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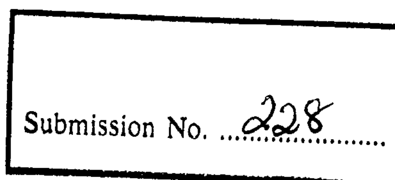
The Honourable Andrew Thomson MP
Chair
Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600


Submission No. 228

Dear Mr Thomson,

1998 Rome Statute of the International Criminal Court

I understand that the Committee will this month be considering whether or not to advise the government to ratify the above statute.

Enclosed is my submission in relation to that issue. It is in two parts:

(a) Submissions specifically related to possible ratification of the Statute by Australia; and
(b) A short conference paper on the related issue of national sovereignty and its importance.

I will be happy to discuss these matters with the Committee if asked.

Yours sincerely,

(Professor Emeritus) Geoffrey Walker

Encl.

SUBMISSION ON THE ROME STATUTE 1988

KEY POINTS

1. The "Statute" (treaty) would require Australia to invest the ICC with criminal jurisdiction over Australian territory. That jurisdiction forms part of the judicial power of the Commonwealth and can only be entrusted to courts formed in accordance with Chapter III of the Constitution. The ICC would not be such a court.

2. The ICC would not be a "court" as Australians understand that term. It would be prosecutor, judge and jury all in one and would even determine appeals from its own decisions. It would infringe the constitutional separation of powers. The incentives built into the Statute would encourage abuses of power.

3. The ICC's promoters claim that it would be purely "complementary" to the national justice system and would only have jurisdiction if Australian courts were unable or unwilling to act. That is false and misleading. The ICC could prosecute whenever the ICC <u>itself decided</u> that domestic court proceedings were not "genuine". The ICC itself would be the sole judge of that, and there would be no right of appeal. An acquittal or a light sentence in an Australian court could be taken as proof of non-genuine proceedings entitling the ICC to prosecute.

4. The Statute violates what is coming to be recognized as the constitutional guarantee of due process as reflected in recent decisions of the High Court and the New South Wales Court of Appeal.

5. The ICC's three-stage prosecution and trial procedure amounts in substance to a "trial on indictment" within s 80 of the Constitution. The Statute's failure to provide a right to trial by jury as required by s 80 could therefore by itself invalidate any legislation adopting the Rome Statute.

6. The attempt to confer what amounts to legislative power on the ICC (Art. 21) and the express conferral of legislature power on the Assembly of States Parties (Art. 121) are unconstitutional. The only legislature for the Commonwealth permitted by the Constitution is the Parliament.

7. Even in their present form, the crimes covered by the Statute are so loosely defined as to be capable of unlimited expansion. NGOs have already signalled their intention to press for the addition of new crimes, many of an ideological nature.

8. The Statute is probably invalid under international law because it infringes the fundamental rule that a treaty cannot impose obligations on states that are not parties to it.

9. Most countries have not ratified the treaty. Not one state in South, East or Southeast Asia has seen fit to do so. Ratification could weaken Australia's national security.

10. It would be possible to craft a treaty for an international criminal court that would promote Australian values of constitutional democracy and the rule of law, but the Rome Statute fails to do so. Australia should refuse to ratify it and should lobby other countries to do likewise.

SUBMISSION
TO THE
STANDING COMMITTEE ON TREATIES

1998 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

I understand that the committee this month will probably be making its recommendation to the government on whether or not Australia should ratify the ICC "Statute" (treaty). I would like to present some arguments for the committee's consideration. The public debate on this important issue has to date been one-sided and at times misleading. The joint Attorney-General's – DFAT departmental "National Interest Analysis" (undated), for example, merely sets out the hoped – for benefits of the ICC but makes no attempt to assess the likelihood of their being achieved, nor does it consider any possible disadvantages for Australia. It also fails to mention the constitutional implications of attempting to legislate for the conferral of jurisdiction on the court, or the debatable validity of the treaty under international law.

It would be possible to design an international criminal court that would advance justice and the rule of law but the Rome Statute fails disastrously in that endeavor. I turn first to the issue of judicial power.

THE ICC AND THE JUDICIAL POWER OF THE COMMONWEALTH

There is currently no draft Commonwealth legislation implementing the ICC Statute available for public comment, which makes precise analysis impossible. The proposed structure and jurisdiction of the institutions to be established do, however, permit some consideration of the principles involved.

