# AUSTRALIA'S WAR CRIMES TRIALS: A MORAL NECESSITY OR LEGAL MINEFIELD?

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[*After considering the Menzies Report into allegations that significant numbers of Nazi war criminals entered Australia after World War II, the Australian Government has established the Special Investigations Unit. This Unit is to consider whether evidence justifies the trial of such persons under the War Crimes Act 1945. The author considers the principles of international law which establish state jurisdiction over war crimes and crimes against humanity. She also examines the options of extradition, deportation and revocation of citizenship under the Immigration Act 1920 and of the Migration Act 1958. Legal difficulties in applying this legislation explain why the Australian Government has adopted, as its preferred option, the prosecution of war criminals in Australia. The author considers the particular problems posed by reliance upon evidence from Soviet-controlled Baltic States and asks whether the moral imperative posed by the presence of war criminals in Australia outweighs legal and political problems.*]

. . . it was the war. And now the war is over.[1]

So responded Klaus Barbie to the President of the Lyon Palais de Justice before the jury returned its verdict that Barbie was guilty of war crimes and crimes against humanity. His words reflect the philosophy of Australian Government practices concerning war criminals. This philosophy is demonstrated by the refusal, in 1961, of a request from the Soviet Union for extradition of an alleged war criminal. The Acting Minister for External Affairs, Sir Garfield Barwick, explained that, while Australians felt an abhorrence for offences against humanity, the nation should provide the opportunity for people to turn their backs on the past and to make a new life.[2]

After the Second World War Australia both participated in the trials of the International Military Tribunal in Tokyo and conducted, on its own behalf, military trials of approximately 1,000 minor war criminals.[3] Public criticism of the long trials and the growing sense that Australia should move forward with the task of post-war construction prompted Barwick's conclusion that the time had come 'to close the chapter'.[4] By the 1980s, however, a new generation has been exposed to well-documented evidence of atrocities during the Second World War. International demands are now being made for the trial of serious war criminals. In 1979 the United States established the Office of Special Investigations (O.S.I.) to identify alleged war criminals living in the United States and to take legal action to denaturalize and deport them.[5] An all-party Parliamentary

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1 *Australian* (Melbourne) 6 July 1987.

2 Menzies, A. C. C., *Review of Material Relating to the Entry of Suspected War Criminals into Australia* (1987) 9 (hereinafter referred to as the 'Menzies Report'); Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 22 March 1961, 451.

3 Dickinson, G., 'Japanese War Trials', (1952) 24 *Australian Quarterly* 69.

4 *Supra* n. 2.

5 For an examination of U.S. practices see Moeller, J. W., 'United States Treatment of Alleged Nazi War Criminals: International Law, Immigration Law and the Need for International Cooperation' (1985) 25 *Virginia Journal of International Law* 793.

Committee has been established on an informal basis in the United Kingdom to examine what, if any, action it should take with regard to war criminals and, similarly on 7 February 1985, the Canadian Government established a Commission of Inquiry to report on appropriate procedures against Nazi war criminals.[6] Reconsideration of Australian policy was prompted by allegations raised in an Australian Broadcasting Corporation radio series called 'Nazis in Australia' on 13 April 1986 and in a television programme on 22 April 1986 entitled 'Don't Mention the War'. These programmes alleged that significant numbers of Nazi war criminals had entered Australia after the war, partly as a consequence of misleading information from United Kingdom and United States intelligence sources and partly through the connivance of Australian immigration officers.

This article describes the findings of the Menzies Report into these allegations and the subsequent establishment by the Australian Government of a Special Investigations Unit (S.I.U.). The Government decision to try, where appropriate, those Australian residents suspected of serious war crimes, raises wider issues of public international law concerning the jurisdiction of a nation to prosecute persons for offences they have committed in another country against non-nationals, where the accused were nationals of a third country at the time of the offence and subject to the commands of their government. Such prosecutions raise further questions as to the reliability and availability of evidence and as to the human rights implications of retrospective war crimes legislation. An examination is made of the development of international customary law and state practices relating to the trial of war criminals since the Second World War which might indicate some guidelines for Australian prosecutions under the War Crimes Act 1945 (Cth).

## *Menzies' Report*

On 25 June 1986 Mr A. C. C. Menzies, O.B.E. was requested by the Special Minister of State to conduct a review of all material 'relating to the entry into Australia of persons alleged to be or suspected of being war criminals . . .'.[7] He was to make findings and recommendations on whether war criminals are resident in Australia; whether their entry reveals any breaches of the law; whether it was Government policy to allow or assist the entry of war criminals into Australia and whether further investigations are required. Mr Menzies reported on 28 November 1986 that it was 'more likely than not'[8] that a significant number of persons who had committed serious war crimes during the Second World War had entered, and were presently residents of, Australia. This likelihood, he argued, requires that some action be taken. The contention that Australian officers or A.S.I.O. connived to ensure entry into Australia for war criminals was rejected. The fact that war criminals succeeded in migrating to Australia was explained by the 'serious limitations'[9] in numbers and geographic spread of staff

6 Canada's Deschenes Commission reported 30 December 1986.
7 Menzies Report, *supra* n. 2, Terms of Reference s. 1.
8 *Ibid.* 177.
9 *Ibid.*

available to do the necessary checking, by gaps in security data and by the urgency and intensity of post-war immigration programmes. The report also rejected, for a lack of 'direct evidence',[10] the contention that United Kingdom or United States intelligence officers misled or withheld information from Australian officers as to war crimes committed by applicants for migration. Menzies included with his report a confidential list of about 70 named persons who are Australian residents and who are alleged to have committed serious war crimes. While it would not generally be practical to prosecute these persons for offences relating to their entry into Australia, Menzies recommended, nonetheless, that action be taken to investigate the allegations against these persons with a view to determining whether charges of serious war crimes could be laid against them. He emphasized that all normal standards of justice should be applied. To achieve this, he recommended that a small unit in the office of the Director of Public Prosecutions (similar in concept to the United States O.S.I.) be established to deal with requests for extradition and to make preliminary investigations. Where the offences were committed in a state with which Australia did not have an extradition treaty and from which an extradition request was unlikely, Menzies recommended that Australia should consider making special extradition arrangements. If such arrangements were not appropriate, he recommended that consideration should be given to revocation of citizenship and deportation. In the event that none of these alternatives is appropriate, Menzies concluded that consideration should be given to amending the War Crimes Act 1949 (Cth) in order to allow a civil court to prosecute the crime.

