

¹⁵² Julian Burnside, *Watching Brief: Reflections on Human Rights, Law, and Justice* (2007) 29.

¹⁵³ *Nulyarimma v Thompson* (1999) 96 FCR 153.

¹⁵⁴ Andrew D Mitchell, 'Genocide, Human Rights Implementation and the Relationship between International and Domestic Law: *Nulyarimma v Thompson*' (2000) 24 *Melbourne University Law Review* 15.

¹⁵⁵ *Trevorrow v State of South Australia* (2007) 98 SASR 136.

¹⁵⁶ Human Rights and Equal Opportunity Commission, *Bringing them home: The 'Stolen Children' Report* (1997); Sue Stanton, 'Time for Truth: Speaking the Unspeakable – Genocide and Apartheid in the "Lucky" Country' (1999) 14 *Australian Humanities Review* <<http://www.australianhumanitiesreview.org/archive/Issue-July-1999/stanton.html>> at 22 May 2009.

However, as the Court held in the *Nulyarimma* case the crime of genocide was not punishable under Australian law on the basis of the transformation principle, despite the *Genocide Convention Act 1949* (Cth) which acknowledged Australia's ratification of the *Convention on Genocide*.¹⁵⁷

These observations are made without any disrespect for the office of Attorney-General; however, one can never know what future times will bring to this office. The *ICC Act* places reliance on people in the executive political leadership to do the right thing and act in the right way. The *Rome Statute*, above all else, takes aim at those in positions of high authority. As noted in Professor McCormack's statement the *Rome Statute* risks very reasonable accusations of being a tool of the West or in other circumstances a mechanism for selectivity.¹⁵⁸

VI CONCLUSION

The question arises if the *Rome Statute* is designed to deal with the most senior leadership in perpetrating the four crimes under its jurisdiction – genocide, war crimes, crimes against humanity¹⁵⁹ and crimes of aggression (yet to be defined) – then by its very nature its operation will have political implications. The Australian legislation demands that the ICC, when seeking assistance in Australia, operate through the absolute discretion of the Attorney-General, one of our senior political leaders, thus politicising the process domestically. Even more concerning is the attempt in the *ICC Act* to remove any possibility of review of the Attorney-General's actions except by the Australian High Court.

The 2007 Labor Government has indicated a desire to engage with the United Nations in a spirit of cooperation.¹⁶⁰ Australia's human rights record stands to improve.¹⁶¹ The opportunity now exists: and the Australian Government should withdraw the Australian declaration to the *Rome Statute* in recognition of this renewed spirit of cooperation and accordingly amend the *ICC Act*. Australia would be given a strengthened voice at the international level if it was to do this, indicating a clear support for the ICC and a willingness not to see such serious crimes go unpunished no matter who has committed them.

¹⁵⁷ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, (1951) 78 UNTS 277 (entered into force 12 January 1951).

¹⁵⁸ JSCOT, *Reference*, above n 135; see also Wasil Ali, 'Sudan to behead any person attempting to extradite Darfur suspects', *Sudan Tribune* (Sudan) 2 March 2007: 'Taha stated that if the ICC wants to try criminals committing war crimes then it needs to start with US president George Bush and British Prime Minister Tony Blair for using weapons of mass destruction and phosphorous bombs in Iraq, southern Lebanon and Afghanistan. He pointed out that the ICC accuses his government of "burning straw huts while Bush and Blair burned towns with their fighter jets."'

¹⁵⁹ *Rome Statute* art 7; see Bellamy and Hanson above, n 6, 427.

¹⁶⁰ See, eg, Lindsay Tanner, *Australian Labor: Making Australia a Good International Citizen* (2008) Lindsay Tanner <<http://www.lindsaytanner.com/pcards/pcard3.html>> at 28 April 2009.

¹⁶¹ See generally Charlesworth et al, above n 5, 71–82; Triggs, above n 15.