Sovereignty and the International Criminal Court: An analysis of the submissions opposed to Australia's ratification

Mary Dean[#]

Background

On July 17, 1998, 120 members of the international community voted in favour of the creation of an International Criminal Court (ICC).[1] The ICC will operate as a permanent international tribunal to hear crimes that breach the ICC Statute. The purpose of the ICC, according to the United Nations Secretary General is to "ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity".[2]

Australia has been a strong advocate of the ICC since the end of World War II.[3] Government sources have predicated this support on the view that it is in Australia's national interest to work toward a peaceful international community where grave crimes do not threaten either individual countries or the larger global community.[4]

Before the ICC could commence operations, a total of 60 States were required to ratify the multilateral agreement by which it was created.[5] The required ratifications were received by May 2002, and the ICC Statute came into force on July 1, 2002 (Art. 126 of the ICC Statute).

[#] Honours LLB student, Southern Cross University. I would like to thank the anonymous reviewer and Associate Professor Sam Garkawe for their helpful comments on previous drafts of this article.

1 United Nations, *Rome Statute of the International Criminal Court Overview*, p1 <http://www.un.org./law/icc/general/overview.html> (18 March 2002)

2 United Nations, note 1

3 Department of Foreign Affairs and Trade, *National Interest Analysis*, p 1 http://www.austlii.edu.au/au/other/fdat/nia/2000/200024/html (18 March 2002)

4 Department of Foreign Affairs and Trade, note 3

5 *Rome Statute of the International CriminaI Court*, Article 126 <http://www.un.org/law/icc/statute/romefra.html> (31 March 2002)

In Australia the ratification process requires consideration of the proposed treaty by the Commonwealth Parliament's Joint Standing Committee on Treaties (JSCOT), the tabling of a report from this Committee before both Houses and the passing of the necessary enabling legislation.[6] Despite these requirements, and the fact that such a Committee had been constituted and was undertaking its inquiry, a media release issued on 12 December 1999 indicated that the Government had decided to ratify the ICC Statute.[7] This intention was again annunciated in media releases on 25 October 2000[8] and June 21 2002.[9]

However, debate about the merits of the ICC Statute cast a shadow over the desire of the Government to be amongst the first signatories. Although support for ratification was found amongst academics, recognised non-government organisations and individual members of the public, the same could also be said for the dissenting argument.

For example, the Law Council of Australia believed that "the new International [Criminal] Court … is one of the most significant advances in human rights in the last 50 years".[10] Australian Red Cross was of the view that "ratification is very much in the national interest"[11] and Garkawe, Orevich and Burton considered that the

---

6 See: <http://www.aph.gov.au/treaties/FAQ>

7 Minister for Foreign Affairs, Attorney General and Minister for Defence, *Joint media release -Australia Commits to International Criminal Court*, 12 December 1999, <http://www.dfat.gov.au/media/releases/foreign/1999/fa135_99.html> (25 March 2002)

8 Minister of Foreign Affairs and Attorney General and Minister for Defence, *Joint media release -Ratifying the International Criminal Court*, 25 October 2000, <http://www.dfat.gov.au/media/releases/foreign/2000/fa116_2000.html> (25 March 2002)

9 Howard J, Prime Minister of Australia, *International Criminal Court*, transcript, 21 June 2002 <http://www.pm.gov.au/audio/icctranscript.htmn> (21 July 2002)

10 Law Council of Australia, "Government urged to ratify International Criminal Court", *Australian Lawyer*, April 2001, p 1

11 Australian Red Cross - National Advisory Committee on International Humanitarian Law, *JSCOT Submission 26*, p 1 <http://www.aph.gov.au/house/committee/JSCOT/ICC/subICC.html> (18 March 2002)

advantages available to those first 60 countries to ratify made it "imperative" that Australia should do so as a matter of urgency.[12]

The Department of Foreign Affairs and Trade *National Interest Analysis* (*NIA*), which suggested that having the ICC Statute in place would materially benefit people's lives by achieving practical outcomes of an institutional nature, supported these arguments.[13] The Department saw the ICC as a "deterrent for individuals against the commission of atrocities and a deterrent for States against harbouring the perpetrators of atrocities".[14] As its mainstay, the *NIA* posited the view that a peaceful international community was best for Australia, and that the creation of the ICC would contribute to that end.[15]

In contrast, those who were not in favour of Australia's ratification of the ICC Statute argued on largely political grounds. For example, four parliamentarians grounded their view against the ICC in concerns about it's impact on Australia's criminal justice system, on perceived potential for political prosecutions, and on the non-signature of the United States of America (who voted against creation of the ICC).[16]

Additionally, the issue of the constitutionality of acceding to the authority of the ICC was questioned[17] as was the "broad and loose" nature of some of the definitions contained in the ICC Statute.[18] Professor Hilary Charlesworth noted concern about compromises with regard to jurisdiction,[19] and other submissions raised issues surrounding the ability to ratify but then remain exempt from the ICC Statute, the Statute's reliance on State cooperation to exercise its

---

12 Garkawe S, Orevich C and Burton S, "Why Australia should ratify the International Criminal Court Statute? *International Commission of Jurists (Qld Branch) Newsletter*, February, 2002, p 3

13 Department of Foreign Affairs and Trade, note 3

14 Department of Foreign Affairs and Trade, note 3, p 2

15 Department of Foreign Affairs and Trade, note 3, p 1

16 The Parliament of the Commonwealth of Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Australia's Role in United Nations Reform*, Canberra, June 2001, p 273.

17 Winton, Professor G, JSCOT Submission 231

18 Egan R, "International Criminal Court: Parliament By-passed" *News Weekly*, 18 November, 2000, p8

19 Charlesworth Professor H, JSCOT Submission 33 <http://www.aph.gov.au/house/committee/JSCOT/ICC/subICC.html> (18 March 2002)

jurisdiction and finally, the perceived lack of advantage in recognising the ICC.[20]

Of all the issues raised however, the most frequently articulated related to the perceived loss of sovereignty that accompanies ratification of the ICC Statute.[21] One writer suggested that ratification was "unwarranted, unjustified, undemocratic and un-Australian".[22] Another suggested that it was "the final nail in the coffin containing the remnants of our freedom, sovereignty, and independence" and accused the Government of treason and sedition.[23] A third argued that, because some decisions could be taken without Australia's consent, sovereignty was being surrendered, without an appropriate benefit in return.[24]

Given the vehemence and volume of dissenting voices on this issue, the question that requires an answer is whether those who are speaking against ratification are using a construction of the concept of sovereignty which is in keeping with that used by the political decision makers. If it is not, such views may be disregarded as non-conformist, and therefore outside the scope of legitimate dissent.

