PUNISHING NAZI WAR CRIMINALS IN AUSTRALIA: ISSUES OF LAW AND MORALITY

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"Who remembers the Armenians?"

Adolf Hitler[1]

"The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating that civilisation cannot tolerate their being ignored because it cannot survive it being repeated."

Justice Robert H Jackson[2]

INTRODUCTION

It is timely to reflect on these quotations as the Federal Government has recently decided to abandon further investigations into a fourth alleged Nazi war criminal living in Australia. The likely impact of this decision is that, apart from the two prosecutions still proceeding in the Courts,[3] no further charges will be laid pursuant to the *War Crimes Amendment Act* 1988 *(WCAA)*. Ivan Polyukhovich was the first person charged under the *War Crimes Amendment Act* 1988 *(WCAA)* which came into force on 25 January 1989. The 1988 Act *(WCAA)* made substantial changes to the *War Crimes Act* 1945 *(WCA)*. Instead of a Military Court hearing the charges, State and Territory Courts now have Federal Jurisdiction

* The author wishes to acknowledge helpful comments of my colleagues Stanley Yeo and David Fraser on an earlier draft of this paper.

1 Referring to the Armenian Holocaust of 1915 where two thirds of the population of Turkish Armenia was slaughtered.

2 Chief American prosecutor at Nuremberg Tribunal.

3 Ivan Timofeyeich Polyukhovich, aged 75, of Adelaide, was charged on 26 January 1990 with having murdered 24 men, women and children and having been knowingly involved in the murder of 850 Jews in the Ukraine between 1941–1943. These charges were altered on 7 August 1990, following the exhumation of a mass grave near Semicki. He was eventually committed for trial on two murder charges involving six people. The magistrate found no case to answer on five other counts, but in a surprise move, the DPP later relaid three revamped charges. One of these included Polyukhovich's alleged involvement in the massacre of 850 Jews in the Ukraine. Lawyers for Polyukhovich are due to appear in the Adelaide Supreme Court on 30 November 1992 to move to have the war crimes charges against him dropped.
Mikolai Berezowski was charged with being involved in the murder of 102 Jews near the village of Gnivan, in the Ukraine. After a five week committal hearing, the magistrate found he had no case to answer and dismissed all charges on 29 July 1992.
Heinrich Wagner is charged with the murder of 19 part-Jewish children and a railway construction worker, as well as being knowingly involved in the murder of 104 people near the village of Ustinovka in Nazi occupied Ukraine in 1942 and 1943. The committal proceedings commenced on 10 August 1992. At the time of writing, the magistrate and the parties involved are currently in the Ukraine taking testimony from witnesses. The hearing is due to recommence in Adelaide in mid-September.

to try the cases. The *WCAA* also restricts the operation of the Act to war crimes committed in Europe between 1 September 1939 and 8 May 1945 (unlike the *WCA* where "any war" referred to one in which His/Her Majesty was engaged since 2 September 1939). Other amendments of importance include a retrospective operation of the law, and restriction to those charged being either Australian citizens or residents of Australia or of an external Territory, among others. Such substantive amendments have given rise to the suggestion that the *WCAA* is in essence, a whole new Act.

The problems associated with the passage of the legislation as well as with the committal hearings have been, and continue to be, considerable. It is my intention in this paper to examine some of those problems and the costs associated with them. In addition, I will look at the counterveiling arguments in support of, not only the necessity of the legislation, but also the advisability of proceeding with the prosecutions. Australia's response to the prosecution of war criminals will be analysed within a wider theoretical framework, which looks at such issues as natural law principles, the place of morality based justifications and rationales of punishment.

The article will firstly deal with the history of how the *WCAA* came into effect, together with procedural difficulties encountered both by the government and by the prosecutors in the case.[4] Secondly, recent events in Europe will be considered, in particular their possible ramifications for Australia's war crimes trials. Thirdly, and most significantly, the various moral and jurisdictional aspects will be discussed, as a backdrop to supporting the position the Australian government initially took, but from which it seems to have now resiled.

DIFFICULT BEGINNINGS

A series of radio[5] and television[6] programs in 1986, based on research by Mark Aarons, alleging the involvement of the Australian government in allowing Nazi war criminals to enter this country after World War II, led to the passing of the *WCAA*, in December 1988.

The publication of the *Menzies Report*[7] was followed by the establishment of a Special Investigations Unit within the Department of Public Prosecutions. As a direct result of the findings of the Menzies Report, the Labour Government introduced the *War Crimes Amendment Bill* 1987 into the Lower House on 28 October 1987. It took 14 months for the Bill to be enacted,[8] during which time a report by the Senate Standing Committee on Legal and Constitutional Affairs[9] concluded that "it is reasonable to expect that the evidence and related material believed to be available abroad is likely, if brought to Australia, to be of

4 *DPP v Polyukhovich*, ibid.
5 *Background Briefing*, "Nazis in Australia", ABC Radio National, 13, 20, 27 April and 4, 11 May 1986.
6 *Four Corners*, ABC Television, "Don't Mention the War", 21 April 1986.
7 Menzies, A C C, *Review of Material Relating to the Entry of Suspected War Criminals into Australia* (1987) Canberra.
8 *War Crimes Amendment Act* 1988 passed through both Houses on 21 December 1988.
9 Australia, Parliament, *Matters Relating to the War Crimes Amendment Bill* 1987, Report by the Senate Standing Committee on Legal and Constitutional Affairs, Canberra, February 1988 (hereinafter referred to as the *"Senate Report"*).

sufficient evidentiary value to warrant the institution of prosecutions for alleged war crimes, if the Bill is enacted".[10] What started as a bipartisan approach in the House of Representatives[11] turned into a bitter political debate in the Senate, resulting in an about face by the Liberal Party in both Houses.[12]

Further difficulties were encountered after the Legislation was passed. The day before Polyukhovich was due to appear at the Adelaide Magistrates Court, he was shot in the chest,[13] necessitating a lengthy delay. An appeal to the High Court challenging the constitutional validity of the *WCAA*,[14] and an appeal to the South Australian Supreme Court as to the accused's fitness to plead both delayed the committal proceedings further.