Chapter III and the separation of powers. Article 1 invests the ICC with "jurisdiction over persons for the most serious crimes of international concern". Criminal jurisdiction over Australian territory pre-eminently forms part of the judicial power of the Commonwealth: Huddart Parker & Co. v Moorehead (1909) 8 CLR 353, 366. That judicial power may only be vested in courts established under Chapter III of the Constitution: Re Wakim: ex parte McNally (1999) 198 CLR 511, 542, 556, 558, 575. The proposed International Criminal Court fails to meet that standard because its judges would not satisfy the requirements of s.72 of the Constitution in relation to manner of appointment, tenure and removal (Shell Co. of Aust. v FCT (1930) 44 CLR 530, 545-46; Lane's Commentary on the Australian Constitution, 2nd ed. 1997, 528-34). They would be elected by states parties to the Rome Statute, which prospectively include some countries that may not share Australian concepts of judicial independence and the rule of law, eg. Tajikstan, Sierra Leone and Croatia, which have ratified the treaty.

Further, the ICC would not be a "court" at all in the sense understood by the Constitution or the Australian people. It would have a full-time staff of about 600 and would in fact exercise the powers of prosecutor, judge and jury. It would even determine appeals against its own decisions. There would be no appeal to any outside body such as the International Court of Justice. Under Article 44, the court may employ personnel provided by selected NGOs. As these staff would be unpaid, they would presumably be there for the purpose of advancing their particular agendas.

As there would be no separation of powers except at a bureaucratic level, the judges' exercise of their functions would inevitably be affected by their close links with the investigation and prosecution roles of the ICC. While it is possible that initially the idealism of some foundation judges might result in impartial justice, the political wisdom and experience that underlie the separation of powers doctrine tell us that in the

longer term the perverse incentives built into the ICC's structure would inevitably come into play. Their effect would be that it would not be in the interests of judges to acquit or no-bill any significant number of defendants, whatever the merits of the case; on the contrary, it would pay them to convict often as possible and to interpret the already loose definitions of the subject crimes and of its own jurisdiction as widely as possible. The absence of an independent appeal or of the right to a jury trial would make the court the sole judge of all these matters. It is designed to be accountable to no-one, not even to the United Nations itself.

This tendency could derive further strength from the Preamble, which has a heavy prosecution bias, with its emphasis on the punishment of atrocious deeds and the ending of impunity. It fails to mention the defendant's right to a fair trial, even in passing.

The requirements of s.72 and of the separation of powers would be fatal to the validity of any legislation purporting to give the ICC jurisdiction over Australian territory. Parliament's power to make laws under s.51 (xxix) (external affairs) is subject to the separation of powers doctrine enuniciated in the Boilermakers's case : Lane, 306; Cth v Tasmania (1983) 158 CLR 1, 253-54; Koowarta v Bjelke-Petersen (1982) 153 CLR 168, 213, 225-26, 240, 250.

Justice Deane's remarks to the contrary in Polyukhovich v Cth (1991) 172 CLR 501, 627 were obiter dicta. They reified an "international community" as a notionally structured institution with notional constitutional attributes including judicial power. None of this represents legal or political reality today or in the foreseeable future. Further, his Honour had in mind an international tribunal "for the trial and punishment of international crimes" (my emphasis), not one that purported to be policeman and prosecutor as well. While the relation of Chapter III to s.51 (xxix) has yet to be fully

clarified, there is useful guidance in a decision of the United States Supreme Court in Ex parte Milligan (1866) 71 US 2, a case that arose of the Civil War. Milligan was charged before a military commission in Indiana for treasonous conspiracy by membership of a secret society, violation to the laws of war and like offences. He was neither a prisoner of war, nor in military service, nor a resident of a rebel state, and Indiana was not in rebellion or under invasion. The court concluded that there was no way in which Congress could vest judicial power in any body other than a court as defined in the Constitution:

"Every judicial trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it 'in one supreme court and in such inferior courts as the Congress may from time ordain and establish' ...

But it is said that the jurisdiction is complete under the 'laws and usages of war'.

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed ... Congress could grant no such power .... One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by congress and not composed of judges appointed during good behaviour" (121-22, my emphasis).