*Special Investigations Unit*

After receiving the Menzies Report, the Attorney-General, Mr Lionel Bowen, made a statement to the House of Representatives in which he reversed the Barwick policy. Bowen declared that the present Government 'does not regard the chapter as closed' and that 'justice must be done, no matter how much time has passed since the events in question'.[11] He stated that appropriate action under the law would be taken to 'bring to justice those persons found in Australia who have committed serious war crimes'.[12] He confirmed that there would be no reduction in the normal standards of justice and that any prosecutions were neither intended to be directed against ethnic groups, nor should be regarded as a slur upon such groups. The Government then proceeded to establish, as recommended, a small Special Investigations Unit to conduct investigations.[13] In order to separate the investigatory from the prosecutory functions the Director of the S.I.U., Mr Robert Greenwood, Q.C., is to report directly to the Attorney-General. The D.P.P. is to decide if the results of the investigation justify prosecution and to conduct any trial. The S.I.U. is, first, to investigate the allegations

[10] *Ibid.* 178.

[11] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 24 February 1987, 594, 595, (hereinafter referred to as the 'Ministerial Statement').

[12] *Ibid.* 594.

[13] The S.I.U. is now operating through its Sydney Office.

contained in the list supplied by Menzies and any other such allegations, including those from the Simon Wiesenthal Centres in the United States and Israel. The function of the S.I.U. is to assess the truth of the allegations and to examine all relevant facts and to report within two years of its commencement on 3 April 1987.

The Menzies Report placed emphasis on the extradition and denaturalization and deportation procedures as the recommended approaches prior to considering the alternative of war crimes prosecutions in Australia. This emphasis accords with the practices of the United States which, where there has been no request for extradition, has applied its Immigration and Nationality Act (1952)[14] to deport alleged Nazi war criminals. A United States court can denaturalize an American citizen only when he has violated immigration procedures by illegal or fraudulent procurement.[15] It cannot employ this legislation to prosecute war crimes *per se*. Once the alleged war criminal has been denaturalized he can be deported as an undesirable resident alien but, again, this is not a criminal punishment for war crimes *per se*. The United States position has been that deportation is the only alternative to criminal prosecution within the United States courts in the absence of an international war crimes tribunal or of a request for extradition. Deportation, as a punishment for violation of the immigration procedures is, however, not a substitute for war crimes prosecutions and the employment of domestic law does not meet the 'moral dimensions'[16] of the crimes and, for practical purposes, leaves them unpunished.

The United States approach has been subject to criticisms on other grounds. Ethnic groups, in particular Lithuanian, Latvian and Estonian communities are fearful that they may suffer from unsubstantiated imputations against their members.[17] These groups also argue that reliance by United States courts on Soviet evidence is suspect because of a Soviet interest in discrediting anti-communist refugee groups. A further basis of criticism is that the deportation activities of the United States O.S.I. are said to have turned people into a form of international 'flotsam', contrary to the *Convention on Statelessness*.[18] This criticism has less significance for the United States which is not a party to this Convention than it has for Australia, which became a party on 13 March 1974.

Each of these factors may have played a rôle in the decision by the Australian Government to reject the essentially procedural approach taken by the United States. Rather, the preferred option is to conduct war crimes prosecutions in Australia. Where an extradition request is made within the context of Australia's normal extradition arrangements it will be dealt with accordingly.[19] If extradition is not appropriate, revocation of citizenship and deportation will be considered

[14] Public Law No. 82-414; 66 Stat. 163 (1952). Codified at 8 U.S.C. ss 1101-1557 (1982); see Moeller, *op. cit.* n. 5, 813 ff.

[15] See generally, Gordon, C. and Rosenfield, H., *Immigration Law and Procedure* (Rev. ed. 1983) ss 20-4.

[16] Moeller, *op. cit.* n. 5, 834.

[17] In discussion of the zone *infra* 27-8.

[18] *Convention Relating to the Status of Stateless Persons* (1954), *Australian Treaty Series* (1974) No. 20.

[19] For a description of Australia's extradition practices see Shearer, I. A., 'Extradition and Asylum' in Ryan, K. W. (ed.), *International Law in Australia* (2nd ed. 1984) 179-209.

within the existing legislation and policy.[20] For the most serious war crimes, however, the Government accepts the Menzies recommendation that they be the subject of investigation by the S.I.U. It thus becomes important to determine which crimes will be categorized as serious. Allegations concerning membership of, or sympathy for, fascist organisations in Nazi-controlled Europe and allegations as to the production of fascist propaganda will not, for example, warrant the attention of the S.I.U. Instances of crimes which will be of concern are:

— participation in security units responsible for deportations, *etc.* on racial or political grounds;
— participation as guards or administrators in the operation of German established concentration camps;
— participation in national or puppet governments under Nazi German direction at an executive level allegedly involving direct responsibility for deportations, *etc.*[21]

*The War Crimes Act 1945*

The decision to prosecute within Australia requires that amendments be made to the War Crimes Act 1945. This legislation was applied to the trials conducted by Australia in the Pacific, but it has not been invoked since 1951. A war crime is defined as:

> s. 3 (a) a violation of the laws and usages of war; or
> (b) any war crime within the meaning of the instrument of appointment of the Board of Inquiry appointed on the third day of September, One thousand nine hundred and forty-five, under the National Security (Inquiries) Regulations . . .

Part (a) is concerned with the relatively narrow meaning given to crimes against the laws of war which includes the *Fourth Hague Convention Concerning the Laws and Customs of War on Land* (1907).[22] The instrument of appointment referred to in (b) includes the list adopted by the Responsibilities Commission of the Paris Peace Conference in 1919, but this list is not exclusive and has since been added to.[23] The War Crimes Act 1945 applies to:

> s. 12 . . . war crimes committed, in any place whatsoever, whether within or beyond Australia, against British subjects or citizens of any Power allied or associated with His Majesty in any war, in like manner as they apply in relation to war crimes committed against persons who were at any time resident in Australia.

The Act does not extend to crimes committed by citizens of the Axis powers against their own civilian populations and it suffers from the significant defect

20 Migration Act 1958 (Cth), Nationality Act 1930 (Cth).
21 Ministerial Statement, *op. cit.* n. 11, 595.
22 100 Br. & For. St. Pap. 338, 2 Malloy 2269.
23 'War Crimes' is generally understood as including crimes against the peace and crimes against humanity. The instrument of appointment refers to a list of war crimes compiled by the U.N. War Crimes Commission which, in turn, adopted the list employed by the Responsibilities Commission. See Advice from Attorney-General's Department 30 July 1986, Menzies Report, *op. cit.* n. 2, Attachment A. The list of crimes is also included in the Menzies Report, *ibid.* See generally, Schwelb, E., 'United Nations War Crimes Commission' (1946) 23 *The British Year Book of International Law* 363, 366; Brownlie, I., *Principles of Public International Law* (3rd ed. 1979) 561-3.

that a trial under the Act must be conducted by a military court. Menzies believed that a military trial of civilians who have been resident in Australia for up to 41 years after the Second World War is 'unthinkable'[24] and that this, and the penalty provisions, require amendment. A further difficulty lies with the politically awkward and sensitive fact that Australia does not recognize the validity of the Soviet Union's annexation of the Baltic States where many crimes are alleged to have been committed against civilian populations.[25]

Senator Bowen has recognized these difficulties and proposes the introduction of the following amendments to the War Crimes Act 1945:

— trial by State courts exercising federal criminal jurisdiction or, where appropriate, Territory courts;
— widen scope to war crimes committed in the Second World War (to overcome the present restriction to countries allied with His Majesty);
— confine application of the Act to persons resident in Australia;
— repeal evidentiary and procedural provisions that would be inappropriate for a criminal prosecution in civil courts;
— ensure retrospective operation of the criminal laws.[26]

The War Crimes Act assumes jurisdiction over persons who were non-nationals at the time of commission of an act against another non-national which was committed in a foreign country. The validity of such an assertion of jurisdiction depends upon international law.