On 14 August 1991 the High Court ruled[15] that the *WCAA* was a valid exercise of the Parliament's power.[16] The committal proceedings recommenced in March 1992, and the accused pleaded not guilty to each of 5 counts on day 1 of the trial in the Adelaide Supreme Court on 27 July 1992. One further accused is in the process of committal proceedings with a third having been discharged on the basis that there was no case to answer.

These problems have been exacerbated by procedural difficulties with interpreters[17] during the Committal proceedings, rising costs associated with investigations,[18] delays caused by continuing illness of both the accused and the witnesses,[19] and a general feeling of unease about possible ethnic divisions within the Australian community. In addition, upheavals in the USSR in 1991 no doubt had an effect on both the investigations and conduct of the prosecutions.

THE COLLAPSE OF THE SOVIET UNION AND ITS EFFECT ON EVIDENCE

One of the procedural difficulties with conducting war crimes trials in Australia concerns the availability of evidence. Not only is the identification of the defendant a problem, but so is reliance on documentary evidence, much of it, until very recently, in Soviet hands. There is a general fear in some quarters that Soviet motivation in cooperating with the prosecution was suspect and that the evidence may not be authentic.[20]

10 Clause 9.11 at 87. This was the conclusion of the majority. Senator John Stone (National Party) and Senator Robert Hill (Liberal Party) dissented.

11 *Hansard*, 26 November 1987 at 2735 and 2739.

12 House of Representatives, *Hansard*, 21 December 1988 at 3773.

13 29 July 1990. There was an allegation in the press, based on police evidence, that the shot was self-inflicted: *Sydney Morning Herald* 28 March 1992.

14 In April 1990.

15 By a 4:3 majority, comprising Mason CJ, Dawson, Toohey and McHugh JJ.

16 *Polyukhovich v The Commonwealth* (1991) 65 ALJR 521.

17 In one case "a witness had been asked if he had been forced to wear a yellow star after the Germans occupied the Ukraine. This had been translated as 'Did you wear a green sign'." (*Australian Jewish News* 3 April 1992).

18 It has been estimated that as at 30 June 1992 when the special Investigations Unit ceased operations, the approximate cost of the unit's investigation of 820 allegations was close to $20 million. The SIU became the War Crimes Prosecution Support Unit from 1 July 1992.

19 *Sydney Morning Herald*, 2 May 1992.

20 This issue was raised in both the House of Representatives, by Mr Cadman (Mitchell), Mr N A Brown (Menzies) and Mr Lionel Bowen (Kingsford-Smith) on 26 November 1987, and in the Senate by Senator

Most of the alleged criminals who entered Australia illegally committed crimes against residents of the Baltic States and the Ukraine during World War II.[21] The bulk of the evidence pertaining to the trials of these individuals was held by Soviet sources, who offered to make it available for prosecutions. The fear of authenticity is based on a suspicion that the "Soviets" may have been motivated by a desire to discredit former nationals who were no longer loyal to the Soviet government. Although such suspicions cannot be ignored, the US and Canadian experience in using Soviet source evidence has proved that it is reliable so long as certain safeguards are implemented, such as providing independent interpreters, access to original documents and access to witnesses' previous statements. In addition, it is expected that foreign witnesses will appear in person, in open court, away from the influence of former Soviet officials.[22]

The collapse of the Soviet Union has already had, and will no doubt continue to have, a significant impact on the outcome of the prosecutions. Generally, several new avenues of inquiry have become available,[23] but staffing disruptions in various regional governments have broken many personal contact relationships. Outbreaks of hostilities in various regions caused a cessation of investigative enquiries until calm had descended.

Recent reports[24] claim that a number of Lithuanian witnesses who had previously agreed to co-operate by testifying in person have now changed their minds. This is no doubt due to the break up of the Soviet Union. These witnesses were collaborators who have already been tried and punished by the Soviet Union, which was exerting pressure on them to testify in Australia. Since the Lithuanians have gained their independence, with a corresponding resurgence of nationalism, the regional government has now removed the pressure to testify. Whilst such a change of attitude could have created an obstacle to future prosecutions, it should not affect the course of the two already underway, where the offences were all committed by Ukrainians. The Ukrainian government has remained most cooperative,[25] as have many of the other regional governments, who have allowed SIU Investigators to examine original archival material.

Allegations of non-authenticity of documentary evidence is of little relevance in the *Polyukhovich* case where the occurrence of the events in question is not in dispute. The main

Hill (South Australia) on 15 December 1988; See *Hansard*. It is important to distinguish between two classes of documents. First are the protocols, or witnesses' statements taken immediately after the war. These are the ones alleged to have been tampered with by the Soviet officials so as to implicate people with anti-Communist leanings. The statements were taken by the regional republics which kept the originals, with copies sent to Moscow. It should now be possible to compare the originals, where direct access to documents is offered by the individual regional governments. The second type of document is the recent statement from eyewitnesses, at the behest of the SIU. These are taken by personnel in the regional republics where the incentive to make people lie no longer exists.

21 Menzies Report, above n7.

22 See Senate Parliamentary Debates, *Hansard*, 15 December 1988 at 4318–9. See also precautions recommended by the Senate Committee Report, above n8 at 19–27, 42, 52–3.

23 See Attorney General's Department, *Report on the Operation of the WCA 1945* to June 1991, Canberra (hereinafter referred to as the *SIU Report*) at 4.

24 *Australian Jewish News*, 3 April 1992.

25 Personal advice from Director of SIU, Mr Graham Blewitt, on 14 April 1992.

issue in dispute is the identification of the accused, where the prosecution is relying on the personal evidence of eyewitnesses.

