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THE INTERNATIONAL CRIMES AND INTERNATIONAL CRIMINAL COURT ACT 2000 (NZ): A MODEL FOR THE REGION?

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I INTRODUCTION

The International Crimes and International Criminal Court Act 2000 (NZ) (ICC Act) is New Zealand's domestic implementing legislation for the Rome Statute of the International Criminal Court (Rome Statute).[1] The legislation is commendable – it is as straightforward and coherent as legislation implementing such a complex treaty could be. Despite this, in the author's view, the ICC Act ought not to be presented as a model for the region. This is because preparing implementing legislation for the Rome Statute is not simply a technical exercise translating international treaty provisions into domestic law. Rather, it involves sensitive foreign policy choices that cannot be accommodated or explored using a model approach. This paper demonstrates the point by first exploring two aspects of the New Zealand legislation, its jurisdictional reach and its provisions on immunity, before sketching out some broader

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1 Rome Statute of the International Criminal Court (Rome Statute) (17 July 1998) 2187 UNTS 3; 37 ILM 999. The International Crimes and International Criminal Court Act 2000 (NZ) (ICC Act) is available at <http://www.legislation.govt.nz> (last accessed 1 December 2006). The text of the Rome Statute is reproduced in the Schedule to the ICC Act.

N Boister and A Costi (eds) *Regionalising International Criminal Law in the Pacific* (NZACL/ALCPP, Wellington, 2006)

reflections on the use of models generally. At the outset, though, the paper offers an overview of the ICC Act.[2]

II AN OVERVIEW OF THE INTERNATIONAL CRIMES AND INTERNATIONAL CRIMINAL COURT ACT

The purpose of the ICC Act is two-fold: first, to criminalise in New Zealand law those offences that fall under the jurisdiction of the International Criminal Court (ICC); and, secondly, to ensure that New Zealand can cooperate with the ICC by way of surrendering a suspect or assisting in an investigation.[3] Reflecting this dual purpose, the ICC Act itself can be divided as follows: first, those provisions domesticating the core crimes over which the ICC has jurisdiction;[4] and, secondly, those provisions that are aimed at ensuring that New Zealand will be able to cooperate with the ICC through a request for assistance or surrender.[5]

In terms of the offences covered, genocide, crimes against humanity and war crimes are criminalised in New Zealand domestic law.[6] In each case, the ICC Act adopts the precise definition contained in the Rome Statute. Essentially, the definition of genocide (Article 6 of the Rome Statute and section 9 of the ICC Act) is the same as that found in the 1948 Genocide Convention,[7] to which New Zealand is

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2 A more complete analysis than can be offered in this paper can be found in Treasa Dunworth "New Zealand" in Ben Brandon and Max du Plessis (eds) *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States* (Commonwealth Secretariat, London, 2005) 173-185.

3 ICC Act, above n 1, s 3.

4 ICC Act, above n 1, ss 8-13.

5 ICC Act, above n 1, ss 24-177.

6 The crime of aggression is not included in the ICC Act, although it will fall under the jurisdiction of the International Criminal Court (ICC) once art 5(2) of the Rome Statute, above n 1, is satisfied. When, or if, that happens, presumably the New Zealand legislation will be amended.

7 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) (9 December 1948) 78 UNTS 277.

also a party. Crimes against humanity (Article 7 of the Rome Statute and section 10 of the ICC Act) comprise a total of 11 different acts (such as murder, torture, rape and persecution) with the essential element being that the acts in question must be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[8] Article 8 of the Rome Statute lists 34 different acts which can constitute a "war crime" in an international conflict and 16 acts that could occur in a non-international conflict. Section 11 of the ICC Act adopts this definition. Thus, for the first time in New Zealand criminal law, genocide and crimes against humanity are provided for in the statute book. War crimes, in the sense of grave breaches of the 1949 Geneva Conventions and the First Additional Protocol of 1977,[9] had been criminalised since 1958.[10] However, the ICC Act has greatly expanded the list of offences which can be considered war crimes.[11]

The second key aspect of the ICC Act, and by far the greater part of the legislation, is the machinery provisions that will allow New Zealand to effectively cooperate with the ICC. A request to New

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8 Rome Statute, above n 1, art 7(1).