The case is striking, not only for the exact parallel with our Chapter III, but also for the Court's unhesitating rejection of the argument that international law might somehow extinguish the citizen's constitutional right to trial by a real court.

<u>**The "complementarity" argument**</u>. This leads to one of the most misleading arguments put forward by the ICC's promoters: that the jurisdiction of the new court would not simply be a new tier of judges to second-guess the Australian justice system. The Law Council of Australia, for example, claims that the "ICC is a Court of last resort, based on the 'principle of complimentarily' [sic]. Under the Statute the Court must defer to Australia's own criminal law and proceedings. It is only when a country is unwilling or unable to prosecute an international crime that the ICC may have jurisdiction" (*Australian Lawyer*, April 2001, 1). That is incorrect. The ICC will have jurisdiction <u>whenever it decides</u> that the domestic institutions are not "genuinely" prosecuting the accused. A no-bill based on insufficiency of evidence, or an acquittal or a light sentence in an Australian court, could easily be treated as showing ineffective domestic jurisdiction entitling the ICC to prosecute.

This is not farfetched – there is nothing to prevent the situation where all the judges in a case represent countries unfriendly to Australia. Most of the world's governments are unelected, and one way they can hamper the spread of democratic ideas to their own countries is to strike at the Western democracies through international bodies such as the ICC. They have used the UN and its committees in this way for decades, as Australians have had cause to notice in recent years. Australia is a soft target that does not normally hit back when attacked, an inviting quarry for governments reluctant to risk a confrontation with the United States, the EU or Israel. The lack of jury trial or an independent appeal removes the two main safeguards against such politically-motivated prosecutions.

The "National Interest Analysis" stresses that the court's judges, prosecutors and officials are to be persons of high moral character, impartiality, expertise and independence, but there is no way of enforcing these criteria, and the record of other

UN bodies in this respect is not reassuring. After the United States was expelled from the UN Human Rights Committee recently, it was replaced by Sudan, which tolerates an open slave trade, and China, which has practised real genocide in Tibet. North Korea, which has ratified the Human Rights Convention, is eligible to be represented on the committee.

Quite apart from this scenario, the absence of separation of powers gives the ICC a powerful incentive to assert jurisdiction, as was noted above.

Due process and Chapter III. As Justice Drummond of the Federal Court has recently pointed out, one of the strongest and clearest trends in Australian constitutional law in recent years has been the growing appreciation that Chapter III entrenches certain basic preconditions of justice and due process in the very concept of the Commonwealth's judicial power. High Court decisions such as Polyukhovich, Lim, Dietrich, Brandy, Kable and Wilson, and the New South Wales Court of Appeal in John Fairfax & Son v A-G [2000] NSWCA 198 have made it clear that the nature of judicial power presupposes certain standards of fairness and openness that cannot be compromised or circumvented. It cannot be coupled with other functions that might contaminate its independent and impartial operation, nor can it be constrained in ways that make its exercise of judgment a fiction or a mere front for legislative arbitrariness. Quoting authorities such as Justice Gaudron, Chief Justice Spigelman and the federal attorney-general Mr Williams, his Honour points out that procedural due process is a fundamental right protected by the Constitution, which mandates certain principles of open justice that all courts must follow (Drummond, "Towards a more compliant judiciary" (2001) 75 *ALJ* 304, 306-09).

This constitutional guarantee raises further doubts about whether the Parliament could validly confer jurisdiction on the ICC. It is already clear that trials before that tribunal would follow an entirely foreign inquisitorial procedure. As has been noted above, there would be no principles of *autrefois acquit* or *autrefois convict* (popularly called the rule against double jeopardy). Prosecution witnesses may be anonymous and are not required to be available for cross-examination. Hearsay would be used extensively, as is usual in non-common law jurisdictions. There is no provision for bail, even for minor offences, and no requirement for a speedy trial.

Invalidity under s. 80? The absence of an independent appeal or of trial by jury has already been noted. The latter point could in itself invalidate attempted legislation to impose the ICC on Australia. The formalistic, procedural interpretation of the jury trial guarantee in s.80 of the Constitution originally adopted by the High Court has been much criticized by judges from Justices Dixon and Evatt onwards. It is unlikely that the Court has written its last word on s.80, and indeed the section is gradually being given more substantive content (Brown v R ((1986) (160 CLR 171, 196, 202, 215; Kingswell v R (1984) 159 CLR 264, 298ff; Clyne v DPP (1984) 154 CLR 640, 652-53).