JURISDICTIONAL ISSUES AND THE HIGH COURT DECISION

Although the High Court judgments[26] dealt mostly with constitutional issues related to Parliament's power to enact the *WCAA*, there was some discussion as to whether reliance could be placed on international principles of criminal jurisdiction.

Toohey J referred to the five principles of International Criminal Jurisdiction,[27] before concluding that the Universality jurisdiction was a valid basis for the *WCAA*. The Universality principle allows any State municipal courts, on behalf of all the citizens of the world, to assert jurisdiction over crimes which have been judged to be particularly "heinous and harmful to humankind generally".[28] The theoretical basis of this principle relies on the notion of a common goal of humankind to pursue and prosecute various criminals, including war criminals.[29] Piracy and hijacking have traditionally been prosecuted under this principle.[30]

Unlike the domestic jurisdiction, which has its repository in a government setting, the International law jurisdiction has no central location. It is a firmly entrenched presumption that foreign nations will not intervene in the domestic criminal jurisdiction of States. However, there have always existed exceptions to this basic rule, the most notable of them being the Nuremberg Tribunal, which created three categories of crime under International Law, pursuant to its Charter: crimes of war, crimes against peace and crimes against humanity.[31] It is the Universality principle which is invoked when alien States prosecute Nazi war criminals within their own municipal courts. The Genocide Convention[32] gave full force to the notion that foreign States may override the domestic jurisdiction of States whenever human rights have been threatened. Despite continuing controversy, the Universality principle is a well established tenet of International law. Since the Nuremberg Tribunal is no longer in existence, one of the most effective ways of criminalising acts committed by alleged war criminals is for individual States, exercising International jurisdiction, to carry out prosecutions.

26 Above n16.

27 Territoriality, Nationality, The Protective Principle, Passive Personality, Universality; above n15, at 581–9. See also Triggs, G, "Australia's War Crimes Act: justice delayed or denied?" (1990) 64 *Law Inst J* 153 at 155; see also Brennan J at 540.

28 Sobchak, N J, "The Aftermath of Nuremberg... The Problems of Suspected War Criminals in America" (1989) 6 *Journal of Human Rights* 425.

29 Paust, J J, "Universality and the Responsibility to Enforce International Criminal Law: No US Sanctuary for Alleged Nazi War Criminals" (1989) 11 *Houston Journal of International Law* 337.

30 *Polyukhovich v The Commonwealth*, above n16, per Brennan J at 540; see also Triggs, above n27 at 155.

31 Nuremberg set a precedent in International Law by creating "new" offences, although such is the normal process of the common law. It defined the limits of criminal behaviour on a grand scale.

32 *Convention on the Prevention and Punishment of the Crime of Genocide*, G A Res — 260 (III) art 2 (1948).

However the Australian government is not relying on the Universality principle per se. By enacting the *WCAA*, the government is relying on its domestic jurisdiction, albeit based on the Universality principle, to prosecute Nazi war criminals.[33]

The High Court decision has not abated the controversy which continues in relation to the trials. Inspite of the ruling that the *WCAA* is a valid act, the fact that the decision was closely split, together with the fact that arguments about morality, justice and abuse of process continue to be aired, it is not surprising that the High Court decision was not the end of the story.

MORAL CONSIDERATIONS UNDERLYING THE WCAA

The Parliamentary debates of the *War Crimes Amendment Bill* 1987 were conspicuous by the high level of morality-based discussion,[34] and the highly charged emotional atmosphere. It is suggested that it is in the very nature of this Legislation that issues of morality, including precepts of natural law, must play a dominant part.

NATURAL AND POSITIVE LAW

Law and morality may seem strange bedfellows to adherents of "the rule of law". The distinction between the two starts to blur when precepts of natural law are accepted as valid, subject to sanction by the Courts. Natural law is based on ideas of morality and justice, independent of sovereign created rules. It is supposedly intrinsically just and fair, as it devolves from God or another supreme source. Some would argue that the idea of an act being a crime against natural law is juridicially meaningless, since the very concept of crime presupposes an offence against some prescribed rule imposed by the State.[35]

With the emergence of the Sovereign State from the nineteenth century onwards, positive law came to surpass natural law in importance. As competition between nations grew, so the sanctity of the freedom of each Sovereign to set norms became entrenched. This emphasis

33 By using domestic enabling Legislation, jurisdictional problems are overcome as soon as the Legislation is held to be valid. In the High Court challenge, counsel for the Commonwealth argued that the *WCAA* was a law appropriate to the exercise of the right of every nation to try those charged with International crimes, especially war crimes: see Brennan J at 539. The majority of the High Court accepted a wide interpretation of the external affairs power, extending it to matters outside Australia even if there is no recognisable nexus with Australia. Brennan J emphasised that "a law which vested in an Australian Court a jurisdiction recognized by International law as a universal jurisdiction is a law with respect to Australia's external affairs" and that unless "Australia had the right to try offenders who had breached one of the principles of international jurisdiction, Australia's international personality would be incomplete", at 539.

34 See Senate debates, *Hansard*, 15 Dec 1988, for example, at 4341, 4323, 4342 and 4257.

35 See April, N, "An Inquiry into the Judicial Basis for the Nuremberg War Crimes Trial" (1946) 30 *Minnesota Law Review* 313; Birmingham, R L, "The War Crimes Trial: A Second Look" (1962) 24 *University of Pittsburg Law Review*, 132. The origins of natural law extend back to early Judeo-Christian teaching, with later expansion by the Stoics, Romans, Aristotle and Cicero, among others. Early natural law was closely linked with religion, God being the supreme sovereign law giver. However, later scholars tried to develop secular notions of natural law, the most notable being Hugo Grotius. Grotius posited a theory of natural law based on the rationality of man, rather than on the divine spirit of God. Such an idea was only partly successful, as the secularists were unable to advance any authority other than God to support their theories.

on positivism reduced the impact of natural law to the point where the State was heralded as the final arbiter on issues of right and wrong. It was not until the Nuremberg Trials that precepts of natural law came to be formally acknowledged.