To address this question, this paper will provide an historic overview of the development of the concept of sovereignty, and undertake a critical analysis of its application to the submissions opposed to Australia's ratification of the ICC Statute.

A brief overview of the ICC Statute[25]

Before progressing further, it may be useful to outline the key features of the ICC Statute itself.

---

20 The Parliament of the Commonwealth of Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade, note 17, p171-174

21 A summary of the arguments raised can be found in Report 45, *The Statute of the International Criminal Court*, Joint Standing Committee on Treaties, The Parliament of the Commonwealth of Australia, May 2002, p 16, footnote 1.

22 Spry I, JSCOT Submission 18

23 Beckett J, JSCOT Submission 11

24 Stone J, JSCOT Transcript of Evidence, 13 February 2002, TR 90

25 This overview is based on the Chapter 8, *Australia's Role in United Nations Reform*, note 17. For a more detailed overview see: Schabas W, *An Introduction to the International Criminal Court*, Oxford University Press, 2001

The ICC Statute is a complex document with over 120 provisions. The Statute provides for the establishment of the ICC in The Hague once 60 States have ratified it. The ICC will be an independent institution, with links to the United Nations, and will deal solely with the prosecution of individuals (aged over 18 years – Art. 26) for criminal offences outlined in the ICC Statute. The crimes to be tried by the ICC reflect "the most serious crimes of concern to the international community…", namely, the international offences of genocide, war crimes and crimes against humanity (Art. 5(1)). The crime of aggression will be included once a definition of this offence can be agreed (Art. 5(2)). The jurisdiction of the ICC is not retroactive, and will only cover offences that occur after July 1, 2002 (Arts. 11(1) & 22(1)).

States party will elect eighteen judges, each of whom must have extensive credentials and experience either in the field of criminal law and procedure or in areas of international law including human rights law and international humanitarian law. These judges will represent the world's principal legal systems and geographic areas (Art. 36). In addition, a Prosecutor, independent of the ICC, will be elected by States party to the ICC Statute (Art. 42(4)). The Prosecutor will have the authority to initiate prosecutions of his/her own volition (Art. 15(1)).

The ICC Statute gives preference to prosecution within national criminal justice systems, and cannot investigate or prosecute a matter that has been dealt with by a national court. This is called the 'complementarity' principal (Preamble & Art. 1). There are two exceptions: when the national system is unwilling or unable to conduct a prosecution, or when it is apparent that a sham proceeding has been conducted (Art. 17).

The ICC may additionally exercise its own jurisdiction if either the Prosecutor commences a proceeding by his/her own motion, or if a State Party refers a matter to the Prosecutor (Art. 14). In both these circumstances, the offence must have occurred in the territory of a State Party or the accused must be a national of a State Party. The ICC may also exercise its jurisdiction in any territory if requested to do so by the United Nations Security Council acting under Chapter VII of the UN Charter (Art. 13(b)). In this event the ICC will have jurisdiction regardless of whether the State concerned is a party to the ICC.

The ICC will adopt a mix of both Civil and Common Law doctrines, but will always accept a presumption of innocence and will require proof to the Common Law standard – beyond reasonable doubt (Art. 66). There will be no statute of limitations to prevent prosecution of crimes (Art. 29), and Heads of States and other officials will not be able to claim traditionally available immunity (Art. 27).

The defences of insanity, intoxication, self-defence or the defence of others, and duress are available (Art. 31), but the defence of superior orders is only available in limited circumstances (Art. 33).

The ICC can impose sentences up to life imprisonment (Art. 77), and States cannot abrogate this. The ICC can also impose civil penalties including fines and forfeiture of property, which State Parties are obliged to administer. States Parties must also agree to extradite individuals sought by the ICC, and are required to surrender evidence and provide assistance to the Prosector as required (Art. 86).

This then, represents the body of law dissenters sought to prevent Australia from accepting.

Methodology

The object of this article is to examine the way in which sovereignty is used in the argument of those who do not favour Australia's ratification of the ICC Statute. The content of both written submissions and direct testimony presented to the JSCOT will be considered for this purpose.

This analysis is characteristic of hermeneutics – a branch of the interpretive theoretical perspective which sees documents, and the text they contain, as a way of transmitting meaning – experience, beliefs and values - between members of a community.[26] In this context, 'text' refers to content and meaning, rather than to the linguistic structures of written discourse or speech.[27]

This study is based not in interpretation of the law itself, but rather in looking at the context and attitudes of those people who express an

---

26 Crotty M, *The Foundations of social research: meaning and perspective in the research process*, Allen & Unwin, St Leonards, 1998, p 5, 91

27 Douzinas C and Warrington R, *Postmodern jurisprudence: The law of text in the texts of law*, Routledge, London, 1991, p 38

adverse opinion about the value of ratification. On this basis, the research will not fall into the 'black letter', doctrinal research paradigm, but rather will be utilising a broader social science perspective, reflective of the 'theoretical research' paradigm.[28]

In particular, Critical Theory will provide the framework for analysis. Such a framework recognises the social construction of experience and considers that all discourses (for example, sovereignty) are the result of power relations in a social and historical context. [29]

The work of Foucault, in recognising that power is implicit in any discourse,[30] will guide more detailed analysis.