But even if narrowly limited to "trial on indictment", the guarantee could apply to ICC proceedings. The reason is that even the present restrictive interpretation is not a literal one because there is strictly no such thing as an indictment in Australia. An indictment can only be presented by a grand jury, an institution that was never established in Australia because of practical constraints in the early days of convict settlement. What we have in this county is an "information in the nature of an indictment" which issues after a preliminary hearing by a magistrate, or ex officio from the attorney-general. It is treated as an indictment by analogy.

Though the ICC's procedures are not clearly defined in the Rome Statute, it is quite possible that the contemplated three-stage process of a semi-judicial preliminary inquiry leading to a "committal for trial" under that name (Art. 61/7)) followed by a trial, could also be deemed to constitute a "trial on indictment" by analogy. In that event the failure to provide the safeguard of jury trial would be fatal to the validity of the adopting legislation.

THE ICC AND THE LEGISLATIVE POWER OF THE COMMONWEALTH

The Statute and its promoters are at great pains to present the ICC as an institution for punishing "the most serious crimes of international concern" such as genocide. A number of authorities have pointed out, however, that the list of offences punishable by the court extends to acts that are not normally regarded as major crimes, such as "outrages upon personal dignity". One should also note that the court's jurisdiction extends to attempts to commit any of the listed offences (Art. 25 (3) (f)). The "crime of aggression" has been left undefined for the time being, but high vigilance will be needed to ensure that it excludes peacekeeping operations.

Even as the statute stands, the substantive provisions are capable of expansion to cover conduct far beyond anything most people would regard as "the most serious crimes of international concern." The range of acts that could be treated as constituting an attempt to commit "cultural persecution" (Art. 7 (1) (k)) or an attempt to outrage human dignity might be limited only by the imagination of the prosecutors and their NGO – supplied helpers.

These concerns are real – the Toonen case concerning a section of the Tasmanian Criminal Code showed an UN body extending a treaty to cover conduct not mentioned in it, and which the treaty's framers almost certainly did not intend to include ("United Nations: The Toonen Case" (1995) 69 *ALJ* 600).

The separation of powers issue. The substantive criminal and other law to be applied by the ICC raises constitutional concerns as well. The sources of law to be used by the ICC include:

- principles and rules of [(customary)] international law;
- "general principles of law derived by the Court from national laws of legal systems of the world"; and
- "principles and rules of law as interpreted in [the court's] previous decisions" (Art. 21(1), (2).

These provisions add vast new fields of discretionary law-making to the already broad and elastic definitions of the crimes covered in the statute. The phenomenon of "instant customary law" has become notorious since international tribunals have abandoned the former requirement of proof of state practice as a precondition for the identification of a new customary norm. Now the evidence of international law "experts" who cite one another's academic publications as authority is all that is required. International customary law has become a "free-floating vapour" through which new rules appear from nowhere (J. Rabkin, *Why Sovereignty Matters*, Washington 1998, 55-63). Again, virtually anything can be found in the "national laws of the legal systems of the world". Finally, the court's own decisions will have the force of law.

This wholesale delegation of law-making authority to a (putative) court encounters serious objections stemming from the separation of powers. These are quite separate from, and additional to, the Chapter III problems outlined above. They are exemplified in the Native Title Act Case, in which the High Court struck down a provision of the NTA that purported to bestow on the common law of native title the

status of a law of the Commonwealth. "The attempt must fail", six of the seven justices said, "either because the Parliament cannot exercise the powers of the Courts or because the Courts cannot exercise the powers of the Parliament". "Under the Constitution", the Court continued, "the Parliament cannot delegate to the Courts the power to make law involving, as the power does, a discretion or , at least, a choice as to what the law should be" (Western Australia v Cth (1995) 183 CLR 373, 485-87.

Delegation of legislative power to the Assembly. The already wide range of crimes within the ICC's jurisdiction can be supplemented by new offences created by a two-thirds majority of the Assembly of States Parties (Art. 121). Already a number of NGOs (which played a leading role in framing the Statute) have indicated their intention to press for the creation of new crimes such as money laundering, actions against trade unions and environmental pollution.