Crimes against humanity had not been previously proscribed per se by positive law, perhaps because the framers of sovereign laws could not imagine that such crimes could occur. Prior experience, together with an ability to predict possible crimes, are necessary preconditions to the framing of positive law. With Nuremberg, International law emphasised the idea that morality as understood within the context of natural law may indeed be relied on to fill the void inadvertently left by positive law.

Natural law presupposes a belief in the absolutist nature of right and wrong, unaffected by cultural factors. An act does not warrant condemnation simply because of its jurisdictional prohibition, but rather because it offends against some higher order. Such absolutist notions disregard domestic sovereign differences. While positive law recognises jurisdictional inconsistencies, adherents of natural law would view a crime as being inherently absolute, unaffected by time and place.

Acts of genocide do not cease to be crimes, simply because they are culturally endorsed during the period of commission. Civilian murder has always been a crime, even in Nazi Germany.[36] Similarly, a person who breached an immoral and unjust government ordinance would be viewed, from a natural law standpoint, as acting lawfully.[37]

Cultural relativists advance strong arguments for rejecting absolutist notions of right and wrong, on the basis that our concepts of right and wrong have been socially conditioned. They warn against making ethnocentric judgments of culturally disparate value systems. How is one to distinguish right from wrong, without reference to prescribed norms? Eichmann's claim that he was merely conforming to a culturally prevalent value system illustrates the absolute–relative dichotomy of law and morality.

Natural and positive law are not necessarily mutually exclusive concepts. Positive law itself recognises exceptions based on natural law precepts, for example "exempting from responsibility otherwise criminal acts committed under duress, in self defence, or the defence of others, as well as in states of necessity".[38] Prescribed laws take account of the fact that certain morally valuable interests, such as self-preservation and family ties, may override

36 See comment by Toohey J in *Polyukhovich*, above n16 at 593, where he says that the law prevailing in the Ukraine at the relevant time in relation to murder was no more beneficial to an accused than it was in Australia.

37 An illustration of such is the case of Giorgio Perlasca, an Italian citizen who volunteered to work as a Consular official with the Spanish Legation in Hungary, offering protection for Jewish families. When the head of the mission fled to Switzerland in November 1944, Perlasca was the only person left in the program with a Spanish passport. He took over the leadership role for eighty days, by convincing Hungarian authorities that he was the new Spanish Consul, and in the process saved the lives of over 5,000 Jewish families by providing them with illegal consular letters of protection, as well as food and medical aid. His acts were no doubt illegal, within a positive law context, yet he has since been labelled as a hero. Giorgio Perlasca died in August 1992 at the age of 82.

38 Silving, H, "In Re Eichmann: A Dilemma of Law and Morality", (1961) 55 *American Journal. of International Law* 307.

the "rule of law".[39] The position advanced by Helen Silving has a great deal of merit. It favours a basic acceptance of positive law, tempered with a "minimum measure of natural law" in the exceptional situations in which "positivism leads to the sacrifice of the spirit of justice".[40] Positive law is not intended to contradict natural law, but rather to complement it, almost as a commentary. However, this system of rules did not envisage a situation such as existed during Hitler's reign. Positive law may function well within a healthy government structure. But when the total structure is aberrant, so that positive law deviates from those natural laws upon which it was predicated, then it becomes imperative for International law to redress the balance by introducing "a minimum measure of natural law".[41] Such a measure should be applied parsimoniously and cautiously and restricted to those situations which are exceptional, as where compliance with the formal validity of laws leads to gross injustice. The adoption of Silving's thesis rests on a view that Nazi Germany as a unity or "whole" was a sick society, where adherence to prescribed norms would necessarily lead to injustice.

The phrase "a crime ... is a crime ... is a crime" comes to mind as a metaphorical illustration of this position. It is no less a crime because the criminals were law abiding citizens, carrying out the wishes of the government. It is a crime against the natural law whenever the positive law has so departed from what is just and moral that inhumane acts cease to be condemned by formal proscription.

International law thus serves as a guardian, ensuring that positive law does not stray too far from its counterpart, natural law. The International Military Tribunal at Nuremberg paved the way for future convictions of war criminals. However, a new medium would have to be found, as the Tribunal was disbanded after Nuremberg. The Australian Government found such a medium in the *WCAA*. This medium allows guilty individuals to be punished for their crimes, despite their having escaped punishment for so long. But the question remains, who is actually guilty? Is it the person who conformed and/or the whole structure which created the norm?

COLLECTIVE GUILT AND SUPERIOR ORDERS

In order to carry out its plans, Nazi Germany was organised in a way whereby highly structured and efficient entities pursued clearly defined goals. Just as a corporation is a separate legal entity in the eyes of the law, there are compelling reasons why States or collectives should also be held accountable where heinous crimes are committed, the commission of which would not have been possible without group support.

The crime of genocide is one which by its very nature presupposes an organisational master-plan. The Nuremberg Court avoided the delicate issue of prosecuting the State for war crimes, perhaps fearing future action against the member States, of being pierced by their own sword. There is certainly no paucity of incidents in the history of the modern world where States might potentially be liable to charges of criminal behaviour.

39 Ibid.
40 Id at 309.
41 Ibid.

It may be worthwhile to publicly denounce a collective as being responsible, while using the full force of the criminal justice system against the individual. Symbolic shaming, while it may be of little practical significance in a world where political supremacy takes precedence over justice and morality, may nonetheless be important for educative purposes, and as an acknowledgment by the International legal community that heinous crimes should be stigmatised. It has sometimes been said that the responsibility for crimes against humanity should not be attributed to organisations or individuals, but to the social conditions existing at the time. The argument is that a collective's responsibility should be judged in the light of currently existing social problems. Since the German people were reacting to tyranny at the time of Hitler's "final solution" it would be inappropriate to hold the German people responsible as a collective. This type of argument advances the position put by the cultural relativist. For instance at the Nuremberg Trials, in addition to the indictments against twenty-two men, successful indictments were obtained against the Nazi Party, the Gestapo, the SD and the SS while the SA, the Reich Cabinet and the German General Staff and High Command were acquitted.[42] One of the reasons for the conviction of the SS was "not only ... because its members actually committed crimes but also because the essential mode of its thinking and its group behaviour was that prevalent in organised criminal organisations".[43] In the SS we see a transformation from a group of individuals working collectively, into a "collective", a unity comprised of individuals. The collective attains an added dimension, something not reducible to its individual members.

