IV JURISDICTION

Jurisdiction – universal jurisdiction – war crimes and crimes against humanity

In the course of his reasons for judgement in *Polyukhovich v. Commonwealth* (1991) 101 ALR 545, handed down by the High Court of Australia on 14 August 1991, Toohey J., who was in the majority of the Court that upheld the *War Crimes Act 1945* (see under Part I above), held that the Act was, amongst other things, an exercise of the universal jurisdiction to prosecute war crimes and crimes against humanity, as formulated in international law at the relevant time. His Honour's reasons for this conclusion were as follows (at 649–663):

External affairs–universal jurisdiction

> The Commonwealth contended that, in the event that the court found no relevant international obligation or concern to exist, the Act is nevertheless a valid exercise of the external affairs power because Australia has jurisdiction in international law to prosecute war crimes and crimes against humanity which occurred outside Australia against non–nationals. The focus of this analysis shifts from inquiry into a substantive obligation or concern, requiring or justifying action on the part of the Australian Government, to the concept of crimes existing in international law and principles of jurisdiction which provide Australia with authority to prosecute those crimes.
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> The term "jurisdiction" has different meanings in international and municipal law. In international law it is used in various ways but it may be taken to refer to "a state's general legal competence and is an aspect of state sovereignty": Triggs, "Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?", (1987) 16 *Melbourne University Law Review* 382 (hereafter "Triggs"), at 387. Relevantly, it "refers to a state's legitimate assertion of authority to affect legal interests": Randall, "Universal Jurisdiction Under International Law", (1988) 66 *Texas Law Review* 785 (hereafter "Randall"), at 786. The term has legislative, adjudicatory and enforcement dimensions: Randall, at 786; Triggs, at 387; Wagner, "US Prosecution of Past and Future War Criminals and Criminals Against Humanity: Proposals for Reform Based on the Canadian and Australian Experience", (1989) *29 Virginia Journal of International Law* 887 (hereafter "Wagner"), at 899. We are here concerned with Australia's authority to make criminal law applicable to certain persons, events or things with the aim of dealing with an international law crime. We are concerned, therefore, not only with Australia's legislative power in constitutional law, but also with Australia's enforcement and adjudicatory authority in international law because the Commonwealth relies on that authority to support its legislative power.
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> The subjects of international law are primarily, though not exclusively, states: Brownlie, *Principles of Public International Law*, 4th ed (1990)

(hereafter "Brownlie"), ch III and see ch XXIV. Individuals are recognised by international law in so far as they are protected by, or more importantly here, are subject to, international law. There is no exhaustive list of bases upon which a state may exert authority over an individual in international law nor is there precise agreement between commentators as to categorisation. But a common and convenient analysis is that five principles emerge by which the legitimacy of an asserted jurisdiction in criminal matters may be assessed: Kobrick, "The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes", (1987) 87 *Columbia Law Review* 1515 (hereafter "Kobrick"), at 1519; Randall, at 787–8; Wagner, at 899–900. Cf Brownlie, at 300–7; Triggs, at 387–9. They are: 1. the territoriality principle, which applies when an offence occurs within the territory of the prosecuting state; 2. the nationality principle, which applies when the offender is a national of the prosecuting state; 3. the protective principle, which is excited where an extraterritorial act threatens the integrity of the prosecuting state; 4. the passive personality principle, which applies where the victim of the offence is a national of the prosecuting state; and 5. the universality principle.

The last of these principles permits jurisdiction to be exercised over a limited category of offences on the basis that the offender is in the custody of the prosecuting state. The jurisdiction is based on the notion that certain acts are so universally condemned that, regardless of the situs of the offence and the nationality of the offender or the victim, each state has jurisdiction to deal with perpetrators of those acts. Since the Act focuses primarily (and, in practice, possibly entirely) on acts committed by non–nationals against non–nationals outside Australia, its likely basis for jurisdiction over war criminals from World War II is the principle of universal jurisdiction: see Wagner, at 901. There appears to be no consensus that the "nationality of offender" basis for jurisdiction will include the situation where an offender later becomes a national. Cf Triggs, at 393, where it is suggested that "territorial jurisdiction over Australian citizens and residents" may be applicable.