Foucault was critical of the Marxist and traditional liberal notions of power, which he viewed as repressive or negative.[31] Rather he viewed power as positive, arguing that it produced reality, domains and rituals of truth.[32]

Foucault also suggested that power was not held in a single source, but rather that it existed at many levels and in many locations throughout civil society.[33]

As a result of these arguments, Foucault de-emphasised the importance of the sovereign command imposing constraint from above, and suggested that instead, a web of power existed at a micro level. Accordingly, "power cannot be taken, used or possessed, but is a relation, something exercised through particular techniques and strategies in particular situations".[34]

---

28 Pearce Committee Report, *Australian law schools*, 1987, vol 2 para 9.15, as quoted in: Schillmoller A, *Legal Research: Methodologies and Perspectives* Southern Cross University, Lismore, 2001, p 17

29 Kincheloe J and McLaren P, "Rethinking Critical Theory and Qualitative Research" in Denzin N and Lincoln Y (eds), *Handbook of Qualitative Research*, Sage, Publications, New York, 1994, p 139

30 The definition of discourse varies, but considering discourse as' speech or writing seen from the point of view of the beliefs, values and categories which it embodies' is useful. See: Schillmoller, note 28, p 2

31 Bateup C, "Power v The State: Some cultural Foucauldian reflections on Administrative Law, corporatisation and privatisation" (1999) 3 *Southern Cross University Law Review* 88

32 Foucault M, *Discipline and Punish*, Pantheon, New York, 1977, p 194

33 See generally: Foucault, note 32

34 Bateup, note 31, p 91

Further to this, Foucault developed a notion whereby the State, because of the existence of power in many locations, became a conglomerate of "institutions, procedures, tactics, calculations, knowledges and technologies, which together comprise the particular form of government".[35] He referred to this as the notion of "governmentality", and posited that "it is the tactics of government which make possible the continual definition and redefinition of what is within the competence of the State and what is not, the public versus the private, and so on".[36]

This use of the dichotomy of inside/outside is reflective of post-structural critical thought.[37] As Davies explains, the existence of a limiting mark, or trait, for any area of knowledge (like governance) is required to allow for differentiation. However, the boundary or the limit is itself neither inside nor outside the area of knowledge.[38]

This inside/outside dichotomy will be used in conjunction with Foucault's concepts of power and governmentality to provide a basis for analysis of the call to sovereignty in the dissenting texts.

Method

In all, 252 submissions were made to the JSCOT with regard to the issue of ratification of the ICC Statute. Of these, approximately 30 were from Government departments or non-government organisations. The remaining 220 submissions were made by private individuals.

A randomly selected sample of 54 (25%) was used to determine that nearly 85% of private submissions indicated a view that Australia should not ratify the ICC Statute. In addition, three private individuals attended the public hearings conducted by the JSCOT to advocate their position against ratification.

Both the written submissions and oral testimony of those who appeared before the JSTC were used to provide data for analysis. In

---

35 Bateup, note 31, p 95

36 Foucault M, "Governmentality", in Burchell G, Gordon C and Miller P (Eds), p 1, cited in Bateup, note 31, p 96

37 Davies M, *Asking the law question*, The Law Book Company, Sydney, 1994, p 258

38 Davies M, note 37, p 267

addition, a selection of comments from other submissions against ratification were included.

Initially, the qualitative research technique of theme analysis was used to find the patterns in the data – these reflect value statements, similar features and recurrent concepts.[39] A discursive analysis process was then used to expose the structures of power and governance, and to locate these in the wider historical and social contexts of sovereignty.

What is sovereignty?

Although having neither sole nor scientific definition[40] sovereignty can be discussed in terms of both national governance and international relations.[41] It must also be understood in relation to its given meaning in any specific time or space.[42]

With this in mind, the following will provide first an overview of the philosophical development of the concept of sovereignty, then an account of its practical application in international governance. As a result, it will be possible to deconstruct current debate, looking at contemporary meaning.

Philosophical theories of sovereignty

As Elshtain notes:

> Sovereignty is an heroic and contradictory narrative. It is the story of civil peace and unity on the one hand, and of the necessity of war and State violence in the other. This narrative gained ascendancy and had held sway as a particular historic

39 Neuman L, *Social research methods: Qualitative and quantitative approaches*, 2nd ed, Allyn and Bacon, Massachusetts, 1997, p 406, 411

40 Koskenniemi, M "The future of Statehood" (1991) 32(2) *Harvard International Law Journal* 404

41 Makinda S, "The United Nations and State Sovereignty: Mechanisms for managing international security" (1998) 33 (1) *Australian Journal of Political Science* 103

42 Camilleri J and Falk J, *The end of sovereignty? The politics of a shrinking and fragmenting world* Edward Elgar, Aldershot, 1992, p 12

> configuration, a response to concrete pressures and problems.[43]

One such 'problem' existed in Europe during the 17th Century – the Thirty Years War that had embroiled several European powers and parts of the Holy Roman Empire in ongoing conflict.[44] As the traditional means of ending battle was for one army to be victorious in gaining control of the territory of another, the situation in which no army could claim such control had led to a state of chaos.

The Peace of Westphalia, declared in1642, ended the conflict and "redefined sovereignty in terms of autonomy, population, territory and secular authority".[45] Many argue that this created the modern concept of the nation-state, and as a result State sovereignty has become "recognised as the primary constitutive principle of the modern political system".[46] The 1642 accord has also been seen as the point of triumph of the secular over religious power, and marks a "clean break between the social formations of Christendom and subsequent sovereign communities".[47]

In considering the development of secular superiority, Elshtain notes that early theories of State power are "parasitic upon a singular, sovereign, masculinised deity".[48] Bodin, writing at the time of the Peace of Westphalia, reinforced the State sovereign/God replication when he insisted that the State sovereign cannot himself (as he would have undoubtedly been male) be subject to the commands of another.[49]

---

43 Elshtain J, "Sovereign God, Sovereign State, Sovereign Self" (1991) 66 *Notre Dame Law Review* 1355

44 Gross L, "The Peace of Westphalia 1648 –1948" (1948) 42 (20) *American Journal of International Law* in Steiner H and Alston P, *International Human Rights in Context*, Clarendon Press, Oxford, 1996, p 148

45 Makinda, note 41, p 104

46 Walker R, "Sovereignty, Identity and Community: Reflections on the horizons of contemporary political practice" in Walker R and Mendlovitz S, *Contending Sovereignties: redefining Political Community*, Rienner, Boulder, 1990, p 159