To give effect to this mechanism the Parliament would need in effect to delegate to the Assembly the power to make laws operating in Australian territory. That it cannot do: Parliament "is not competent to 'abdicate' its powers of legislation" or to create a separate legislature and endow it with Parliament's own capacity: Victorian Stevedoring and General Contracting Co. v Dignan (1931) 46 CLR 73, 121; Capital Duplicators Pty Ltd v ACT (No 1) (1992) 177 CLR 248; Re Initiative and Referendum Act [1919] AC 935, 945). This is because "the only power to make Commonwealth law is vested in the parliament" (Native Title Act case p 487).

A state becomes bound by a newly created offence under the Rome Statute only on ratification of the particular Assembly resolution (Art. 121), but in Australia ratification is a purely executive act that legally need not involve the Parliament at all. As there is no draft legislation adopting the Statute available to the public, one can only conjecture on how it is intended to circumvent Parliament's exclusive legislative role.

A delegation to the executive government of the power to ratify amendments to the Rome Statute might be attempted, but such an open-ended delegation might amount to an abdication and thus be invalid. Although under Dignan's case the conferral of subordinate legislative power to the executive can be in quite broad terms, Sir Anthony Mason has suggested that the courts should at least insist that Parliament provide the executive with a suitable legislative framework dealing with the significant issues of policy and principle (Mason, "A New Perspective on the Separation of Powers", *Canb. Bull. Of Pub. Admin.*, Dec 1996, 1, 4-5.

POSSIBLE INVALIDITY OF THE STATUTE UNDER INTERNATIONAL LAW

It is not often that doubts arise over the validity of a duly executed treaty as a matter of international law, but the Rome Statute squarely presents a problem of possible invalidity because Article 12 attempts to assert jurisdiction over countries that have not ratified the Statute. An obvious situation in which jurisdiction over non-parties might be claimed would be if a foreign government opposed to a particular peacekeeping operation were to lodge a complaint with the ICC over the conduct of Australian members of the peace force (assuming Australia to be a non-party).

A treaty can be void if it violates a peremptory norm of international law. A peremptory norm is defined in Art. 53 of the Vienna Convention on the Law of Treaties 1969 as a recognized norm from which no derogation is permitted. This doctrine of "*jus cogens*", as it is called, is designed to protect the overriding interests and values of the international community of states (L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, Helsinki 1988, 4).

A fundamental rule of international law, enshrined in Art. 34 of the Vienna Convention, is that a treaty does not create obligations or rights for a state without its consent. Obligations can only be accepted by a third state in writing (Art. 35). The rule that a treaty cannot violate the rights of a third state without its consent rests firmly on the sovereignty and independence of states, which is the whole basis for international relations (A. Aust, *Modern Treaty Law and Practice*, Cambridge 2000, 207-08). The maxim *pacta tertiis nec nocent nec prosunt* is supported by general legal principle, by the nature of a treaty as a contract and by common sense (I.M. Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester 1973, 101-02).

It is hard to think of a rule of international law that is more fundamental than this one. It is "obvious to the point of being tautological" (P. Reuter, *Introduction to the Law of Treaties*, London 1995, 101). It was confirmed by the Permanent Court of International Justice at the Hague in the Free Zones Case (PCIJ (1932)) series A/B No. 46, 1; also River Oder Case, PCIJ (1929) series A, No. 23, 19-22). An EC agreement was struck down because of the necessary involvement of third parties in Commission v Luxembourg and Belgium [1964] ECR 625, cases 90 and 91/63. While it has sometimes been argued that, at most, a treaty could confer a benefit on a third state (Aust p.77), the rule about the incapacity of a treaty to burden a non-party has never been questioned.

As no other rule of international law qualifies more clearly as a peremptory norm within the *jus cogens* doctrine, there is a strong argument for saying that the violation of this rule by Article 12 makes the Rome Statute void. If Australia ratifies it, the High Court may one day have to have to disentangle the resulting legal muddle.

CONCLUSIONS

Three years after the Rome Statute was formally adopted, only 34 of the world's 190 nations have ratified it. Those that have not done so include Britain, the United States, Russia, China, India, Indonesia, the Netherlands, Switzerland and Japan.