Before examining material which is relevant in deciding whether war crimes and crimes against humanity in international law are subject to universal jurisdiction, it is useful to look at the doctrine itself because views differ as to its nature. The principle of universality is, at times, used to refer to the authority of states to exercise jurisdiction over certain conduct, regardless of whether it constitutes a crime under customary international law. On this view of the principle it is the universality of the condemnation of, for example, the common crime of murder which allows every state to exert authority over an alleged murder offence where it would otherwise fall within the jurisdiction of another state under its own municipal law. No question of an international law offence arises.

However, the principle is most often formulated so that it applies only to crimes which are already constituted as such under international law. In this respect, the principle rests on the existence of an offence in international

law; the municipal law under which an individual is prosecuted must be in conformity with that international law. On this view, authority to prosecute the relevant conduct extends to every state under its own laws, even in the absence of one or more of the other jurisdictional links such as territoriality or nationality. But it is the existence of the crime in international law, and not simply the universality of condemnation in states' own municipal laws (though this may be evidence supporting the existence of the crime), which justifies the exception to the requirements of the other jurisdictional bases: Randall, at 795–8; American Law Institute, *Restatement of the Law, Third: The Foreign Relations Law of the United States* (hereafter "*Restatement*"), §404; Williams and Castel, *Canadian Criminal Law: International and Transnational Aspects*, (1981) (hereafter "Williams and Castel"), at 137. In the context of war crimes and crimes against humanity, it is this formulation of the universality principle, relying as it does on the existence of an offence in international law, which is relevant: Brownlie, 305; Williams and Castel, ch 5. And it is this formulation on which the Commonwealth relies.

The Commonwealth's use of the concept of a "right" existing in international law by reason of the universality principle is misleading, especially if it is (as it was in argument) associated with a right vested in Australia by treaties and other international agreements. We are concerned here with authority to proceed legally; in that sense Australia may have a right but it is not in the nature of a substantive right created by treaty or, by analogy, contract. The Commonwealth's concern was to emphasise the potency of the principle for the purposes of relying on it for constitutional validity. Thus a distinction was drawn between a "special and limited right" and mere permission. Again terminology may be misleading because universality of jurisdiction is in fact a permissive doctrine. But the proposition that universal jurisdiction is positively conferred by international law and is not merely the absence of prohibition is well founded. Specifically conferred authority to exercise that jurisdiction is a sufficient foundation on which to base a law of the Parliament with respect to external affairs because the universality of the condemnation necessarily touches and concerns Australia. If jurisdiction conferred by principles of international law is a component of sovereignty, then, in the absence of constitutional prohibition or conflict between the scope of federal and State powers, that jurisdiction is a necessary aspect of the Commonwealth's capacity to function effectively in the international community. Therefore the exercise of that jurisdiction where it exists – or rather the perceived commission of an international crime subject to that jurisdiction – is, or may give rise to, an external affair for the purposes of the legislative power of the Commonwealth. That Australia has a choice whether or not to exercise the jurisdiction does not alter that characterisation as an external affair.

Universal jurisdiction: war crimes and crimes against humanity

Whether the rationale for the universality principle lies in the proposition that those committing certain offences lose their national character and are therefore subject to any state's jurisdiction, or whether it lies in the fundamental nature of the crime – its particular gravity and heinousness (see Randall, at 792–5; *Re List (Hostages Trial)* (1948) 15 Annual Digest 632 at 636; *Attorney-General (Israel) v Eichmann* (1962) 36 ILR 5, 277 (Supreme Court), at 282–3; (1961) 36 ILR 18 (District Court), at 50), there appears to be general agreement that war crimes and crimes against humanity are now within the category subject to universal jurisdiction: see Brownlie, at 305, 562; Kobrick, at 1522–23, 1529; Randall, at 800; Wagner, at 905 (with respect to war crimes).