47 Orford A, "The uses of sovereignty in the new imperial order" (1996) 6 (2) *The Australian Feminist Law* Journal 67

48 Elshtain, note 43

49 Bodin J, in Franklin J (ed), *On Sovereignty*, Cambridge University Press, Cambridge, 1992, p 1 cited in Elshtain, note 43

This position is what Elshtain describes as the "standard narrative, the classic theory in which sovereignty is seen as indivisible and inalienable, supreme and above all else". He also notes that this position is more than theoretical – involving civil order, individual identity, and world-views of personal safety.[50]

Campbell agrees that effective political order can be achieved by using the promise of security[51] - a notion first posited by Hobbes in his description of the anarchic state of nature, which he used to justify the imposition of sovereign authority.[52] In the view of both Bodin and Hobbes, this need for security can be seen as the justification for sovereign absolutism in two instances – firstly, when chaos threatens and peace and order must be maintained at any price, and secondly when the exclusive territory of the State is under attack.[53] These two situations can be tied back to the "concrete pressures and problems" that Elshtain has identified as part of the narrative of sovereignty itself.

In this view of the discourse of sovereignty, individual citizens surrender their personal sovereignty for the collective security offered by the State. This allows for the State sovereign to be habitually obeyed, giving rise to the Austinian view of positive law – the command of the sovereign is absolute, and the position of non-sovereign members of the society is "a state of subjection, a state of dependence".[54] It is this autocratic view of sovereignty that is usually preferred by dictatorial or authoritarian regimes,[55] bringing them into conflict with those who favour liberal democratic principles.[56]

In contrast, John Locke, an early liberal thinker, was of the view that the preservation of individual rights was the sole and only legitimate purpose of the State.[57] For Locke, the State derived its power from

---

50 Elshtain, note 43

51 Campbell D, *Writing security: United States Foreign policy and the politics of identity*, Manchester University Press, Manchester, 1992, p56

52 Orford, note 47, p 67

53 Elshtain, note 43

54 Freeman M, *Lloyd's Introduction to Jurisprudence*, 6th Ed, Sweet Maxwell, London, 1994, p 261

55 Makinda, note 41, p 105

56 Makinda, note 41, p 105

57 Voon T, "Multinational enterprises and state sovereignty under international law" (1999) 21 (2) *Adelaide Law Review* 223

the consent of the people, and retained that power only so long as it acted in the interests of the people.[58] This popularist or empirical view of sovereignty stands in complete juxtaposition to that of autocratic sovereignty. The first requires legitimacy given by the will of the people, and the second claims complete authority by reason of the subjugation of the people.

Modern day, Western-oriented philosophical theorists favour the more liberal view of sovereignty, giving rise to State intervention only in those circumstances where the civil population favours it.[59] Indeed, according a 1995 report from the Commission of Global Governance "sovereignty ultimately derives from the people. It is a power to be exercised by, for, and on the behalf of the people of the State".[60]

Sovereignty theory in practice

Since the recognition of secular, territorial State sovereignty as an outcome of the Peace of Westphalia, the use of State sovereignty in political practice has varied in regard to its legitimating principles and norms.[61]

Cassese describes the early international community as an individualistic relationship among States, where each territorial possessor was "concerned only with its own well-being and its freedom of manoeuvre, pursing its own economic, political and military interests".[62] In Cassese's view the will of the people was "overshadowed and absorbed" by the power of the sovereign – who may have been autocrat, monarch or powerful elite.[63]

After the Treaty of Versailles (1919) sovereignty became associated with self-determination, non-aggression and the peaceful settlement of disputes – the "nationalist norm".[64] Powerful colonial States did not

---

58 Camilleri and Falk, note 42, p 20-21

59 Makinda, note 41, p 106

60 Commission on Global Governance, *Our Global Neighbourhood,* Oxford University Press, New York, 1995, p 69

61 Makinda, note 41, p 102

62 Cassese A, *Human Rights in a Changing World*, 1990, p 13 cited in Steiner and Alston, note 44, p 155

63 Cassese, note 62, p 13

64 Makinda, note 41, p 104

however, consider that this view was applicable to their colonial territories, suggesting the nationalist norm was not enough to gain sovereignty for all entities. The nationalist norm was again applied after World War II, but, whilst still recognising nationalistic independence, was more directly related to whether the emerging State could maintain its territorial sovereignty.[65]

Following the end of the Cold War (1980s), the practical notion of State sovereignty has again been redefined to fit the changing requirements of global politics. Makinda suggests that the focus has now shifted to internal governance and popularist empirical sovereignty – a democratic norm that emphasises liberal democracy and internal legitimacy.[66]

In practical application, the notion of sovereignty has shifted from one based on territorial protection, through one based on the independence of States as recognised by other States, to a more recent position reflecting the internal governance of the nation. This reflects three major aspects of sovereignty – territorial, external and internal,[67] and the following passage provides useful working definitions of each of these:

> The territorial aspect of sovereignty is the complete and exclusive authority which a state exercises over all persons and things found on, under or above its territory.
>
> The external aspect of sovereignty is the right of the state freely to determine its relations with other states or other entities without the restraint or control of another state. This aspect of sovereignty is also known as independence. It is this aspect of sovereignty to which the rules of international law address themselves primarily.
>
> The internal aspect of sovereignty is the state's exclusive right or competence to determine the character of its own institutions, to ensure and provide for their operation, to enact laws of its own choice and ensure their respect.