*International legal principles of state jurisdiction*

The concept of jurisdiction refers to a state's general legal competence and is an aspect of state sovereignty.[27] The limits of a state's jurisdictional power, whether exercised through legislation, executive decree or judicial order, are established by international law, though the issue of 'sufficiency of grounds'[28] for jurisdiction is relative to the rights of other states rather than one of objective competence. It is neither easy nor useful to attempt to describe with certainty the bases of jurisdiction because state practice varies considerably and does not reflect categories of jurisdiction, because municipal courts will assert jurisdiction upon interwoven bases and because there is little international judicial *dicta* on the subject. A principle of international law which is, however, fundamental, is that of non-intervention by one state in the political independence and territorial integrity of another. The Permanent Court of International Justice confirmed that:

> the first and foremost restriction imposed by international law upon a State is that . . . it may not exercise its power[s] in any form in the territory of another State.[29]

[24] Menzies Report *op. cit.* n. 2, 163.
[25] Australia recognized Soviet annexation for a brief period between 1973-6.
[26] Ministerial Statement, *op. cit.* 595.
[27] Brownlie, *op. cit.* n. 23, 298. See generally, Mann, F. A., 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Hague Recueil* I, 9-162.
[28] *Ibid.* 298.
[29] *The Case of the S.S. 'Lotus'* (1927) *Permanent Court of International Justice Publications*, Series A, No. 9, 18.

The first basis of jurisdiction thus lies in the territorial link. A state has exclusive sovereignty over all persons, citizens or aliens and all property, real or personal, within its own territory. While the paramountcy of the territorial principle has the advantage of simplicity, it is not a satisfactory description of state practice in modern jurisdictional conflicts, nor does it give appropriate weight to the principle of substantial and genuine connection between the subject-matter and the territory and reasonable interests of the state asserting jurisdiction.[30] The strictly territorial approach to jurisdiction also reveals the substantial inadequacy that some offences are committed in one state but consummated abroad and others are committed outside the state but consummated within the territory. Municipal courts have met this problem by developing the objective and subjective principles of jurisdiction. These principles do not, however, satisfactorily resolve conflicts which arise today in the areas of extraterritorial jurisdiction in trade and commercial matters.[31]

A second, and generally accepted, basis of jurisdiction lies in the nationality of the accused and rests upon his obligations of allegiance to the state of which he is a national.[32] A state has jurisdiction over its own citizens wherever they may be in the world. Common law states have not, in fact, relied heavily on this principle, preferring instead to found jurisdiction on the territorial link. It should also be remembered that there is an important difference between the right to prosecute the conduct of nationals abroad and the power to enforce this law in the territory of another state. For practical purposes the prosecuting state must wait to exercise its jurisdiction until the national returns or is extradited or deported to that state's territory.

A third basis of jurisdiction is the passive personality or protective principle under which a state asserts the right to punish aliens for offences committed outside its territory, but which injure one of its nationals.[33] With the exception of the *Cutting* incident,[34] the protective principle is not reflected in state practice

30 Brownlie, *op. cit.* n. 23, 298.

31 See discussion of this problem by Triggs, G., 'Extraterritorial Reach of United States Anti-Trust Legislation: The International Law Implications of the Westinghouse Allegations of a Uranium Producers' Cartel' (1979) 12 M.U.L.R. 250.

32 American Law Institute, *Restatement of the Law, Second: Foreign Relations Law of the United States* (1965):

30(1) A state has jurisdiction to prescribe a rule of law
(a) attaching legal consequences to conduct of a national of the state wherever the conduct occurs
or
(b) as to the status of a national or as to an interest of a national, wherever the thing or other subject-matter to which the interest relates is located.
(2) A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals.

Mann criticizes this statement as going further than is indicated by the judgment of the Permanent Court in *S.S. Lotus*: *supra* n. 29. Note also, *Joyce v. Director of Public Prosecutions* [1946] A.C. 347, 372 and Barry, J. W., 'Treason, Passports and the Ideal of Fair Trial' (1956) 7 *Res Judicatae* 276.

33 See Harvard Research in International Law, 'Jurisdiction with respect to Crime' (1935) 29 *American Journal of International Law* Supp. 435, 579.

34 Moore, J. B., *A Digest of International Law* (1906) Vol. II, 228-42. For a summary of the incident see Bishop, W. W., *International Law: Cases and Materials* (2nd ed. 1962) 459 ff.

and is the most dubious of grounds upon which to assert an extraterritorial jurisdiction over aliens.

State practice confirms a fourth basis of extraterritorial jurisdiction where aliens act against national security. The Harvard Research in International Law describes the protective principle as giving a state jurisdiction with respect to crimes committed outside its territory 'by an alien against the security, territorial integrity or political independence of that State . . .'.[35] This concept has not received support from the Anglo-American courts, mainly because they have relied principally upon the territorial principle. The national security concept is also open to the obvious criticisms that there are no objective tests to ascertain when a particular act violates security and that each state is likely to judge for itself where its interests are at risk.

A fifth basis of jurisdiction is the universality principle.[36] This principle permits the exercise of jurisdiction by a state in respect of criminal acts committed by non-nationals against non-nationals wherever they take place. Jurisdiction is based upon the accused's attack upon the international order as a whole and is of common concern to all mankind as a sort of international public policy. Historically, the universality principle has been employed to prosecute piracy and, more recently, hijacking.[37] Under the principle of universality the criminal act is a violation of national law. International law merely gives states a liberty to punish but it does not itself declare the act illegal.