The Military Tribunal at Nuremberg stated that prior to punishing individual members of an illegally declared organisation, it would be necessary to prove that the individual became or remained a member with full knowledge of the criminal organisation, otherwise the majority of the German people would have been culpable. The reluctance of the Tribunal to criminalise a State is exemplified by the statement of Justice Jackson that "crimes are committed by individuals not abstract entities called States".[44] It is instructive to note the development of the law in relation to corporate criminal liability, in the light of Justice Jackson's statement.[45]

In 1992 it is no longer possible to prosecute any organisations or States of the Third Reich — that was completed at Nuremberg. This is not to deny the theoretical possibility of so doing, in the appropriate circumstances. One is then left with the traditional option of prosecuting any individual who is guilty of a crime but has been fortunate enough to escape punishment for almost fifty years. The guilty individual should not benefit from the fact that the organisation to which s/he belonged has ceased to exist. S/he does not cease to be blameworthy, just because the collective or the State may also have been blameworthy. Knowledge on the part of an individual, exercising free choice in furthering the criminal aims of an organisation, should make him/her liable to prosecution, long after the organisation has ceased to function.

42 Arens, R, "Nuremberg and Group Prosecution" (1951) *Washington University Law Review*, 329, at 352.
43 Alexander, L, "War Crimes and their Motivation" (1948) 39 *Journal of Criminal Law* 298.
44 *Department State Bulletin*, 12 August 1945, at 227.
45 See *Howard's Criminal Law* (Fisse B (ed)) 1990, 5th ed, Ch 7.

Crimes against humanity are not subject to any Statute of Limitations.[46] It is thus the responsibility of the unity of nations to pursue war criminals whenever and wherever they are found. They should not be able to hide behind the "collective" shield, nor should they be able to seek refuge behind relativist arguments of current societal conditions. It is true that adherence to the rule of law is strongly advocated by every society, but where torture, murder and genocide are carried out under the rubric of being a "good citizen", it is time for the International community to make a firm symbolic stand in favour of justice and morality, even if that means searching out elderly and frail men and women who have escaped punishment for too long. Despite the lack of enthusiasm of previous Australian governments[47] in seeking out Nazi war criminals, the Hawke Labour government emphasized the moral necessity underpinning the *WCAA*.[48]

The defence of superior orders was rejected as a defence at Nuremberg although German and Israeli law now does recognize it.[49] The Nuremberg Trials ruled that although not recognised as a complete defence to a crime, the defence of superior orders "may be considered in mitigation of punishment if the Tribunal so requires".[50] Every Nazi defendant at Nuremberg pleaded the defence nonetheless. However, in over forty years of prosecutions, no defendant has ever successfully proved that he would have suffered in any way for failing to carry out criminal orders.[51]

Both Adolph Eichmann and Klaus Barbie claimed they were good soldiers following orders from above. Eichmann presented himself as a "martyr of the wicked system".[52] Barbie

46 Cf Justice Michael D Kirby,"War Criminals — The Right to a Fair and Speedy Trial?", Conference paper given at McGill University, Montreal, Canada, entitled *Nuremberg Forty Years Later — The Struggle against Injustice in Our Time*, 4 November 1987. Kirby sees the issue of war crimes trials so long after the event as a balancing of two public interests, that of a fair and speedy trial and that of bringing criminals to justice. His conclusion is that is would be an abuse of process to now punish war criminals after such a lengthy delay; See also comments of Justice Marcus Einfeld who in essence agrees with Kirby. This issue of delay in bringing prosecutions was fully debated in Parliament — See House of Representatives, *Hansard*, 26 Nov 1987, at 2747; Senate, *Hansard*, 15 Dec 1988 at 4329–30, 4365. Contrary views to those of Kirby and Einfeld have been made in the NSW Legislative Assembly, *Hansard*, 16 April 1986, by Mr Walker at 1981, in the House of Representatives, *Hansard* 26 Nov 1987, by Mr Reith, at 2732, in the Senate, *Hansard* 15 Dec 1988, by Senator Zakharov, at 4324–5 and by Aarons, M, *Sanctuary: Nazi Fugitives in Australia* (1989).

47 The Chifley and Menzies governments.

48 See Second Reading Speech, *Hansard* 28 Oct 1987 at 1612, especially "... The Government has a duty statement to ensure that justice is done, no matter how long since the events in question have passed"; see also Parliamentary Debates in The Senate, *Hansard* 15 Dec 1988 and 16 Dec 1988.

49 German Military Criminal Code 1957, s5(1); Israeli Criminal Code Ordinance 1936, s19(b) and Military Justice Law 1955, s125.

50 Charter of the International Military Tribunal, 1945. See also s16 *WCAA*.

51 See Friedlander, H, "Holocaust and Human Rights Law: The First International Conference" (1988) 8 *Boston College Third World Law Journal* 1. See also the chilling account of the events which occurred on 13 July 1942 in the Polish Village of Jozefow, in Browning, C R, "German Memory, Judicial Interrogation, and Historical Reconstruction: Writing Perpetrator History from Postwar Testimony" in Friedlander, S (ed) *Probing the Limits of Representation: Nazism and the Final Solution* (1992). Based on the testimony of 125 former members of the German Reserve Police Battalion 101, it appears evident that soldiers who were either unwilling or unable to follow orders to shoot every woman, child and elderly person in the village suffered no consequences apart from some derision by their more obedient colleagues.