Legislation implementing the Statute would inevitably infringe the Commonwealth Constitution in four or five different ways. It would subject Australians to the risk of politically-motivated prosecutions at the hands of an unaccountable body that would be prosecutor, judge, jury and appeal court all in one, in a system that contains no safeguards against, or remedies for, abuses of power. It would entail the wholesale subversion of the constitutional rights of Australians.

Australia is on the edge of a volatile region. While it is hard to predict what defence emergencies Australia may face in the coming decades, one can certainly predict that ratifying the Rome Statute will make the provision of national defence and security considerably harder. It is notable that not one nation in South, East or Southeast Asia has ratified it.

The Statute's promoters are pressing for early ratification so that Australia can be a foundation party and play a role in establishing the new body. This is a variant of the old "buy now and beat the price rise" pitch. But we are also told that the Australian delegation was heavily involved in drafting the Statute as it stands. Given their apparent inability to secure the recognition of basic Australian constitutional democracy and rule of law values to date, it would be naïve to expect that with only one vote in the Assembly, and a maximum of one judge on the Court, Australian representatives could bring about any significant improvement.

Australia has nothing to gain and much to lose by ratifying the Statute. Indeed, we should be lobbying other countries to refuse to ratify a treaty which itself violates the most basic tenets of international law.

It might be possible to craft a treaty for an international criminal court that would promote the values of constitutional democracy and the rule of law. The Rome Statute of 1998 does not.

(Professor Emeritus) Geoffrey Walker

Opening Address

WHY SOVEREIGNTY MATTERS

Professor Emeritus Geoffrey Walker

KEY POINTS

1. In international law, national sovereignty means that nations are the final law-making and enforcement authorities over their own territory and, conversely, that each nation has a right to a safe and independent existence free from outside intervention. This "Westphalian principle" aims to preserve peace by separating the advocates of rival values.

2. National sovereignty empowers smaller nations such as Australia by specifying their rights and establishing equality before the law.

3. The national borders derided by globalizers serve to identify the groups of people entitled to participate in the government of particular land areas. They are the source of the people's democratic rights. A single world government could not possibly be democratic, which is why only elite groups advocate it.

4. Important areas of Australian sovereignty have already been lost to international bodies which, in a process rather like money laundering, repackage elite agendas and re-export them to member countries in the guise of "international norms". Britain's drastic loss of independence through its subordination to the EU contains important lessons for Australia.

5. Contrarily to the globalizers' contentions, the world wars of the 20th century were not the result of national sovereignty. They were clashes of multi-national empires, and empires have always hated the nation-state.

6. The cause of war is not national sovereignty but lack of democracy. History does not record a single case of two established democracies going to war with each other.

WHY SOVEREIGNTY MATTERS

Global Policy Laundering is Eroding our Democracy

Geoffrey Walker

A controversy quietly raging in Australian political and legal circles is bringing into sharp focus the place of national sovereignty in an age of expanding global institutions and challenging the long-term future of the independent nation-state.

The immediate issue is the possible ratification of the treaty establishing the International Criminal Court, which supporters such as the Law Council of Australia say provides a better way of prosecuting perpetrators of genocide and other international crimes. Critics counter that the treaty is not confined to genocide or similar offences but extends to acts not normally considered major crimes, such as "outrages upon personal dignity". They argue that an unfriendly foreign government could use the new procedures against Australians on peacekeeping duties. Australia's view that there were no grounds for prosecution, or even acquittal or a light sentence by an Australian court, could be treated as a "non-genuine" exercise of domestic jurisdiction entitling the ICC to prosecute.

At the core of the controversy is the fact that the prosecution and trial of one's own citizens is an essential part of sovereign power and that yielding it to an outside body is a surrender of national sovereignty. For that reason most countries have not ratified the treaty, including Britain, the USA, Israel, Russia, China, Indonesia the Netherlands, Switzerland and Japan.

But does sovereignty still really matter? In international law, sovereignty means that nations are the final law-making and law enforcement authorities over their own territory, holding the exclusive right to the use of internal force. Conversely, each nation has a legal right to a safe and independent existence, without interference from outside governments or organizations. This crucial non-intervention principle is enshrined, at least theoretically, in the United Nations Charter.