By contrast, some acts are crimes under international law.[38] They may be punished by any state which has custody of the accused. Examples of this sixth basis of jurisdiction include breaches of the laws of war included in the Hague Convention of 1907 and the four Geneva 'Red Cross' Conventions of 1949, torture, apartheid, attacks on diplomatic agents, drug trafficking and terrorism. To assert the distinction between a jurisdictional base founded in the universality principle and jurisdiction founded in an offence against international law may appear pedantic. It can, however, be important in cases such as the *Eichmann* trial, where the State of Israel did not exist at the time of the criminal acts.[39] Hence, an assertion of jurisdiction in that case best rests upon the power to punish crimes under international law rather than upon domestic legislation. When examining the validity of prosecutions under the War Crimes Act 1945 it would be wise to found jurisdiction upon the international breach rather than upon a violation of Australia's legislation. This is not because of any doubts about Australia's international personality during the war, but because of the retrospective nature of the Australian legislation.

35 Harvard Research, *op. cit.* n. 33, 543; adopted into general jurisprudence in art. 3 of the draft Convention: 'A State has jurisdiction with respect to any crime committed in whole or in part within its terrritory.' See also, *Joyce v. Director of Public Prosecutions* [1946] A.C. 347.

36 Brownlie, *op. cit.* n. 33, 23, 304.

37 Harvard Research, *op. cit.* n. 33, 563-92.

38 Brownlie, *op. cit.* n. 23, 505.

39 *Attorney-General for the Government of Israel v. Adolf Eichmann* District Court of Jerusalem (1961) 36 I.L.R. 5; affirmed by Supreme Court (1962) 36 I.L.R. 277.

*International law of war crimes and crimes against humanity*

A modern definition of war crimes was given in the Charter which was annexed to the London Agreement of 8 August 1945 between the United Kingdom, the United States of America, France and the Soviet Union.[40] This Agreement established an International Military Tribunal for the trial and punishment of major war criminals of the European Axis. Article 6 of this Charter established three categories of crime over which the Tribunal had jurisdiction and for which there was to be individual responsibility:

> (a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan of conspiracy for the accomplishment of any of the foregoing;
> (b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian proportion of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
> (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The war crimes category (b) was an enumeration of accepted principles of international law. The definition of crimes against peace was, however, a development of law by adopting a distinction between aggressive war and the right of self-defence; a distinction which is central to the United Nations Charter. The third category of crimes against humanity represents a significant development of customary law which goes well beyond the *Hague Convention on the Laws of War* (1907) (Articles 46, 50, 52 and 56) or the 1929 *Convention Relating to Treatment of Prisoners of War* (Articles 2, 3, 4, 46 and 51). The International Military Tribunal was a supra-national court which asserted jurisdiction over 22 major war criminals whose acts took place in various geographical locations and had an effect upon many different nationalities. After 218 days of trial, the Tribunal found 19 of the defendants guilty and sentenced 12 of them to death. The Tribunal established many fundamental principles of international law and considered its function to be an 'expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law'.[41] The Tribunal established the significant 'moral choice'[42] test in respect of the defence of superior orders and declared that the doctrine of the sovereignty of a state cannot protect individuals for carrying out state policy. The Tribunal concluded that:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[43]

[40] A convenient source for the London Agreement and Charter is the Menzies Report, *op. cit.* n. 2.
[41] 'Judicial Decisions' (hereinafter 'Nuremberg Judgment') (1947) 41 *American Journal of International Law* 172, 216.
[42] *Ibid.* 221.
[43] *Ibid.*

Crucial to any determination of criminal guilt is the principle *nullum crimen sine lege*: no one should be found guilty of any criminal offence for an act or omission which did not constitute a criminal offence under national or international law when it was committed. For this reason, the Tribunal had to be sure that the crimes with which the accused were charged satisfied this principle. There was no difficulty with Art. 6(b) war crimes, which the Tribunal found 'too well settled to admit of argument.'[44] By contrast, when applying Art. 6(c) crimes against humanity, the position at law was less clear. The Tribunal interpreted the provision to require that acts carried out before the outbreak of war must be in execution of, or in connection with, any crime within the jurisdiction of the Tribunal.[45] While the Tribunal concluded that there is no doubt whatever[46] that the ruthless policy of prosecution, repression and murder of German civilians was implemented well before 1939, it believed that:

> revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime.[47]

On this ground, the Tribunal refused to declare the acts prior to 1939 to be crimes against humanity. With regard to acts after 1939, the Tribunal found that they were committed on such a vast scale that they now constituted a crime against humanity within the meaning of the Charter. The Tribunal recognized the maxim *nullum crimen sine lege* as a general principle of justice. It avoided the difficulty that crimes against humanity did not exist, as such, before 1946 by linking inhumane acts with the undoubtedly pre-existing crime of waging aggressive war. The Tribunal found that the inhumane acts were all committed in execution of, or in connection with, the aggressive war.[48]

The Tribunal argued that:

> Occupying the positions they did in the Government of Germany, the defendants or at least some of them must have known of the treaty signed by Germany, outlawing recourse to war for the settlement of international disputes, they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression.[49]

The primary source of the illegality of aggressive war lay with the *General Treaty for the Renunciation of War* of 27 August 1928, known as the *Kellog–Briand Pact*.[50] This treaty was binding on 63 nations, including Germany, Italy and Japan, when war began in 1939. The Tribunal accepted that the renunciation of war as an instrument of national policy 'necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.'[51] The Tribunal was able to extend the logic that the alleged crimes against humanity were illegal when they were committed by the accused because they were encompassed within the prohibition on aggressive war as an inevitable

[44] *Ibid.* 248.
[45] *Ibid.* 249.
[46] *Ibid.*
[47] *Ibid.*
[48] *Ibid.*
[49] *Ibid.* 217.
[50] U.K.T.S. 29 (1929), Cmnd 3400; 94 L.N.T.S. 57.
[51] Nuremberg Judgment *supra* n. 41, 218.

and terrible consequence which included inhumane acts. In this way, the Tribunal was able to conclude that the maxim *nullum crimen sine lege* had no application[52] to the present facts.

The progression of this logic creates a certain unease, particularly in relation to a criminal trial, which is of such international significance. It is notable, for example, that Streicher was found guilty only of crimes against humanity and not for violating the laws of war. That the Tribunal was concerned about the category of crimes against humanity is suggested by the confusing and hasty sentence in which it said:

> insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes Against Humanity.[53]

The Tribunal met the argument that the Pact neither stated that aggressive war is a crime nor established courts to try those who make such war, by making an analogy with the Hague Convention of 1907. While the Convention also made no provision for criminal prosecutions, it has since been applied by military tribunals, when prosecuting individuals for violations of the rules laid down by the Convention.