9 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31, art 50; Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85, art 51; Convention (III) relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, art 130; Convention (IV) relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, art 147; Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3; 16 ILM 1391, arts 11, 85.

10 Geneva Conventions Act 1958 (NZ), s 3.

11 For a clear exposition of the variations between the provisions of the Geneva Conventions and the First Additional Protocol and art 8 of the Rome Statute in terms of what is a "war crime", see Peter Rowe "War Crimes" in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds) *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing, Oxford, 2004) 203-230.

Zealand by the ICC for the arrest and surrender of an accused person would trigger these provisions. Generally speaking, such requests will be made through diplomatic channels and the ICC Act sets out the procedures to be followed in detail.[12] Cooperation might also take the form of assisting the ICC with an investigation.[13] The ICC Act also includes provisions relating to enforcement fines and orders for forfeiture or reparations against a convicted person.[14]

There is no doubt that the New Zealand implementing legislation has a great deal to commend it. It is straightforward, logical and coherent, which is an admirable feat given that the Rome Statute runs to 128 articles and the legislation has 187 sections. In this sense, it is indeed a model piece of legislation. However, it ought not to be promulgated as a "model law" because beneath the apparently technical nature of many of the provisions lie delicate foreign policy choices which cannot be neatly summarised and packaged. By way of illustration, two such issues are explored below – the jurisdictional reach of the legislation and the approach taken to immunities.

III WHY THE ACT OUGHT NOT TO BE A MODEL

A Jurisdictional Issues

There is no express provision in the Rome Statute requiring states to enact domestic criminal legislation. However, the principle of complementarity enshrined in Article 17 of the Rome Statute, whereby the ICC initially defers to state parties to undertake their own prosecutions, means that domestic criminal legislation is essential if a state wishes to be certain it could itself conduct an investigation and, if necessary, a prosecution. Thus, it is not unusual that the ICC Act establishes extraterritorial jurisdiction so as to cover various peace operations around the globe. The extent to which the ICC Act reaches outside New Zealand, however, is remarkable.

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12 ICC Act, above n 1, ss 32-80.

13 ICC Act, above n 1, ss 81-123.

14 ICC Act, above n 1, ss 124-135.

First, the Act asserts "universal jurisdiction" in that genocide, crimes against humanity and war crimes, as defined by the Rome Statute, can be prosecuted under New Zealand domestic law:

- regardless of the nationality of the accused;
- whether or not any act forming part of the offence occurred in New Zealand; or,
- whether or not the person accused was in New Zealand at the time that the act constituting the offence took place.[15]

In other words, not only does the legislation extend extraterritorially in respect of New Zealand nationals or persons ordinarily resident in New Zealand (which is more common), but the ICC Act asserts jurisdiction where there is no nexus to New Zealand at all.

The second unusual feature of the ICC Act's jurisdictional reach is that it operates retroactively in respect of crimes against humanity and genocide.[16] For genocide, the ICC Act reaches back to 28 March 1979, the date on which New Zealand became a state party to the Genocide Convention.[17] In the case of crimes against humanity, the jurisdiction reaches back to 1 January 1991, the same temporal jurisdiction as the International Criminal Tribunal for the Former Yugoslavia.[18] Reading the territorial and temporal provisions together means that any act of genocide committed anywhere in the world since 28 March 1979 and any crime against humanity since 1 January 1991 fall under the jurisdiction of the New Zealand courts.[19]

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15 ICC Act, above n 1, ss 8(1)(c)(i), (ii) and (iii).

16 ICC Act, above n 1, s 11 (war crimes) does not operate retroactively (s 8(1)(b)), but the Geneva Conventions Act 1958 (NZ) continues in force (s 11(4)).