52 See Hausner, G, *Justice in Jerusalem* (1966) at 539.

claimed, unsuccessfully, that the system which put him on trial was hypocritical and that he was merely acting pursuant to instructions.[53] US involvement in delaying Barbie's punishment, fully reviewed in the Ryan Report[54] might be seen as reinforcing the view that Barbie was a useful puppet, not only to the Germans, but also a source of valuable information to the Americans after the war. As appealing as such a view might at first appear, is should not be forgotten that where free choice is exercised, with no threat of severe punishment for failing to co-operate, the notion that a war criminal was acting merely as a puppet lacks credibility.

The German Code of Military War carried a proviso that where a soldier knew the order of a superior was illegal, he was not compelled to carry it out.[55] Murder of civilians was illegal in wartime Germany.

S16 of the *WCAA* also precludes the defence of superior orders except for mitigation of sentence. No doubt the rationale of s16 would be similar to that of Nuremberg, that is, the horrendous nature of these war crimes.[56] S17 allows a defence where the act was either a) permitted by the laws, customs, and usages of war and b) was not under international law a crime against humanity. In addition, pursuant to s6(2) and s13(2)(f) of the *WCAA*, an accused may rely on any defences to the charge either available at the time the act was committed or at the time of the charge being laid.[57]

It is of interest to look to s31(2) of the Queensland and Western Australian Criminal Codes which allow a defence of acting in "obedience to the order of a competent authority which he is bound by law to obey, unless the order is manifestly unlawful ... Whether an order is or is not manifestly unlawful is a question of law".[58] This defence is not part of the common law, although some of the traditional defences to murder would still be available in the common law states.[59] Can an accused who is charged in one of the Code States of Australia

53 For a more detailed discussion of the trial of Klaus Barbie, see Doman, N R, "Aftermath of Nuremberg: The Trial of Klaus Barbie" (1989) 60 *University of Colorado Law Review* 449.

54 Ryan, A, *Klaus Barbie and the United States Government: A Report to the Attorney-General of the United States* (1983).

55 See Nichols, D B, "Untying the Soldier by Refurbishing the Common Law", (1976) *Criminal Law Review*, 181, where he states that the defence of superior orders was excluded because of the heinous nature of these particular crimes, where it would have been obvious even to the "dullest serviceman" that those acts were "manifestly and palpably illegal", at 182. A more recent attempt to use the defence of superior orders was in the case of the My Lae Massacre by Lieutenant William L Calley, who was charged with the murder of twenty-two civilians in 1968 in Vietnam. The judges of the Court of Military Appeals held, inter alia, "... that the acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful." See Johnson, D H, "The Defence of Superior Orders" (1986) 1985 *Aust. Year Book of International Law* 291 at 299.

56 A claim of superior orders may, nonetheless, play a part in proof of mens rea where that is an element of the offence. If a person neither knew an order was illegal, nor had reason to think so, this may provide a justification or excuse for committing the illegal act.

57 See House of Representatives, *Hansard*, 21 Dec 1988, Mr Lionel Bowen, at 3812, where he agrees to an amendment by the opposition, adding to the power of the defence available to an accused.

58 S38 of the Tasmanian Code and s26 of the Northern Territory Code also use the words "manifestly unlawful".

59 Such as duress, necessity, self-defence.

rely on s31(2) to escape conviction? Theoretically, despite the apparent strictness of s16 of the *WCAA*, there is no reason why this should not be available. However, in practical terms, it is most unlikely that an accused charged with war crimes would be able to overcome the element of "manifest unlawfulness". It would, it is suggested, be necessary to show not only that he did not know the act was manifestly unlawful, but that the ordinary person would similarly not have known the act was manifestly unlawful. In relation to the charge of mass murder of civilians, such an assertion has little chance of success.

Since there is little scope for an accused charged with war crimes to rely on available defences within the Act, a continuing controversy remains whether the *WCAA*, while having been held to be valid, should nonetheless not be used, as it would amount to an abuse of process, since the offences occurred so long ago.

Time to Prosecute? Retroactivity and Forgiveness

Opponents of Australia's recently amended legislation often refer to the "ex post facto" and "retroactive" principles to argue that the war crimes legislation should not be used.[60] The Eichmann Court distinguished ex post facto and retroactive laws. The former were not crimes at the time of commission and therefore innocent, subsequently being converted by the law into a guilty act. Retroactive law, however, merely allows the party to be punished under legislation for an act which was never innocent and indifferent. The act was always considered a crime. Eichmann's acts fell into the latter category, according to the Israeli Court, and thus the law did not offend against the ex post facto principle.

Retroactive laws are not ex post facto within the International jurisdiction because unlike municipal laws which formally prescribe codes of conduct, International law has no legislative code to define an act as criminal. It is similar to early English common law. Murder was not defined by Statute in England, deriving its criminality from the common law. "Just as the first person punished for murder by the common law courts could not claim it was ex post facto law, so the war criminal charged with war crimes or crimes against humanity cannot claim exemption under the ex post facto principle".[61]

60 One of the arguments put by Counsel for *Polyukhovich*, above n16, was that the *WCAA* 1988 was a usurpation of the exercise of judicial power of the Commonwealth and was therefore an ex post facto law. This was rejected by the High Court. It should be noted that the USA approach of denaturalisation, deportation and extradition results from jurisdictional restrictions imposed by the USA Constitution (Bill of Attainder, 6th Amendment) which the USA government is reluctant to test. Australia, however, has no such constitutional barriers to prevent the passing of retroactive laws; see *Polyukhovich v The Commonwealth*, above n16, per Mason J at 528, Deane J at 563, Dawson J at 575; See also Dawson J at 574 where he argues that even though the *WCAA* is retroactive (at times he interchanges the words ex post facto and retroactive) and it is clear that Parliament intended it to have a retrospective operation, "there can be no doubt about the capacity of Parliament to pass [such laws]". Toohey J, 594–5 asserts that "the Act is not offensively retroactive in relation to the information laid against the plaintiff", and does not therefore offend Chapter III of the Constitution. The Canadian government passed similar legislation in 1987 following the Deschenes Commission of Inquiry. The Ontario High Court rejected the argument that crimes against humanity were not recognized as international crimes before 1945 (*RV Finta* (1989) 61 DLR (4th) 85). Imre Finta, 77, the first prosecution under that legislation was acquitted of all charges on 25 May 1990.