It is likely that legal counsel appearing for persons accused of war crimes before Australian courts will want to canvass, yet again, these arguments founded on the maxim *nullum crimen sine lege*. Certainly, however, the opinion of the Nuremberg Tribunal on this issue will, quite properly, have a highly persuasive value for Australian courts. So, too, will the judgment of the District Court of Jerusalem in the *Eichmann* trial where, in the absence of an international criminal court, the State of Israel asserted jurisdiction over war crimes. Eichmann was prosecuted under the Nazi and Nazi Collaborators (Punishment) Law 1951 (Israel) for war crimes, crimes against the Jewish people and crimes against humanity. War crimes are punishable if done during the period of the Second World War, in an enemy country and other offences were punishable if done during the period of the Nazi regime, in an enemy country. The Court rejected the defence of *nullum crimen sine lege* by relying upon the reasoning of the Nuremberg Tribunal.

Professor Julius Stone has concluded that there is no rule of international law against retroactive criminal punishment and further, that it is unclear whether municipal systems invariably apply such a rule in practice.[54] He argues that the Nuremberg prosecutions should be assessed in terms of justice and policy rather than law in a strict sense.[55] The injustice which can lie in retrospective legislation is that the actor can be punished for acts which, at the time of their commission, did not entail any moral responsibility or guilt. While, in a strict sense, the Nuremberg charge of crimes against the peace can be viewed as violating the policy against retrospectivity, the rules of treaty law made the act of waging

52 *Ibid.* 217.
53 *Ibid.* 249.
54 *Eichmann* trial, *supra* n. 39.
55 Stone, J., *Legal Controls of International Conflict* (1974) 359, 360.

aggressive war illegal at least a decade before the commission of the acts in question. In these circumstances, the defendants were hardly morally innocent of the acts for which they were tried. This argument based upon justice is the more powerful in relation to crimes against humanity which were also not strictly defined as crimes in advance of the Nuremberg Charter, but were so universally condemned and punishable in most municipal legal systems by 1939 that committing such acts could not be considered morally innocent. Criticisms of the Nuremberg Trials, which have been based upon the maxim against retrospective punishment, can thus be met with the politically credible argument that the acts contravened commonly accepted and understood norms. Rather less attractive, at least in present times, is Professor Stone's argument that 'in the final resort . . . a technically sound legal basis' for the Nuremberg Trials lay in the 'power of the victor over the vanquished'.[56] It is the repugnance of this concept which must remain a disturbing feature of any war crimes trials by allies after the Second World War.

The Israeli Court's judgment is of particular value for Australian courts concerned with war crimes trials, because it also discussed the bases upon which its jurisdiction was founded. The District Court found that the offences charged were so grave that they were contrary to the law of nations, thereby conferring a universal jurisdiction. It also relied upon the protective principle which confers jurisdiction over crimes injuring subjects of a state or its own safety. The Court recognized the legal difficulty posed by the fact that Israel did not exist when the offences took place and that, therefore, the State could not have been threatened. It avoided the issue by adopting the doctrine of a 'linking point' between the 'punisher and the punished'.[57] There is an obvious link between Israel, the accused and the Jewish people which the Court concluded 'very deeply concerned the vital interests of the State of Israel'[58] and which provided the basis for legislation which applied to a period terminating five years before its enactment. It is significant that, on appeal, the Supreme Court of Israel relied only upon the universality principle, while agreeing in principle with the District Court's adoption of the protective principle.[59] While there is no doubt that Eichmann was given a meticulously fair trial, there remain doubts as to the wisdom of an Israeli court asserting jurisdiction.

Such problems do not arise for Australia. An Australian court would presumably not rely upon the protective principle, nor would it have any particular basis for doing so. It could, however, assert jurisdiction over war criminals resident in Australia on the basis of a right to try crimes against international law, its obligations under the 1949 Geneva 'Red Cross' Conventions and its territorial jurisdiction over Australian citizens and residents.

One of the most interesting issues raised by the *Eichmann* case concerns the principles which should govern the determination of a state to try an offence

[56] *Ibid.* 359.
[57] *Ibid.* 50.
[58] *Ibid.* 54.
[59] *Supra* n. 39, 304.

against international law where that jurisdiction rests with all states. The most appropriate venue could be selected by adopting a rule that a war crimes trial should be undertaken by the state which is most willing and able to do so.[60] Jurisdictional conflicts between states are best resolved on the 'proper law' principles developed at private international law. Thus war crimes trials should be conducted by states with the most close, genuine or effective link with the subject-matter, or the accused, or by the court which is the most convenient for the purposes of gathering evidence.

In a criticism of the foundations of jurisdiction in the 'procrustean law of territoriality' Mann concluded that:

> a State has (legislative) jurisdiction, if its contact with a given set of facts is so close, so substantial, so direct, so weighty, that legislation in respect of them is in harmony with international law and its various aspects (including the practice of States, the principles of non-interference and reciprocity and the demands of inter-dependence). A merely political, economic, commercial or social interest does not in itself constitute a sufficient connection. Whether another State has an equally close or a closer, or perhaps the closest, contact, is not necessarily an relevant question, but cannot be decisive where the probability of concurrent jurisdiction is conceded . . . .[61]

In the *Eichmann* case the state with the strongest jurisdictional link — the Federal Republic of Germany — refused to request extradition. Such a refusal can present major problems of evidence for a prosecution which must attain the highest standards of criminal procedures. There were no such difficulties in the *Eichmann* case, where 300,000 survivors of Nazi concentration camps lived in Israel. Indeed, the Israeli Supreme Court concluded that Israel was the most convenient forum for this trial.[62] Australia would not seem to be a convenient forum in which to try war criminals were it not for the fact that seventy or so persons suspected of serious war crimes are Australian citizens or residents and that no other state appears interested in prosecuting them. It is the moral dimension of such prosecutions which becomes the salient feature and driving force behind an assertion of jurisdiction under Australian legislation.

*Can individuals commit crimes against international law?*

Commentators have long debated the question, whether individuals can commit crimes under international law.[63] While the classical view is that individuals cannot be subject to international law, it has now been accepted that they can be criminally liable for certain acts, such as piracy *jure gentium* committed on the high seas and for war crimes.[64] As with so many aspects of international law, and indeed all law, an answer to this theoretical problem lies in an examination of state practice. While there is some historical precedence, the London Agreement for the prosecution and punishment of major war criminals established the first comprehensive supra-national body, the International Military Tribunal for the trial of war criminals. Article 1 established jurisdiction over war criminals 'whose offences have no particular geographical location whether they be accused

60 Moeller, *op. cit.* n. 5, 857.
61 Mann, *op. cit.* n. 27, 49-51.
62 *Supra* n. 39, 302-3.
63 Compare, Schwarzenberger, G., 'The Problem of International and Criminal Law' (1950) 3 *Current Legal Problems* 269 with Lauterpacht, H., *International Law and Human Rights* (1950) 44.
64 De Stoop, D., 'Australia and International Criminal Law', in Ryan, *op. cit.* n. 19, 156.

individually or in their capacity as members of organizations or groups in both capacities'.