This definition of sovereignty and of the pattern of international relations to which it has given rise are known as the "Westphalian model", after the 1648 Peace of Westphalia that ended the Thirty Years' War, the most sanguinary conflict Europe has ever seen. More broadly, Westphalia concluded 150 years of conflict resulting from a pattern of universal intervention on religious or strategic grounds. By so doing it saved innumerable lives. National sovereignty had long been a recognized legal principle, but Westphalia entrenched it as the basis of all international relations. It constructed a system to preserve peace by separating the advocates of rival values while containing and monopolizing internal violence.

The national sovereignty principle empowers smaller states by specifying their rights. For that reason empires have never liked it. During the 18th and 19th centuries the European powers in their drive for colonial empires circumvented it by engineering provocations to justify conquest or by claiming to seize lands where no-one was in charge – the principle of "terra nullius" (a phrase used in debates over native title for its rhetorical impact but which actually has nothing to do with that issue).

The sovereignty of the nation-state guarantees equality before the law, a key element of any system based on the rule of law, domestic or global. This is a huge advantage of sovereignty from Australia's viewpoint. Despite its physical size, Australia will never be more than a minor power. Our continent's sheer aridity will see to that. The non-intervention principle enshrined in the Westphalian system is a significant protection for weaker states such as Australia. Any erosion of it through well-intentioned treaty-mongering or "global governance" bandwagoning could have unexpected results for our rights as a people and ultimately our national survival.

The other great role of national sovereignty stems from its close links with democracy. The national borders so derided by globalizers serve to identify the groups of people entitled to participate in the government of particular land areas. They define the political entity and are the source of the individual's democratic rights. Today they enable peoples to cushion the effects of economic globalization by making special provision for adjustment in areas that need it.

Promoters of the One World Government model never mention that there is no possible way in which a global government could be democratic. Even assuming one vote per adult and no ballot fraud, a small nation like Australia would be permanently outvoted by billions of people who care nothing for our welfare, our democracy or our national survival.

Nor would the rule of law be likely to endure in a world without borders. To date the UN has shown little inclination to live up to its own charter, and its courts and committees have yet to earn a reputation for dispensing impartial justice according to law. Double standards abound. After the United states was expelled from the UN Human Rights Committee recently, it was replaced by Sudan, which tolerates an open slave trade, and by China, which has practised real genocide in Tibet. For these and similar reasons there is little popular support anywhere in the world for abolishing the nation-state in favour of global governance. It is an elite-driven cause promoted by international bureaucrats and unelected NGOs.

The global governance movement's tendency to undermine democracy is already evident in the transfer of domestic policy-making power to international bodies whose policy choices reflect the preferences of bureaucratic elites, of foreign governments (unelected for the most part) and of NGOs.

There are no constitutional checks and balances in this procedure. It is a process rather like money laundering, with controversial policies being sent overseas, repackaged, and reimported in the guise of "international norms". Dire warnings that Australia must ratify them or else become an "international pariah" help to inhibit debate. This "policy laundering", which enables activist lobbies to make a detour around the Constitution and defeat the people's democratic rights, peaked when Gareth Evans was foreign minister. It has been reined in under Howard and Downer, but the revival of the "international pariah" rhetoric aimed at stampeding the government into ratifying the

radical ICC treaty and the one-sided Kyoto protocol shows that it could take off again in the near future.

The Commonwealth Constitution nowhere gives the government the power to delegate legislative, executive or judicial power over Australians to outside powers. The problem, however, is that the Constitution contains no transparent or democratic procedure for ratifying treaties. It is a purely executive act that can be done secretly by the minister (nominally, the Governor-General-in-Council). Gareth Evans used to table treaties before Parliament in twice-yearly batches. Two-thirds had already been ratified before Parliament was told of their existence. Three-quarters lacked even Cabinet approval.