17 ICC Act, above n 1, s 8(4)(a).

18 ICC Act, above n 1, s 8(4)(b).

19 ICC Act, above n 1, s 13 provides that the Attorney-General's consent is required for a prosecution.

This expansive temporal and geographic jurisdictional reach raises potential legal issues, and it is certainly politically problematic. The first potential legal difficulty is the ICC Act's apparent conflict with the norm against non-retroactivity. The New Zealand Court of Appeal has expressed strong disapproval of retrospective criminal penalties in two contemporaneous domestic cases.[20] In doing so, it emphasised the common law presumption against retrospectivity in penal legislation, the provisions of the New Zealand Bill of Rights Act 1990 (NZ) and New Zealand's international legal obligations. However, the ICC Act and the legislation at issue in the cases considered by the Court of Appeal are different in a number of respects.[21] Indeed, a number of justifications can be put forward to defend the temporal reach of the ICC Act, the strongest of which is that the crimes existed at international law from the dates specified in the ICC Act and, therefore, the rule against retroactivity has not been offended.[22] Whatever the merits of the legal debate, the point remains that, in presenting the ICC Act as a model, the question of temporal jurisdiction must be considered carefully.

A second potential legal difficulty involves the geographic reach of the legislation, that is, the assertion of universal jurisdiction. While there is considerable academic support for the concept of universal jurisdiction, the judicial resistance to the concept must also be

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20 *R v Poumako* [2000] 2 NZLR 695 (CA) and *R v Pora* [2001] 2 NZLR 37 (CA). See Treasa Dunworth "Public International Law" [2002] NZ Law Rev 255, 266-269.

21 Dunworth, above n 20, 268.

22 This argument is not watertight, however, because in the case of crimes against humanity, while the justification is that crimes against humanity were crimes at customary international law since at least the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia was triggered, the definition of crimes against humanity in the Rome Statute has a broader scope and was not customary international law. Yet those provisions too are given retroactive effect in the ICC Act. The author is indebted to Professor William Schabas for this point.

acknowledged.[23] For example, in the *Case Concerning the Arrest Warrant of 11 April 2000*,[24] although the International Court of Justice did not have to decide the question of whether Belgium's assertion and exercise of universal jurisdiction in respect of war crimes was a breach of Congo's sovereignty, President Guillaume, in a separate opinion, took the opportunity to discuss the issue at length. He expressed serious misgivings about the exercise of universal jurisdiction by states.[25] Whatever the merits of the various positions, it must be conceded that there is at least debate about the validity of the exercise of universal jurisdiction.

While the legal questions are debatable, even in the light of President Guillaume's reflections, it would be going too far to say that on its face the ICC Act breaches New Zealand's international obligations. However, there is no question that the expansive assertion of jurisdiction does involve sensitive foreign policy choices. In the abstract, it seems just and reasonable to ensure that an offender found in New Zealand could be prosecuted. However, the political realities will be much more complex and, for a variety of quite legitimate reasons, it may not be in New Zealand's interests to prosecute an alleged offender. Indeed, the requirement of the Attorney-General's consent to proceed with a prosecution reflects this reality.[26] However,

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23 In support, see Stephen Macedo "Princeton Principles on Universal Jurisdiction" in Stephen Macedo (ed) *Universal Jurisdiction. National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press, Philadelphia, 2004) 18-35.

24 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3.

25 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, above n 24, paras 15-16 Separate Opinion of President Guillaume.

26 ICC Act, above n 1, s 13. For example, in December 2006, New Zealand's Attorney-General Michael Cullen stayed the prosecution of Lt General (Ret) Moshe Ya'alon in relation to charges of war crimes laid by a Palestinian human rights group. See David Eames "Government Overrules War-crimes Arrest Order" (1 December 2006) *New Zealand Herald* Auckland <http://www.nzherald.co.nz> (last accessed 13 December 2006).

the extremely broad temporal and geographic scope of the legislation opens New Zealand to a potentially fraught decision process. It is one thing to explore the option of prosecuting a contemporary crime in which New Zealand has some connection, either as victim or perpetrator. It is quite another to prosecute an historical crime that has no real New Zealand connection. The sweeping jurisdiction might seem like an expansive gesture from the good international citizen. In reality, it contains the seeds of potential diplomatic disaster. Presenting the ICC Act as a model may not allow an adequate reflection of the extremely sensitive nature of these choices. For example, most of the serious conflicts in the South Pacific – Bougainville, Solomon Islands, Fiji – have occurred during the period covered by the temporal jurisdiction for crimes against humanity of the ICC Act. The full implications for states in the Pacific region contemplating simply adopting it as a model need to be carefully considered as they may well find themselves having to confront the reality of the prosecution of a neighbouring islander.[27]