When the allies were considering the possibility of war crimes trials there was 'some hesitation'[65] as to whether it was possible at international law to punish heads of state, ministers and senior government officials or military commanders who were alleged to be responsible for waging war and perpetrating atrocities. Whatever the theoretical difficulties might have been in such prosecutions they were nonetheless disregarded and the Charter of the Nuremberg Tribunal specifically provided that there was to be individual responsibility for certain criminal acts. While international responsibility for certain criminal acts is now recognized, not only in the area of piracy and war crimes, but also in relation to genocide,[66] terrorism,[67] hijacking[68] and drug trafficking,[69] the practical fact remains that in the absence of an international military tribunal, or other international body with the jurisdictional power to try such persons, prosecutions depend upon a decision by states to employ the domestic legislative and judicial system to arrest, try and punish those accused of war crimes.

*Is there an obligation to prosecute war criminals?*

It is clear that Australia has the legal right to conduct war crimes trials at international law. It is less certain that Australia has the obligation to do so. In 1946 the General Assembly of the United Nations resolved that it 'affirms the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal'.[70] The principles were similarly applied by the International Tribunal for the Far East and by the other war crimes tribunals established by the Allied Powers which tried lesser offences. These principles were subsequently formulated by the United Nations Law Commission in 1963[71] and the United Kingdom's Lord Chancellor stated in parliament that they 'are generally accepted among States and have the status of customary international law'.[72]

The United Nations General Assembly has adopted numerous resolutions which call upon states to investigate war crimes and to arrest, extradite and

[65] *Ibid.* 158.

[66] *Convention on the Prevention and Punishment of the Crime of Genocide* (1948); in force 12 January 1961. By 1 Jan. 1983 there were 90 parties: 78 U.N.T.S. 277; (1951) 45 A.J.I.L. Supp. 6.

[67] *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomats* (1973) art. 2; in force 1977: (1974) 13 I.L.M. 42. Australia became a party to this Convention and gave domestic effect to it in the Crimes (Internationally Protected Persons) Act 1976 (Cth). See generally, De Stoop, *op. cit.* n. 64.

[68] *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (1963); U.K.T.S. 126 (1969) Cmnd 4230. *Hague Convention for the Suppression of Unlawful Seizure of Aircraft* (1970) art. 4, (1971) 10 I.L.M. 133; U.K.T.S. 39 (1972); *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* (1971). Australia is a party, and has given domestic effect, to each of these Conventions; Crimes (Aircraft) Act 1963 (Cth); Crimes (Hijacking of Aircraft) 1972 (Cth); Crimes (Protection of Aircraft) Act 1973 (Cth).

[69] *Single Convention on Narcotic Drugs* (1961) art. 36(2)(iv); 50 U.N.T.S. 204. See also Lord Wilberforce in *D.P.P. v. Doot* [1973] A.C. 807 (H.L.); *Protocol Amending the Single Convention on Narcotic Drugs* (1972); *Convention on Psychotropic Substances* (1971). Australia is a party to each of these agreements.

[70] G.A. Res. 95(1) G.A.O.R. Res., First Sess. Part II, 188.

[71] Reprinted (1950) Y.B.I.L.C. 195.

[72] United Kingdom, *Hansard*, H.L. Vol. 253, col. 831, 2 Dec. 1963; (1963) B.P.I.L. 212.

punish war criminals. On 3 December 1973 the General Assembly adopted nine principles of international co-operation in the detection, arrest, extradition and punishment of war criminals, including the right of every state to try its own war criminals and urging the co-operation and exchange of information and extradition.[73] Thus far, international law recognizes the right to prosecute only.

On 9 December 1948 the *Convention on the Prevention and Punishment of the Crime of Genocide* was adopted unanimously by the General Assembly.[74] The Convention's definition of genocide is similar, though different in scope, to the crime against humanity contained in the Charter. The Genocide Convention requires that an individual charged with genocide should be tried either by an international criminal court, or by a municipal court in the state in whose territory the crime was committed. This is seen as a minimum obligation and will not prevent the exercise of jurisdiction by another municipal court as in the *Eichmann* case.

Further attempts since the Second World War have been made to draft a general codification of offences against the peace and security of mankind. Prompted by President Truman, in 1946 the United Nations requested the International Law Commission to draft codes of such offences. A second draft, completed in 1954, listed 13 categories of international criminal offences including acts by state authorities or private individuals which were '. . . committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such . . .'.[75]

Progress upon the Draft Code has been retarded by difficulties in defining the concept of aggression and agreeing upon an international criminal court. The I.L.C. resumed its work in 1982 but many obstacles remain before a Code will be concluded, particularly ideological and philosophical approaches to the substance and practical difficulties posed by the need for the I.L.C. to first complete its work on state responsibility.[76] For the present, the Charter of the Nuremberg Tribunal describes principles which are now binding upon all states and individuals within the international community as customary law.

The jurisdictional power to try war criminals was translated into an obligation by the four 1949 Geneva 'Red Cross' Conventions. These require parties to 'undertake to enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed, any of the grave breaches of the present Convention . . .'.[77] The definition of 'grave breach' is common to each of the four Geneva Conventions and includes:

[73] G.A. Res. 3074, 28 U.N.G.A.O.R. Supp. (No. 30) 78, U.N. Doc. A/9030 (1973). These principles include the right of every state to try its own criminals.

[74] 78 U.N.T.S. 277; 45 A.J.I.L., Supp. 6 (1951).

[75] De Stoop, *op. cit.* n. 64, 155-78, 175.

[76] See report of the Sixth Committee on the Draft Code of Offences Against the Peace and Security of Mankind, A/39/775, 7 December 1984; Report of the I.L.C. on the work of its 36th Session 7 May-27 July 1984, G.A.O.R. 39th Sess. Supp. No. 10, A/39/10.

[77] The texts are published in (1950) Y.B.I.L.C. Vol. II, 374-80. A guide to the provisions of the *Red Cross Convention* is International Committee of the Red Cross Geneva (ed.), *Basic Rules of the Geneva Conventions and their Additional Protocols* (1983):
*First Geneva Convention (Wounded and Sick)* art. 49; *Second Geneva Convention (Maritime)* art. 50; *Third Geneva Convention (Prisoners of War)* art. 129; *Fourth Geneva Convention (Civilians)* art. 46.

> wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[78]

Australia has ratified these Conventions and has implemented them in the Geneva Conventions Act 1957 (Cth). Under Section 7(1) any person who in Australia or elsewhere commits *etc.* a grave breach of any of the Conventions is guilty of an indictable offence. This section applies to anyone regardless of their nationality or citizenship and can, in this respect, have an extraterritorial operation. As a party to the four Geneva Conventions, Australia is not only obliged to enact legislation to provide penal sanctions, but also it is under an obligation to:

> search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another high contracting party concerned, providing such high contracting party has made out a prima facie case.[79]

These international obligations, now translated into Australia's domestic law, do not, however, have a retrospective effect. They do not, therefore, have any bearing on proposals to prosecute those suspected of serious war crimes during or before the Second World War. Thus, although Australia has a legal obligation to prosecute for war crimes committed after its ratifications of the Geneva Conventions, it has no such obligation in relation to acts occurring before that time.