---

65 Jackson R, *Quasi-States, Sovereignty, International Relations and the Third World*, Cambridge University Press, Cambridge, 1990, p 13 cited in Makinda, note 41, p 106

66 Makinda, note 41, p 106

67 Burmester H, "National sovereignty, independence and the impact of treaties and international standards" (1995) 17 *Sydney Law Review* 130

> Sovereignty as so defined [the sum total of all three aspects] is the most fundamental principle of international law because nearly all international relations are bound up with the sovereignty of states.[68]

Sovereignty and International law

International (public) law is related to the regulation of entities who possess and exercise rights, and who are bound by duties, in the international arena.[69] Foremost amongst the growing number of legal personalities to be encompassed by this branch of the law are States.[70]

Through the creation of the United Nations at the end of World War II, the international community of States acknowledged and supported the regulation of matters that impact on peaceful coexistence. It has been asserted that, in fact, the United Nations has become the most powerful norm setting and norm regulating body in international law.[71]

The Charter of the United Nations provides insight into the view of State sovereignty that has been promulgated over the last 50 years. Article 2(1) of the Charter articulates the basic premise that the United Nations recognises the sovereign equality of all its (State) members.[72] Article 2(4) prohibits the threat of use of force by any State against the political independence or territorial integrity of another sovereign State. Article 2(7) prohibits intervention in matters that are essentially in the domestic jurisdiction of any State. These guiding principles appear to give recognition to the definitions of territorial, external and internal sovereignty outlined above.

The process of decolonisation has been responsible for bringing the essentially Western notion of State sovereignty to all parts of the

---

68 Sorensen M (ed), *Manual of Public International Law*, (1968), p 523 cited in Burmester, note 67, p 131

69 Blay, S, Piotrowicz, R and Tsamenyi M, (eds) *Public International Law: An Australian perspective*, Oxford University Press, Oxford, 1997, p 41

70 Blay, note 69, p 41

71 Makinda, note 41, p 106

72 United Nations Charter, <http://www.un.org/charter>

modern world.[73] Prior to World War I the powerful colonial empires – UK, France, Spain, Portugal, Belgium, Russia and the Ottomans, dominated the international community. However, the recognition of nationality based on ethnic and cultural cohesion and the gaining of independence by colonised territories resulted in the number of sovereign States recognised by the United Nations increasing to 165 by 1970.[74] Further States have been created by the collapse of socialism in Eastern Europe and political changes in the Baltic region. In September 2002, the United Nations admitted East Timor, its 191st member.

For each of these States, the Articles of the United Nations Charter that adopt and protect State sovereignty, are both sword and shield against interference from/by other States. As Brownlie suggests:

> Sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having legal personality. If international law exists, then the dynamics of state sovereignty can be expressed in terms of law, and as states are equal and have legal personality, sovereignty is in a major aspect a relation to other states (and to organizations of states) defined by law.[75]

Accordingly, international law protects and in fact requires the existence of equal and independent sovereign States. But States "do not exist in splendid isolation".[76] The absolute sovereignty of States is not recognised by either customary international law or the Charter of the United Nations[77] and the notion of equality between States "at least implies that the sovereign rights of each State are limited by the equally sovereign rights of others".[78]

---

73 Makinda note 41, p 107

74 Blay, note 69, p 43

75 Brownlie I, *Principles of Public International Law*, 4th Ed, 1990, p 287 cited in Steiner and Alston, note 44, p 154

76 Burmester, note 67, 131

77 Burmester, note 67, p 131

78 Hannum M, *Autonomy, Sovereignty and Self-determination*, (1990) p 15 cited in Burmester, note 67, p 131

So, for Hannum:

> Sovereignty in its original sense of 'supreme power' is not merely an absurdity but an impossibility in a world of states which pride themselves upon their independence from each other and concede to each other a status of equality before the law.[79]

This then gives rise to the possibility that States, by mere recognition of the existence and supremacy of international law, are less than sovereign as a result of their agreement to curtail their own power. Certainly, such recognition would fail to meet the Austinian requirement that the sovereign must not be accountable to any other body, but there are writers who argue that the ability of the State to choose to submit to external regulation is in itself an act of sovereign power.[80]

This voluntarist view, in which consent saves sovereignty, is based on two underlying premises – that international law cannot be imposed without consent, and that absolute State sovereignty includes the right to accept restraint on power.[81]

Koskenniemi argues that consenting to limitations allows States to define and domesticate those limitations, and in so doing to confirm the authority of the State as the source of the rights that flow from the constraints on its power.[82] MacCormick has suggested that one way in which States maintain their sovereignty is by having the concomitant power to 'undo' international agreements to which they have consented.[83]

In contrast, Voon argues that there are three circumstances in which international law can be imposed without consent, thereby defeating the argument of those who take a voluntarist position. She suggests firstly, the position when a new State emerges (as it will be

---

79 Hannum, note 78

80 Koskenniemi, note 40, p 397

81 Voon, note 57, p 227

82 Koskenniemi, note 40, p 406

83 MacCormick N, "Beyond the sovereign state" (1993) 56 (1) *Modern Law Review* 3. However, this option does not always exist – for example the International Covenant on Civil and Political Rights has no revocation clause.

automatically subject to existing international customary laws). Secondly, when customary international law does not allow for derogation; and finally when the United Nations Security Council uses force against a sovereign State under Article 42 of its Charter (preventing disruption to peace and security).[84]

In relation to the acceptance of restraints, the International Court of Justice noted, as early as 1923, that

> [t]he Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty … the right of entering into international engagements is an attribute of State sovereignty.[85]

Whilst Austin would not accept this reasoning, it has become a cornerstone in the modern discourse of State sovereignty. Under this view, States are seen to exercise their sovereign power by choosing to act in a particular way in the future.[86] The opposite view would hold that States have surrendered their power to act in the prohibited way. But, "sovereignty is relative"[87] and at some stage, the degree of restraint accepted may amount to subjugation. This may happen when a State surrenders its right to manage its own external affairs,[88] or when the granting of extra-territorial rights becomes excessive.[89] Burmester further suggests that

> [i]n referring to the 'sovereignty' of a state it is, therefore necessary to distinguish the right of a state to decide what constraints it will accept over the exercise by it of its jurisdiction over its territory and people, and the situation where a state has given away such a high proportion of its powers that it is no longer properly described as sovereign.[90]

---

84 Voon, note 57, p 228

85 *The SS Wimbledon* [1923] PCIJ (Ser A) No 1, 25

86 Voon, note 57, p 229

87 Burmester, note 67, p 133

88 *Customs Union with Austria* [1931] PCIJ (Ser A/B) No 41

89 Brownlie, note 75, p 76

90 Burmester, note 67, p133 citing Brownlie, note 75 at p 79

Some would argue that the growth in international law has meant that all States have already reached the point where sovereignty is surrendered.[91] This point is illustrated by the following:

> Classical international law was more or less an inter-state law of peaceful coexistence, dealing with a few topics, which ranged from war and neutrality to the conquest and cessation of territory, from external trade to diplomatic law. Modern international law, by contrast, endeavours to be a law of economic, social, cultural, technical and civilizing cooperation, sometimes even integration and subordination, which aims at regulating problems of development, human rights, communication and traffic, environment, education, labour, science and technology, nutrition and health, resources and energy.[92]

Indeed, apart from the specific restraints imposed by the ratification of treaties, States are also subject to the decisions of international adjudicatory bodies, reporting mechanisms and complaint bodies, and the determinations of international agencies that have been authorised to set standards and regulations.[93]

The end of sovereignty as we know it?