61 See Wagner, C B, "The Passing of Legislation Allowing for Trial of Those Accused of War Crimes and Crimes against Humanity" (1984) 4 *Windsor Year Book of Access to Justice* 143.

According to Professor Julius Stone, International law recognises the validity of the retroactive criminal sanction and it is justice and policy rather than strict positive law which should be the yardstick of assessment of Nazi war criminals.[62] There is no doubt that even in 1939 civilian mass murder and torture offended against civilised norms, even if not literally provided for by Statute. War criminals who were responsible for the brutal murder of innocent victims can hardly claim that such acts were innocent and that they should be absolved from guilt.

But what about objections based on fairness and justice to the accused, as well as questions of mercy and forgiveness by the victims? When Sir Garfield Barwick decided in 1961 that Australia should not pursue Nazi war criminals in this country, he cited as a reason that we should now close that chapter of history and look to the future. It was important not to focus on the past and be held back by the desire to punish people who had made a new start in this country. However, the rhetoric has a hollow sound to it coming as it does from one who presumed to have the right to decide whether to forgive or not. Mercy and forgiveness may be shown to individual wrongdoers under special circumstances. Forgiveness is the prerogative of the victim and is not to be generously meted out by an uninvolved observer, removed in time and pain from the acts in question. In the absence of a Statute of Limitations[63] and where the legislation specifically targets a period of time over forty years ago,[64] questions of mercy, if they have any place at all, should be restricted to mitigation of sentence and not to the advisability of proceeding with prosecutions. It is the responsibility of those charged with this duty to use the full force of the law to pursue and prosecute suspected criminals, without being hindered in this process by the gratuitous benevolence of politicians preaching mercy and forgiveness.

WHY PROSECUTE? RATIONALES OF PUNISHMENT

"A punishment is an act defined and explained by a sentence of condemnation".[65] In relation to war criminals, the issue becomes one of why punish when their acts are already universally condemned, if not necessarily criminalised? Of the traditional rationales of punishment, that is, deterrence, rehabilitation, incapacitation and retribution, only the latter offers a justifiable basis for punishing war criminals.

Deterrence does not serve as a viable rationale, on either the specific or the general level. A seventy year old man whose last criminal act was committed forty-five years ago is unlikely to offend again. As for general deterrence, there is little chance that "fear of punishment will go far to prevent future national leaders from initiating hostilities or acting inhumanely during war".[66] The Pol Pot regime and Saddam Hussein were hardly deterred by the lesson from Nuremberg.

62 Stone, J, *The Eichmann Trial and the Rule of Law*, International Commission of Jurists, Australian Section (1961).

63 *Convention on the Non-Applicability of Statutory Limitations to War Crimes Against Humanity* (1968).

64 *War Crimes Amendment Act* 1988, s9.

65 Wertheimer, R, "Understanding Retribution" (1983) *Criminal Justice Ethics* 19 at 23.

66 Birmingham, R L, "The War Crimes Trial: A Second Look" (1962) 24 *University of Pittsburg Law Review* 132 at 137.

High recidivism rates among prison populations testify to the failure of rehabilitation as a model of punishment. When war criminals have lead exemplary lives as "quiet neighbours"[67] in their various havens since the war, one may well opine that they have been truly rehabilitated so no good purpose will be served by punishing them. If rehabilitation was the only rationale for punishment, this latter argument might be very persuasive. The incapacitation rationale is similarly non-persuasive in the case of Nazi war criminals. It is highly unlikely that these particular individuals pose any further threat to society so as to necessitate their incapacitation. Deterrence and rehabilitation are both goals aimed at some positive future target, to be distinguished from historically oriented goals such as retribution.[68]

Retribution then, together with its two relations, revenge and vengeance, seem to offer the strongest case for carrying out the prosecutions. The theory of retribution dates back to the Code of Hammurabi and the Mosaic Laws of Exodus[69]. Modern thinking often flinches uncomfortably at these Biblical concepts, demanding a more utilitarian and rational approach to punishment. Vengeance has pejorative connotations, focusing not on the blameworthiness of the accused, but on the satisfaction gained by the victim. According to Paul Boudreaux,[70] commenting on the US case of *Booth v Maryland*,[71] social retribution is irrational on a utilitarian basis, because the loss suffered by the defendant is not offset by any gain on the part of the victim. He posits the theory that in certain cases, individual vengeance is to be preferred because "members of society gain satisfaction or pleasure from seeing or knowing that a criminal offender receives punishment. Far from being a vulgar or undesirable human emotion, this satisfaction is an understandable and inescapable facet of human behaviour".[72]

As crimes against humanity do not fit within the normal pattern of criminal behaviour, but may be considered to be extraordinary, there is a strong argument in favour of revenge and its related concepts as an appropriate justification for the punishment of war criminals.[73] Retribution in such a case may be seen as a form of aggregated individual vengeance, of not only the victims and survivors, but of ordinary observers whose humanity is also attacked when they stand idly by and ignore the legacy left by the acts of war criminals.[74]

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67 Ryan, A, *Quiet Neighbours* (1984); see also comments by Sir Garfield Barwick QC on 22 March 1961, House of Representatives, *Hansard* at 451–2, where he argued that these people should be able to make a new life and turn their backs on the past, and that Australia should close that chapter of its history.

68 See Morgan, E M, "Retributory Theater" (1988) 3 *Am U J International Law & Policy* 1.

69 "Eye for an eye, tooth for a tooth", Exodus 21: 25–26.