### *Evidence*

The difficulties of gathering evidence for a war crimes trial over 41 years after the offences were committed have been mentioned. This aspect of the proposed Australian war crimes trials has prompted criticisms in newspaper articles in the *Sydney Morning Herald* (Sydney) and the *Age* (Melbourne) warning of the dangers inherent in relying upon Soviet sources.[80] These articles and other publications are particularly critical of the practices of the United States O.S.I. in using Soviet materials. Many of the countries in which war crimes took place and which are consequently the sole source of evidence, have long been under Soviet control. The fear is that Soviet motivation in co-operating with Western States to prosecute war criminals is suspect. In particular, human rights activists of Latvian, Lithuanian, Estonian and Ukrainian origin are alleged to have been subjected to Soviet media attacks. These criticisms have been countered by the Director of the O.S.I. in a memorandum to the Menzies inquiry. The Director argues that evidence supplied by the Soviet Union and Eastern Bloc countries has proved correct and has been admitted into evidence in United States courts.[81] American courts have adopted the philosophy that evidence should not be prejudged for its admissibility or credibility and that each deposition should be judged on its own merits on a case by case basis.[82]

78 *Ibid. First*, art. 50; *Second*, art. 51; *Third*, art. 130; *Fourth*, art. 147.

79 *Ibid.*

80 Menzies Report, Attachment B. Barnard, M., 'Search for Old War Criminals Will Spark New Hatred', *Age* (Melbourne) 21 April 1987; Zumbakis, S.P., *Soviet Evidence in North American Courts*.

81 The U.S. case law is cited and discussed in the Menzies Report, Attachment B.

82 See *e.g. U.S. v. Kungys* No. 83-5884 (3rd Cir. filed 20 June, 1986) discussed in Menzies Report, Attachment B.

The Canadian Deschenes Royal Commission examined these arguments when considering taking evidence in the Soviet Union. The Commission concluded that it was both legal and advisable for it to hear and collect evidence available from any foreign country and that the Soviet Union, in particular, met the Commission's requirements. The arguments for and against obtaining such evidence are conveniently listed in the Menzies Report.[83] Menzies concludes that the S.I.U. should 'examine carefully and report to government on the possibility of taking evidence in Eastern Bloc countries for use in Australian courts'. The Director of this Unit plans to visit various countries including the Soviet Union to discuss co-operative efforts to collect relevant documents and evidence. As Menzies points out, however, Australian courts will be concerned with criminal trials of a most grave character and for this reason the standards appropriate for United States denaturalization and deportation procedures may not be either appropriate or sufficiently stringent for Australian purposes.[84]

*Statutory limitations*

Countries will typically place statutory limitation on their prosecution of certain criminal acts. An important example of this was the Federal Republic of Germany's 30 year limitation on the prosecution of murder. This legislation was repealed in July 1979 in conformity with the *Convention on the Non-Applicability of Statutory Limitations to War Crimes Against Humanity* (1968).[85] This Convention achieved its stated object and there is now no period of limitation for war crimes trials.

*Extradition, deportation and revocation of citizenship*

The legislation under which most persons suspected of serious war crimes entered Australia is the Immigration Act 1920 (Cth).[86] Legal action under this legislation is unlikely to be fruitful, however. Under s. 5 of the Act a person who makes a false representation to gain entry to Australia will be required to undergo a dictation test. If he fails this test he may be considered a prohibited immigrant who has thereon committed an offence. This seems an oblique and trivial way of dealing with war criminals.

The Migration Act 1958 (Cth) makes provision for deportation by order of the Minister, but it applies only to persons who are not Australian citizens. Most of the suspected war criminals listed by Menzies are now Australian citizens. In such instances the next step is to consider revocation of that citizenship. The Nationality and Citizenship Act 1948 (Cth) s. 21(a) permits revocation where a

83 *Supra* n. 2, 144-5.

84 *Ibid.*

85 Opened for signature 25 Jan. 1974, reprinted (1974) 13 I.L.M. 540. Article I of the Convention requires the adoption of measures to ensure that statutory limitations shall not apply to the prosecution of either offences specified in the Genocide Convention and the four 1949 Geneva Conventions or violations of the laws and customs of war. See generally, Monson, R. A., 'The West German Status of Limitations on Murder: A Political, Legal and Historical Exposition' (1982) 30 *A.J.Comp.L.* 605.

86 See generally, Brazil, P., 'Australian Nationality and Immigration', in Ryan, *op. cit.* n. 19, 210; Pryles, M., *Australian Citizenship Law* (1981).

person, who became an Australian citizen otherwise than by birth, has been convicted of an offence under s. 50 of the Act. Section 50 makes it an offence to make a false representation or statement, or conceal a material circumstance, in relation to the application for citizenship. A significant defect in this legislation for the purposes of denaturalizing alleged war criminals is that prosecutions for an offence under s. 50 must begin within ten years of that offence. If it could be established, and problems of proof are likely to be insurmountable in many cases, that the alleged war criminal with Australian citizenship made false allegations contrary to s. 50, it is very likely that he or she did so more than ten years ago.

These impediments to revocation and deportation are compounded by the fact that it is not clear that attempts to deport a person deprived of Australian citizenship will be successful. Indeed, no one has been deported following revocation of his Australian citizenship since the legislation was introduced.[87]

It is, of course, possible to amend Australian law to provide specifically for war criminals who subsequently gain Australian citizenship. It would be an easy matter, for example, to remove the ten year time limitation under section 21(a). By contrast, it would not be possible to adopt the United States approach of permitting revocation where that citizenship was gained by misrepresentation of a material fact or illegality at the point of entry.[88] This is because, unlike the United States, Australia is a party to the *Convention on the Reduction of Statelessness*.[89] This agreement prohibits deprivation of citizenship where the basis is misrepresentation at the original point of entry. In any event the Treaty also prohibits the deprivation of nationality if the effect is to make the offender stateless. It is notable that in the only case in which an attempt was made to deport a person deprived of Australian citizenship the state to which he was to be deported, the United States, refused his admission on the ground that, although he had originally been an American citizen, he was now considered an alien. Deportation was, therefore, not possible in this instance.[90]

Thus the combination of international legal obligations with domestic legislation render it difficult, if not impossible, in most cases to revoke Australian citizenship and subsequently to deport alleged war criminals.