Given the foregoing, in a world where globalisation is the most recent manifestation of the liberal paradigm, the concept of State sovereignty is under challenge.

Orford describes this challenge as a "crisis of sovereignty"[94] and suggests that there are four prevalent views with regard to addressing this crisis. These are firstly, to fight to maintain the traditional notion of sovereignty, secondly to accept that State sovereignty, though not without difficulty, remains useful, thirdly to replace the sovereignty of

---

91 See MacCormick, note 83, for example.

92 Wildhaber L, "Sovereignty and International Law" in Macdonald R & Johnston D, *The Structure and Process of International law*, 1983, p 438, cited in Burmester, note 67, p 132

93 Burmester, note 67, p 141

94 Orford, note 47, p 68

States with sovereignty of a larger organisational unit, and finally to accept that the concept of sovereignty is no longer relevant.[95]

Scholars have various opinions as to which of these approaches is possible, necessary or practical. It is beyond the scope of this paper to do justice to each of these arguments, but the following extracts from a discussion between three academics may be illustrative:

> [The state] is the biggest building block we have to build political institutions at the minute. But it doesn't function when you're dealing with AIDS, or ideas, or communications, or the new global capital markets, or the electronic transfer of money, or currency speculation, just to name a few things.
>
> It may be time to try and abolish this mythology of sovereignty. It used to be a kind of a mantra, as though it gives an answer to everything. It seems to me the issue is not sovereignty, but international governance, and what states in a state system have to agree so that we have a civilised world.
>
> The real question is: in a decent world, what is best left to local activity and what requires international governance?[96]

It is in regard to the final question posed above that contention over the rights and powers of sovereign States is so hotly contested. This issue is at the heart of the controversy in Australia regarding ratification of the ICC Statute.

State sovereignty and the outsiders

Before leaving this standard narrative on the subject of sovereignty, it is worth noting that the narrative itself remains incomplete.

Orford argues that marginalised groups (indigenous peoples, women, the mentally ill and refugees are examples) have always been "beyond the sovereign State",[97] and that as a result they have been denied the power of self-determination and participation in the political arena.

---

95 See: Orford, note 47, p68-69 for a discussion of these viewpoints.

96 Urquhart B, Henkin L and Bulter R, "Yesterday's politics, tomorrow's problems: A world without the United Nations?" (1995) 20 (1) *Melbourne University Law Review* 1

97 Orford, note 47, p 71-72

Knop suggests that this is because of the process of development of international law – where the power of the sovereign in regard to domestic affairs was respected and unquestioned.[98] In this sphere "women [and other less powerful groups of citizens] are analytically invisible because they belong to the State's sphere of personal autonomy".[99]

The result of this "boundary-defining discourse of sovereignty"[100] is a failure to sever politics from non-politics, and this has resulted in a narrative in which only the most powerful voice is heard.

Chesterman[101] agrees that sovereignty is rooted in an oppositional framework, where the power of the one over the other prevails. As a result, differing approaches, like a cooperative model, are left out of the narrative because they do not conform to broadly accepted truths about how the game is played.

On this view then, sovereignty is clearly about power. The maintenance of the notion of State sovereignty protects those who currently have power, and prevents others from influencing how that power is used in the international arena. It could be argued that a move to interpreting State sovereignty in terms of expressing the democratic will of the people, as suggested by both Locke and the Committee on Global Governance, would expand the narrative to a more inclusive place.

The Current Debate – Sovereignty and the ICC

As mentioned at the outset, concern about Australia's loss of sovereignty as a result of ratifying the ICC Statute led to many submissions and much debate before the Parliamentary Joint Standing

98 Knop K, "Re/statements: Feminism and State Sovereignty in International Law" (1993) 3 *Transnational Law and Contemporary Problems* 293

99 Knop, note 98, p 295

100 Elshtain, note 43

101 Chesterman S, "Law, subject and subjectivity in international relations: International law and the postcolony" (1996) 20 (4) *Melbourne University Law Review* 991

Committee on Treaties. In fact, this issue was listed first among five areas of concern identified in the final report of the Committee.[102]

The writer's thematic analysis of the arguments raised in both submissions and evidence before the Committee indicated that this concern is of three types. The first can be classified as of a generic nature, dealing primarily with the process of treaty ratification. The second deals with the impact of the ICC Statute on national affairs. The third deals with substantive concerns about various provisions of the ICC Statute, and how they impact on the freedom of both Australian nationals and Australian institutions. Each of these will be addressed in the following discussion.

Treaty ratification

Some submission writers were clearly of the view that the process by which Australia becomes party to international treaties was in itself responsible for the diminution of sovereignty. For example, June Beckett suggests:

> The wishes and needs for the people of all nations are being subverted in deference to the personal whims and desires of the international elite and big business who have no compunction in imposing their rules and their not-so-secret agenda on to the largely unsuspecting global population, unchecked by national governments due to political expediency, personal greed for both power and financial gain, or through an abysmal ignorance of the eventual ramifications of their collective actions.[103]

This view is echoed by Ian Spry, QC, who believes that international utopians "commonly place other interests ahead of those of their own country and its nationals".[104]

---

102 The Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, *The Statute of the International Criminal Court, Report 45*, Canberra, May 2002, p 15

103 Beckett, note 23, p 2

104 Spry, note 22, p 3

Opinions such as these gave rise to a repeatedly stated belief that, prior to Australia entering into any international agreement, approval should be sought from the people via a referendum.