B Immunities[28]

An important feature of the Rome Statute is that it removes the shield of immunity against its jurisdiction. Article 27 of the Rome Statute provides that, in proceedings before the ICC, the official capacity of a person shall not exempt the latter from criminal responsibility. In New Zealand, when the ICC Act was being drafted, the original Bill directly incorporated Article 27 into New Zealand law. This would have had the effect of removing the international customary law of immunity in respect of the crimes in the Rome Statute and thus would have brought about a major change in the legal

27 The author would like to thank Associate Professor Neil Boister for this observation.

28 The following discussion is confined to the immunity issues arising in the context of a domestic prosecution or a prosecution by the ICC. It is not concerned with the issue of immunity of the ICC or its officers when in New Zealand. That aspect is covered by the Diplomatic Privileges and Immunities Act 1968 (NZ), ss 10D and 10E.

landscape. However, the clause was removed and the legislation, as enacted, remains silent on the issue. Consequently, whether there will be immunity in a particular case will depend on the status of customary international law at that time.[29] In legal terms, this is probably quite a satisfactory state of affairs in that it allows the New Zealand courts to keep in tune with contemporary international practice on that point.

A different, but more complex set of issues arises in the context of immunity when there is a request by the ICC for surrender of an accused or for cooperation in some other respect. In such a case, there is a potential conflict where the accused is a national of another state, particularly if that state is not party to the Rome Statute. In that situation, it will be necessary to mediate between the customary international law obligations owed to the nationality state and the treaty obligation in the Rome Statute to cooperate with the ICC. The Rome Statute tries to mediate this potential conflict in Article 98(1), which provides that the ICC will not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law without first getting a waiver. In other words, the Rome Statute acknowledges that a request by the ICC (which has no obligation to respect any immunities) may put a state party (which may have immunity obligations to non-state parties) in a position where it has conflicting international obligations. In such a case, the ICC will obtain the cooperation of the other state, before proceeding with its request for surrender or cooperation.

The New Zealand legislation attempts to mirror that compromise by means of sections 31, 66 and 120. Section 31 of the ICC Act provides that the doctrine of sovereign immunity has been overridden when it comes to requests for assistance or surrender by the ICC. That poses no difficulty when it comes to requests for surrender or

29 Unlike in most other jurisdictions, New Zealand does not have legislation covering issues of state immunity. The question would thus fall to the common law, of which customary international law is a part.

assistance relating to a person who is a national of a state party to the Rome Statute because that state has implicitly waived its immunity in respect of the ICC. However, the conflict which arises in the case of a non-state party is mediated by sections 66 and 120 (dealing with surrender and requests for assistance respectively). Essentially, the effect of these provisions is that in the event of a conflict arising between the obligations to surrender or cooperate with the ICC and any other obligations not to surrender because of immunity, the New Zealand authorities can request the ICC to attempt to resolve the conflict (by persuading the nationality state to waive its immunity, for example). Ultimately, if the ICC proceeds with the request, the legislation stipulates that New Zealand must cooperate. The upshot is that while there is now what might be called a "stalling" provision, New Zealand could well find itself in a situation where it has an irreconcilable conflict of obligations.

In the context of assessing the legislation as a model, it is not necessary to reach agreement on whether the balance finally struck – it was one of the few provisions that were meaningfully debated during the passage of the legislation – was the correct one or not. What is important to appreciate is how politically sensitive the provision is. Immunity goes to the heart of sovereignty and is an area of law that is rapidly evolving (some would say transforming). It is a difficult issue and not one that can be adequately captured in a model law.

IV CAUTION AGAINST MODELS GENERALLY

The fundamental point to be taken from the previous part of this paper is that a model approach is overly simplistic in the light of the detail of the ICC Act. In any event, a model is unable to take into account delicate foreign policy choices. The examples of jurisdiction and immunity have been used to make this point, but there are many other examples that could serve as illustrations. These are all important issues, but there are also more abstract concerns about the use of models in this context, to which we will turn now.