Grotius considered that there was a duty on all states either to punish a fugitive criminal or return him to the state requesting his return.[91] Today, there are several multilateral conventions dealing with international criminal offences which impose an obligation upon states to choose between prosecution or extradition, but the obligation is derived from the treaty itself rather than from any customary rule.[92] There is, for this reason, no general obligation upon Australia to extradite war criminals apart from its bilateral and multilateral treaty commitments.

87 Menzies Report, *supra* n. 2, 158.
88 *Fedorenko v. U.S.* 499 U.S. 490.
89 *Supra* n. 18.
90 Menzies Report, *supra* n. 2, 157-8.
91 Shearer, *op. cit.* n. 19, 179.
92 *Ibid.* 181; O'Connell, D. P., *International Law* (2nd ed. 1970) 720-1.

The present Australian Government policy is that while requests to extradite under Australia's current extradition arrangements will be considered as usual, the Government is reluctant to enter into any special extradition arrangements to extradite to a country with significantly different judicial procedures.[93] This policy reflects Australian past practice. The Commonwealth power to extradite is limited to its domestic legislation which, in relation to Commonwealth countries is the Extradition (Commonwealth Countries) Act 1966 (Cth) and for other countries is governed by the Extradition (Foreign Countries) Act 1966 (Cth). While the latter Act originally required a treaty between Australia and a requesting state it is now possible to extradite without such a treaty where the Governor-General is satisfied that the laws of the requesting state permit the surrender to Australia of persons accused of extraditable crimes. Six requests from foreign states have been made for the extradition of alleged war criminals resident in Australia. In five of these cases, Australia advised that it was unable or unwilling to comply with the request and in the sixth case the request was withdrawn because the evidence was insufficient.[94] The result is that Australia has never granted extradition of any alleged war criminal. It has, however, acceded to requests by foreign states to take evidence in Australia for the purposes of war crimes trials in the foreign state.

The *Case of Mr B* illustrates the complex and ultimately unsatisfactory process of extradition of alleged war criminals from Australia. On 28 April 1967 the Federal Republic of Germany requested the extradition of Mr B for alleged crimes during the Second World War which offences included the deportation of Jews to Treblinka concentration camp. Obstacles to extradition were that there was no extradition treaty between the two states and the draft treaty which was then under negotiation related only to crimes committed after 1965. The War Crimes Act 1945 was not considered a realistic solution because it provided for military rather than civil trials and the Migration Act 1958 did not, in the circumstances permit deportation.

By 12 February 1975 the Attorney-General advised the Federal Republic of Germany that not only would Australia complete negotiations on the proposed treaty but also that it would apply to offences committed before 1966. This change of heart was, it seems, too late. The Federal Republic of Germany now withdrew its request because 'the evidence is not sufficient any more'[95] to justify it. The implication is that the eight year delay was a contributory factor to the decision not to prosecute.

Extradition treaties typically include a political offence exception. A person is not to be surrendered if the relevant offence is one of a 'political character'. Such a provision is included in both the Commonwealth Countries' and Foreign Countries' Extradition Acts.[96] It is ironic that the only instance in which the question of a political offence has been considered by the High Court of Australia concerned war crimes and crimes against humanity. In *R. v. Wilson; ex parte*

93 Ministerial Statement, *supra* n. 11, 595.
94 For a discussion of these cases see Menzies Report, Attachment D.
95 *Ibid.*
96 Sections 10(1) and 13(1) respectively.

*Witness J* Murphy J. concluded that such offences could not be regarded as political offences because of international conventional and state practices.[97] The majority came to the same conclusion though it was based on the view that the fugitive must be 'at odds' with the requesting government for the exception to apply.[98]

The complexities of defining the political offence exception has prompted a trend to adopt the Grotian solution of *aut dedera aut punire* or to characterize certain acts as extraditable notwithstanding political motivation.[99] Australia's extradition legislation, for example, specially excludes the offences created by the *Genocide Convention* (1948). Such binding or persuasive judicial *dicta* as exists on the question suggests that war crimes are not likely to come within the political offence exception.

While changes since 1961 have expanded Australia's ability to extradite, serious impediments remain.[1] A request for extradition depends, in the first place, upon the exercise of discretion by the foreign state; the alleged war crime must fall within the list of offences to which the relevant extradition treaty is applicable; *prima facie* evidence of the offence must be made out and the Attorney-General must be satisfied that the request is not a subterfuge for discriminatory trial procedures or punishment. Most importantly, for practical purposes, Australia has no extradition treaties or arrangements with the German Democratic Republic, the Soviet Union or Bulgaria, which are the states most closely concerned with the activities of the alleged war criminals resident in Australia. In these legal circumstances, and despite the view of Menzies that extradition should 'be first looked to'[2] as the method of dealing with war criminals, extradition is, like denaturalization and deportation, not a practical solution. It is, therefore, not surprising that the Government has adopted war crimes trials as the preferred option.

## *Conclusion*

A decision by the Australian Government to establish a Special Investigations Unit to assess whether action should be taken to prosecute persons accused of war crimes has an inexorable logic. That logic is based upon the practical and legal impediments to extradition or deportation and upon the moral view that justice must be done and be seen to be done. The determination to try those war criminals who escaped post-war prosecutions and who have lived, since then, in relative obscurity reflects the concern of a new generation which is troubled by the well-documented scale and evil of wartime atrocities and by the injustice inherent in allowing those responsible to remain unpunished. The prospect of war crimes trials in Australia nonetheless raises doubts as to the wisdom of such prosecutions. There is every reason to expect that high standards of criminal

97 (1976) 135 C.L.R. 179, 191.
98 *Ibid.*
99 Shearer, *op. cit.* n. 19, 198.
1 *Ibid.* 185-201.
2 Menzies Report, *op. cit.* n. 2, 155.

justice will apply in these trials, but scrupulous care must be exercised with regard to gathering and admitting evidence. Legal arguments based upon the maxim prohibiting retroactive criminal legislation or upon the defence of superior orders are unlikely to be decisive before an Australian court, but they may find favour in political and media circles. Australians may also be concerned that the accused, often sick and old men, are but a shell of their former personalities. The jurisprudential foundation for such trials must lie in concepts of retribution and the deterrence of others; bases of punishment which today are no longer considered pre-eminent. Perhaps the most obvious of objections to Australian war crimes trials is that, unlike Israel, the Federal Republic of Germany or France, atrocities committed in European countries during the Second World War have no direct link with Australia, other than the residence here of those alleged to be responsible. This fact of residence or citizenship and the principle of universality are sufficient to justify an assertion of jurisdiction but there is no legal obligation to do so. Thus the more important question for Australian policymakers is whether the moral imperative of justice outweighs the potential bitterness and conflict within the ethnic communities now settled in Australia. While the Attorney-General has reopened the chapter he may have exposed readers to a tale of evil which cannot be contained.