The belief that the electorate should be consulted about treaty ratification could be seen as one manifestation of the notion of popular or empirical sovereignty – that is, that the Government should only exercise the will of the people. However, as Australia is a representative democracy, the very existence and operation of our parliamentary system is the mechanism by which the will of the people is expressed. Concern about how elected representatives consult their constituents is not a matter that is related to the ICC Statute *per se*.

Other views about treaty ratification in its generic sense suggested that signing treaties gave power over our internal affairs to people who do not live in Australia,[105] that Australians were being denied their independence, treaty by treaty,[106] and more broadly, that it is "unconstitutional" for the Government to enter into treaties in any event.[107]

The vast majority of submissions that raised these issues were argued from an emotive and apparently ill-informed position. They showed little understanding of the nature or content of the ICC Statute, but rather took the opportunity offered by the JSCOT to voice their opinion about the development of globalisation and single world governance. Whilst noting this, it would not be appropriate to suggest that these are unfounded concerns, given the earlier discussion of the development of international law and its impact on State sovereignty. As Australia is party to over 2,000 international treaties of either a bilateral or multilateral nature[108] the collective restraints that these agreements place on national activities need to be considered in light of the total degree of sovereignty that has been surrendered.[109]

---

105 Redfern R, JSCOT Submission 15

106 Redfern, note 105

107 Beckett, note 23

108 Stone J, "Setting the Sovereign Scene: Use and Abuse of the Treaty Power" (2001) 12 *The Samuel Griffith Society* 3, <http://www.samuelgriffith.org.au/papers/html> (01 July 2002)

109 Burmester, notes 87 & 90

The views expressed by those using the "treaty ratification" argument identify that power is held in locations other than with the central organs of government alone. From this perspective, Foucault's micro powers are clearly being exercised by bureaucrats, by big business and by powerful lobby groups, as well as by Parliamentarians and by the Executive Government. This diminishes the impact of individual members of the electorate and results in private individuals becoming Outsiders in the debate about treaty ratification.

As Outsiders, those individuals who protest against ratification are voicing a view that may be heard (as the boundary between Inside and Outside is difficult to define, given that the JSTC accepts submissions from all groups), but which is restrained by lack of power and influence given the form of governmentality existing in Australia.

The call to popular sovereignty is an attempt by those who feel powerless in the current system to exert influence, and through being heard, to reverse the Inside/Outside position so that power returns to the otherwise excluded.

Interference in national affairs

As noted earlier, the Charter of the United Nations respects and protects the concept of State sovereignty. In particular, Article 2 (7) indicates that the Charter does not authorise intervention in matters that are essentially within the domestic jurisdiction of any member State.

This notion formed the basis of many submissions against ratification. For example, it was suggested that ratification of the ICC Statute would give the ICC 'power to intervene is Australia's domestic social policy'[110] and that this would facilitate social engineers in Australia and elsewhere undermining the nation.[111] Likewise, ratification would pose a threat to the rights of the citizens of Australia to govern and order their own affairs.[112]

Others were of the opinion that judicial power is a key aspect of national sovereignty[113] and that "a well functioning, independent,

110 Williams D, JSCOT Submission 3

111 Moore M, JSCOT Submission 122

112 Williams, note 110

113 Egan R, JSCOT Submission 1

sovereign democracy had no valid reason for surrendering its sovereignty in either the legislative nor the judicial spheres."[114]

Some dissenting submissions suggested that the ICC Statute created a "supranational legal identity".[115] It was not seen to be in the best interests of Australians to transfer their State sovereignty to this alien, foreign power - subject to the influence of more powerful nations - leaving Australians without control over future developments.[116]

John Stone[117] argued that the only factor that is relevant in deciding whether a treaty should be ratified is whether it is in the national interest. To this end, he suggests that treaties can be classified in various ways – technical treaties as opposed to political treaties, or treaties which are necessary, useful or morally vain.[118] According to Stone, the ICC Statute can be classified as a "political" treaty in the "morally vain" group. He suggests that there is no real need to ratify the treaty from a domestic point of view, and that doing so is a political move to be seen as a "good world citizen" in a "non-existent international community".[119]

Stone continued by proposing a test to determine whether any treaty is in the national interest: does the treaty provide something Australia needs which it cannot provide itself.[120] In his view treaties of the 'morally vain' type will never pass this test, and State sovereignty should not be surrendered to support them.

A *National Interest Analysis* (*NIA*) was prepared by the Department of Foreign Affairs, but it did not use the test supplied by Stone. Rather, as Spry notes, the NIA "is a highly political document in the sense that [it] sets out determinedly to inflate any possible advantages of an ICC and to minimise and gloss over disadvantages".[121] Accordingly, the *NIA* was not seen as objective, (nor removed from

114 Egan, note 113
115 Moore, note 111
116 Coad S, JSCOT Submission 86
117 Stone J, JSCOT Submission 39
118 Stone, note 108
119 Stone, note 108, p 6
120 Stone, note 108, p 7
121 Spry, note 22

the influence of the Government, which had been ardent supporters of the ICC since its inception) by those who opposed the ICC.

In this discussion, the locus of power is the central Government. Those who wrote submissions did not suggest that the Government did not have the authority or capacity to ratify the ICC Statute, but rather that the Government, in exercising its legitimate power, had not looked closely enough at the impact the Statute may have on domestic issues. In this view, domestic issues are inside the sphere of influence of the Government, and it appears accepted that the Government can and should decide how to act in this arena.

Acceptance of centralised power is reflective of the Marxist or liberal concepts of government, rather than the Foucauldian notion of governmentality. In these models, governmental interference in domestic affairs is both warranted and expected, though in varying degrees. Those who are privileged in the domestic sphere are likely to be ardent supporters of maintaining the status quo, as Governmental power to reign supreme in the domestic arena is pivotal to supporting their position of advantage. Take for example, the following:

> [A]ggrieved feminists, Aboriginal groups, illegal immigrant advocacy groups and radical multiculturalists could be encouraged to launch all sorts of criminal proceedings against this country. This would be enormously damaging to our social cohesion and to the national interest.[122]

As mentioned earlier, power in the domestic sphere marginalises many groups – women, minorities, the disabled or mentally instable, refugees and the working class. It is therefore not unexpected that the issues raised by those arguing to protect State sovereignty were not of a social conscience nature.