70 Boudreaux, P, "*Booth v Maryland* and the Individual Vengeance Rationale for Criminal Punishment" (1989) 80 *Journal of Criminal Law and Criminology* 177.

71 (1987) 107 S Ct 2529.

72 Above n70 at 188.

73 See the speech of Mr Punch, House of Representatives, *Hansard* 26 Nov 1987 at 2741 "... I therefore make no apology for saying that, whether it be 40 years, 140 years or 4,000 years, such inhumanity of man to man must never be allowed to happen again ... and must be the subject of *retribution* (my emphasis), no matter how much later, for the sake of those past and for the sake of humanity in the future ..."

74 Senator Zakharov, Senate, *Hansard* 15 Dec 1988, said "The recognition of a crime by bringing the criminal to justice is likely to assist the grieving process and help those who suffered to find some resolution of the feelings of anger and bitterness that they have experienced for so long. In this sense it may actually serve to lessen the intra-group or intra-national bitterness ..." (at 4324).

It should not be a criticism that retribution and vengeance focus on the victim. The victims in the case of war crimes, were not only those who perished, but all those who remained as witnesses, as so hauntingly expressed in the writings of Elie Wiesel.[75] The satisfaction gained by the victims and witnesses should not be a less appropriate justification for punishment, than a strictly utilitarian model, positing some "benefit" to society. The "benefits" gained through deterrence and rehabilitation have generally proved to be illusory. During the 1960s, after research indicated a need to look at victims' distress following crimes[76], various schemes were set up to compensate victims of crimes. At the international level, progress has been slow in the area of enforcement of laws protecting victims. However, the shift in emphasis, it is suggested, should continue and the punishment of war crimes is one way of providing a symbolic form of compensation to the victims of these heinous crimes.

It may well be that due to the unprecedented nature of the crimes, classical paradigms are inappropriate. Genocide and crimes against humanity, being by their very nature on a different scale to domestic crimes, may require a completely novel approach rather than a strictly utilitarian one. Whilst retribution and vengeance may not effect social change, its symbolic effect should not be minimised. The goal of punishing war criminals should not be merely to mete out a measure of retributive justice to the offender. International criminal policy should also be concerned with a symbolic denunciation of these abhorrent acts, as a form of education promoting ethical knowledge to the law of nations.

Why is it important to promote this type of ethical knowledge and to promulgate documentary evidence in relation to war crimes? The reason is simple. Fact and fiction become easily blurred when attempts are made to rewrite history by revisionist forces. Senator Macklin feared that with the passage of time, the horrors may tend to be discounted.[77] Claims that the Holocaust is a myth continue to spread.[78] Forty years from now, there will be no one left who experienced the horrors of "the final solution" first hand. Future generations will have to rely on documentary evidence. Revisionist literature passing as history must be countered by sufficient authentic records. Prosecution of war criminals is one tangible way of providing such records. Senator Aulich made this point in the Senate[79] when he said that unless this Bill is passed, future civilizations may allow their memories to dim and to forget these horrors and possibly repeat them. The collective amnesia of German parents, he states, has resulted in many young German children being unaware of what happened during those years. Testimonies at trials by witnesses who experienced the atrocities are an important source of counter-revisionist evidence, which will provide history with a true account of the events of the past.

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75 Wiesel, E, *Against Silence: the Voice and Vision of Elie Wiesel* (1985).

76 See Neuberger, L, "An Appraisal of Victimological Perspectives in International Law" (1985) 10 *Victimology: An International Journal* 700.

77 Senate, *Hansard* 15 Dec 1988 at 4257.

78 See Staglich, W, *The Auschwitz Myth* (1986); Butz, A R, *The Hoax of the Twentieth Century* (1977), 2nd ed.

79 *Hansard*, 15 Dec 1988 at 4254.

CONCLUSION

The Federal Government's decision, in September 1992, to abandon investigations into an alleged fourth Nazi war criminal must come as a great disappointment to many people, especially the investigators of the SIU who have gathered so much evidence. No doubt the high cost of the prosecutions, together with the controversial nature of the legislation were important factors in the Government's decision. Fears by opponents of the trials in relation to procedural fairness to the accused have been shown to be unfounded, as evidenced by the fact that one of the three alleged criminals has had his case dismissed at the committal stage. No one has been able to assert that any of the three accused have been afforded any lesser rights than an accused in any other criminal conviction. Allegations of "show trials" have no foundation. It is indeed worrying that political expediency has won out over justice and due process. No one expected that large numbers of people would be prosecuted. The SIU was only ever interested in pursuing mass murders. According to the former director of the SIU, Mr Bob Greenwood QC, the fourth case was a "potentially much more serious offender" and investigators had a strong case.[80]

By abandoning the investigations, the government is allowing Nazi war criminals to remain complacent and protected from their past. Whilst obtaining convictions may be the ultimate goal of the trials, a failure to do so should not lead to the abandonment of prosecutions.

The publicity given to war crimes trials provides a historical record of past events, a necessary weapon in the battle of "historical revision". Recent events in Europe concerning the desecration of gravestones and the daubing of synagogues with anti-semitic slogans illustrate the need for accurate accounts of the horrors of the past. If the Australian government was careless in scrutinising who was allowed to enter our shore, it must now make amends by prosecuting the suspects. The success, or otherwise, of such prosecutions should be of secondary importance. The acknowledgment that justice and natural law are able to be accommodated within our sovereign norms is equally as important.

The time in which to prosecute Nazi war criminals is fast running out. The age or frailty of the accused should not hinder Australia in accepting this valuable opportunity to publicly denounce and criminalise their past acts. The recent wave of anti-semitism and the rise of Neo-Nazism in Europe makes it a matter of urgency that responsible governments are seen to make a symbolic stand against any possibility of a recurrence of past events. Mounting war crimes trials is one way of achieving this objective. Hopefully the remaining two prosecutions will proceed through the Court system unimpeded by political influence.

80 *Sydney Morning Herald*, 5 September 1992.