From the inception of the United Nations and particularly the International Law Commission with its codification project, international treaties have increasingly dominated the legal landscape, governing many, if not all, aspects of international and transnational life. More recently, reflecting international law's purported shift from normativity to enforcement, treaties now either require harmonisation of particular laws or domestic legislation to give effect to their terms. This has been given a particularly high profile in the context of counter-terrorism, but it is a phenomenon that is evident right across the discipline of international law.

These developments have spawned an industry in drafting model laws. The impetus might come from an inter-governmental body, an academic research project or, increasingly, a non-governmental organisation. The starting justification can be benign, even admirable and practical. If all state parties to a particular treaty are required to give domestic effect to its terms, it makes sense to pool resources and develop a template or a model for doing that. Many states do not have adequate resources to manage the increasing number of treaties. States that do might be assisted by using a template as a guide. Even in the face of scarce resources, states nonetheless choose to become state parties for a variety of reasons – political or economic. The Chemical Weapons Convention (CWC) provides an example.[30] At first blush, the prohibition of chemical weapons may not seem like a priority issue in the Pacific region. However, the terms of the CWC are such that states that remain outside the system find it more difficult to trade in certain chemicals, some of which are used in basic industry and as fertilizer. Thus, there is an imperative to join the CWC, which requires domestic effect to be given to its terms.[31] There are also more blunt instances of political force being brought to bear because it is in the interests, not of the state in question, but of other states, outside or

30 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention) (13 January 1993) 32 ILM 800.

31 Chemical Weapons Convention, above n 30, art VII.

peripheral to the region, to ratify. Free trade agreements and counter-terrorism treaties are the best, but not the only, examples of this more problematic dynamic at play.[32]

Even accepting that the impetus may be benign, there are serious difficulties with this "model industry" approach. First, and in some ways this is an abstract formulation of the points raised earlier, the drafting of implementing legislation is not merely a technical exercise. The two issues discussed from the New Zealand legislation show that quite the opposite is true; because the legislation belies sensitive foreign affairs decisions that may even need to be taken on a regional, rather than a national, basis, but in any event, certainly not by an expert for hire. Secondly, the "model industry" often manifests itself in the form of outside experts in the field coming into the country and drafting legislation.[33] However, those experts usually know little or nothing about the legal system in which they are operating, let alone its political context. This cannot be the basis of good law-making. The third concern relates to the "model industry" in the specific context of international criminal law. There seems to be little reflection on the experience of, or lessons learned from, other areas of law where harmonisation has been attempted. One possible source of study would be the harmonisation of intellectual property protection. This is not the place to engage in any full analysis of lessons to be learned, but the point is a more general one – international criminal lawyers are not the first to attempt this process and previous attempts ought to be analysed carefully before proceeding further. Finally, at the broadest level, the move to harmonisation ought to be considered through the lens of a neo-imperialist analysis. It seems that not only is there international pressure brought to bear to become a state party in

32 In the context of free trade agreements, see, for example, the study by Jane Kelsey *Big Brothers Behaving Badly. The Implications for the Pacific Islands of the Pacific Agreement on Closer Economic Relations (PACER)* (Pacific Network on Globalisation, Suva, 2004).

33 The point has also been made earlier in this book by A H Angelo "Legal Capacity in Pacific Island Countries" chapter 4.

the first instance, but now, that same pressure is brought to bear to impose national implementation models.

V CONCLUSION

In identifying specific and general reasons to support the rejection of the ICC Act as a model for the region, this paper does not deny the importance of the ratification of the ICC, or indeed the importance of implementing legislation to that end.[34] Preparing models may seem to be a worthwhile and laudable goal, but the dangers inherent in the process are such that, even allowing for the best of intentions, it is possibly more damaging than helpful. One possible way forward is to change the approach and prepare "checklists" instead: identifying the issues, political and legal, involved in a national implementation exercise; and, perhaps, providing a range of examples and explanations to allow indigenous law and policy-makers to take their own decisions.

However, it seems that more careful thought is needed at both conceptual and practical levels before proceeding to a full-scale "model for the region". This will take longer – there is no quick fix. It is worth reminding ourselves that the ICC itself gestated for at least 50 years before becoming a reality.

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34 Legislation is required by the Rome Statute in terms of cooperation with the ICC: see Rome Statute, above n 1, art 77.