This could happen because when the Constitution was being drafted the Commonwealth was deliberately not given the power to make treaties. It was assumed that Britain would remain the treaty-making authority for all the Dominions. With the historically rapid fall of the British Empire after 1916, Canberra inherited that power by default, but without the democratic safeguards, such as ratification by the Senate, that would have been provided if it had been in the Constitution from the start. The extreme interpretation of the external affairs power adopted by a bare majority of the High Court in the 1983 Tasmanian Dams case meant that a UN committee recommendation or a treaty negotiated and ratified in secret can in effect amend the Australian Constitution without the approval of parliament or of the people voting in a referendum. This has left Australia acutely vulnerable to destablization as well as to erosion of its sovereignty by the policy laundering industry. The Coalition's reforms to the treaty ratification

process lack legal backing and would be jettisoned by Labor. While legislation is still needed to implement a treaty within Australia, the minister's ability to present parliament with a ratified treaty as a fait accompli, coupled with the lobbying firepower of special interests, media and NGOs, are usually enough to lever the necessary bill through the Senate.

A much more open and thorough debate is needed beore Australia loses more of its effective sovereignty through this process. As the Finnish international relations expert Raimo Vayrynen puts it, "the effective loss of sovereignty without the establishment of representative bodies at higher levels of international organizations is probably the most undemocratic combination imaginable". He argues instead for "ever-deepening interdependence rather than truly boundary-crossing processes of integration".

Britain's step-by-step subordination within the European Union contains lessons for Australia. When the UK adopted the Rome Treaty in 1972, the British people were misled by their own leaders on both sides of parliament who assured them that the nation was doing no more than joining a customs union and that its sovereignty would remain undiminished. As they contemplate the remnants of their independence today, many Britons console themselves with the thought that the UK could still withdraw from the EU if matters became intolerable. But that belief is not shared in Brussels, Paris or Berlin. The move to create an EU army and gendarmerie raises ominous possibilities should the EU decide to treat a future withdrawal as an act of rebellion.

In this centenary of Federation there is an historical irony in the fact that while in 1901 Britain was a sovereign state and Australia was not, a century later the positions are

reversed. But if we are tempted to feel smug about that we should remember that the Asia-Pacific Economic Co-Operation treaty (APEC), of which Australia is a member, is designed to develop into our region's equivalent of the EU.

Two main lines of argument are put forward in the assault on national sovereignty. One is that the deepening of cross-border relations and communications has made the nation-state obsolete. A senior UNESCO official interviewed for French documentary recently screened on SBS proclaimed that the growth of the Internet alone makes it essential "that the UN should govern the world". But, as Dr Vayrynen points out, interdependence can flourish without integration. Besides, advances in communications technology have historically worked in both directions, towards broadened consciousness and also towards a reinforced sense of the significance of identity and difference. The invention of printing was a major factor in the growth of the nation-state. It brought home to people that Europe comprised different language communities, thus undermining the old idea of a unified Christendom.

Then the global governance advocates declare with a kind of stage shudder that the last century's world wars were the result of national sovereignty. But World War I was a clash of multinational empires: the British, French, German, Austro-Hungarian, Russian and Ottoman. Even Belgium was an imperial power with vast African colonies. And empires have always hated the nation-state. Adolf Hitler was a racist, not a nationalist, who used German bitterness over the Versailles treaty to attain power but planned to build a greater Europe in which national borders were erased – a European Economic Community (under that name) dominated by Germany and France, with its own

institutions, currency, foreign policy and army. In an important but almost forgotten compilation of Hitler's private political utterances titled *Hitler Speaks*, his former confidant Hermann Rauschning recorded the dictator as declaring that "The concept of the nation has become meaningless. The conditions of the time compelled me to begin on the basis of that concept. But I realised from the outset that it could only have transient validity. The 'nation' is a political expedient of democracy and liberalism. We have to get rid of this false concept and set in its place the concept of race".

The former Soviet bloc showed imperial disdain for nation-states by swallowing an average of one per year until it fell.

The cause of war is not national sovereignty but lack of democracy. It is now accepted, as Gareth Evans himself has pointed out, that democracies are unwarlike. History does not record a single instance of established democracies going to war against each other. As Francis Fukuyama explains, democracies share a fundamental principle of legitimacy that results in peace. Under popular government, strident nationalism is confined to the sporting field. As stable democracies are still a minority in today's world, peace and progress are best served by the spread of democracy and the rule of law. With them will come greater international understanding and interdependence, aided by the communications revolution. Australia's future lies in encouraging that movement, not in the gradual surrender of our independence to outside bodies that may not have our best interests at heart. The national sovereignty principle has protected Australia's self-government and democracy. Australia should protect it in return.

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