Substantive concerns about the ICC Statute's provisions

Although many dissenting submissions were of a general nature, some gave consideration to specific provisions of the ICC Statute.

---

122 Moore, note 111

Article 17 was a cause of major concern. According to the *NIA*

> The Court will operate where a national jurisdiction is unwilling or unable genuinely to carry out the investigation or prosecution of persons alleged to have committed crimes. It will be the Court which determines whether a national jurisdiction is unwilling or unable...[123]

The power that this provision gives the ICC was seen as a major infringement of Australia's sovereignty, as it permits the ICC to intervene in national affairs of its own volition.[124] In terms of international law, this was viewed as a major incursion against sovereignty as respect for State autonomy and independence has been pivotal since the time of the Peace of Westphalia.

This theme was carried forward by the argument that Article 12, which allows the ICC to exercise jurisdiction over non-member States at the request of the Security Council, is a breach of international law as represented by the Vienna Convention on Treaties.[125]

At the level of domestic sovereignty, the ICC Statute has been criticised for requiring member States to amend domestic legislation to give effect to its provisions (Art. 88). This is seen as an infringement of the right of States to manage their domestic affairs without interference.

As a further example, States party are also required to adopt the definition of crimes as they appear in Articles 5, 6 and 7 of the ICC Statute. Those opposed to such requirements see this as dictating to the State what they must include in domestic legislation, thereby reducing the democratic nature of the development of law.

Dissatisfaction at external intervention is fuelled by additional requirements to give effect to requests for arrest (Art. 59) and extradition (Art 90), to provide evidence (Art. 93), to collection fines and property to be seized as penalty (Art. 109), and to hold prisoners in domestic gaols (Art. 103).

---

123 Department of Foreign Affairs, note 3, p 2

124 Spry, note 22

125 Williams, note 110. However, this argument is clearly incorrect as the Security Council has the power to override State sovereignty under Chapter VII of the UN Charter.

In this way, some see the ICC Statute as using international law to control domestic matters. This creates a fear of global governance, with power being held external to the nation-state. This fear is exacerbated by the fact that the jurisprudence of the ICC will develop over time, potentially requiring additional modifications to both domestic legislation and judicial operation in the future – the thin end of the wedge.[126]

At an individual level, the ICC can retry people accused of crimes against the Statute. This is possible if the ICC holds the view that any previous (national) judicial action in relation to the same offence was conducted with a view to protecting the accused, or was ineffectively undertaken (Art. 20). This is seen as an attack on the validity of the judiciary – the heartland of national sovereignty.[127]

In addition, surrender of accused persons has been criticised because the Government is expected to support and protect the rights of its nationals – 'I do not believe that anyone, any government worth its salt, surrenders its citizens to the mercies, tender or otherwise, of some external body.[128]

These arguments reflect the view that domestic judicial and legislative authority is central and pivotal in any debate about sovereignty. The power of the State to govern is supported by domestic law, which gives effect to legislation and judicial determinations that enable stability and peaceful co-existence.

Given its importance then, the law and the people and institutions that make and enforce it, are centres of power in governmentality. The law itself becomes the boundary, and those who are protected by the law are Insiders. Any attempt to tamper with the boundary creates insecurity, and the concept of sovereignty is used to reinforce the shield against the Outside.

Conclusions

The aim of this article was to consider whether the notion of sovereignty allowed for its invocation in protesting against ratification of the ICC Statute.

---

126 Beckett, note 23

127 Egan, note 113

128 Stone, note 24, TR 89

The foregoing discussion has provided an overview of the discourse of sovereignty, using its historical development as the grounds for considering application in current debate. The article then considered the three major themes that arose in dissenting arguments from a critical perspective, using Foucault's concepts of power and governmentality and the post-structural dichotomy of inside/outside as its basis.

It would appear that in each of the three theme areas, the notion of sovereignty has been used in a context that supports the values and beliefs of those who invoke it.

In the first instance, calls were made to popular sovereignty. It was seen that implementing the will of the people was the only legitimate outcome of the exercise of power. In this view, power is spread - across government agencies, businesses, public and private institutions, Parliament, Parliamentarians and the Executive. It is withheld from individuals, and because of this, those who exercise power were called to account. Treaty ratification in general was questioned on the basis that treaties diminish the sovereignty of the people.

In the second instance, national sovereignty was seen as paramount. Power is exercised by a central government, and through this, the individual is included in the exercise of that power by association. This is so because of acceptance of State control in domestic affairs. Any interference in the ability of the State to act in furtherance of the best interests of its nationals is intolerable. The Sovereign State as master of its own destiny, should be free from external interference in its internal affairs.

Finally, the notion of sovereignty was called to protect the national rule of law. Law is seen as the boundary between the State and the Other, and as such attempts to breach that boundary by usurping the primacy of the national law warranted dissent against the ICC Statute.

Each of these views is reflective of the discourse of sovereignty as it exists in a particular time and place in history. Each also reflects the position of its proponents in terms of belief systems, world views and experience in society – making it a valid and legitimate construction of sovereignty for those who invoke it.

And yet, after considering all the submissions presented to it, the JSCOT recommended ratification, finding that:

> The ICC Statute is not seeking to limit or constrain the behaviour of national governments. Instead it is an example of independent nations choosing to act collectively to achieve a consensual objective, that history has shown, cannot be otherwise achieved.[129]

This finding endorses a voluntarist position that suggests that submission to external regulation is, of itself, a powerful act of sovereignty in a global environment.

On this view then, the notions of sovereignty presented in the dissenting arguments were disregarded. Those who advocated 'old' notions of sovereignty were left holding a broken sword and dented shield, and their voices were not heard over the march to global citizenship.

---

129 JSCOT Report 45, note 102, p 73