In numerous cases of prosecution of war criminals after World War II, for both violations of the international laws of war and crimes against humanity, reliance was placed, inter alia, on the universality principle. For example, in *Re Eisentrager* (Shanghai, 1947) 14 Law Reports of Trials of War Criminals 8 (hereafter "L Rep Trials War Crims"), the United States Military Commission rejected the argument of the defendants that, because they were German citizens residing in China, they were subject only to Chinese law and jurisdiction. The Commission said, at 15:

"A war crime ... is not a crime against the law or criminal code of any individual nation, but a crime against the *ius gentium*. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers. Arguments to the effect that only a sovereign of the *locus criminis* has jurisdiction and that only the *lex loci* can be applied, are therefore without any foundation".

See also *The Hadamar Trial (Re Klein)* (Wiesbaden, 1945) 1 L Rep Trials War Crims 46; *Re Tesch (Zyklon B* case) (1946) 13 Annual Digest 250; *Re List; Attorney-General (Israel) v Eichmann; Demjanjuk v Petrovsky* (1985) 776 F 2d 571 at 582.

In *Re List* The United States Military Tribunal (USMT) said, at 636:

"An international crime is such an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances."

And the District Court of Jerusalem, in *Attorney-General (Israel) v Eichmann*, based its jurisdiction "on a dual foundation: the universal character of the crimes in question and their specific character as intended to exterminate the Jewish people": at 26. The court further explained, at 50:

"The State of Israel's 'right to punish' the accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind), which vests the right to prosecute and punish crimes of this order

in every State within the family of nations; and a specific or national source, which gives the victim nation the right to try any who assault its existence."

Both the District Court and Supreme Court judgments described the precedent of universal jurisdiction over piracy, drew an analogy between piratical acts and Nazi atrocities, and found support for the universality principle in the earlier war crimes cases: see at 26 and 290–5.

However, to say that war crimes and crimes against humanity were, sometime after World War II, subject to universal jurisdiction does not answer the question whether the conduct of which the plaintiff is accused was a war crime or a crime against humanity before the end of the War nor whether, if they existed, those crimes could then be prosecuted by any state.

It may be said that, if a crime is found to have existed at some point in the past but was not the subject of universal jurisdiction, the subsequent expansion of jurisdiction is a procedural matter only and that a state with no other jurisdictional link can prosecute legitimately after the status of universal jurisdiction has been achieved. A better approach in this instance, however, is to examine the relationship between the concepts of "international crime" and "universal jurisdiction". The question whether a crime is constituted as such in international law is, conceptually, distinct from the question whether that crime is the subject of universal jurisdiction: Kobrick, at 1522, 1528. A crime created by treaty will not be the subject of universal jurisdiction merely by reason of its conventional existence: see *Restatement*, §404. It is less clear, however, that crimes having their source in custom can be said not to be the subject of universal jurisdiction unless limitations on the right to prosecute are contained in the definition of the crime itself.

Certainly, the two questions – whether a crime exists and the scope of jurisdiction to prosecute – are inextricably linked. An international crime is constituted, precisely, where conduct is identified which offends all humanity, not only those in a particular locality; the nature of the conduct creates the need for international accountability. Where conduct, because of its magnitude, affects the moral interests of humanity and thus assumes the status of a crime in international law, the principle of universality must, almost inevitably, prevail: see Zoller, "Territorial Effect of the Norm on Responsibility" in Ginsburgs and Kudriavtsev (eds), *The Nuremberg Trial and International Law,* (1990), p 106. This is particularly true of crimes against humanity since they comprise, by definition, conduct abhorrent to all the world.

Therefore, while the question whether war crimes against humanity were subject to universal jurisdiction during World War II remains theoretically distinct, the question whether the crimes existed as such at that time is basic. If such conduct amounted, then, to customary international crimes, their very nature leads to the conclusion that they were the subject of universal jurisdiction.

It is convenient to look, first, at the concepts of "war crime" and "crime against humanity" to determine whether they existed in international law between 1942 and 1943 (the period in respect of which the plaintiff is charged) and, if so, to examine the Act in some detail to determine whether its provisions accurately reflect those concepts and are an effective exercise of universal jurisdiction.

International crimes – war crimes and crimes against humanity

The term "war crime" in s 9 of the Act looks to two distinct, though overlapping, concepts in international law: "war crimes" and "crimes against humanity". War crimes in international law are contraventions of the laws and customs of war recorded in such documents as the Hague Conventions of 1907 and in military manuals. "Crimes against humanity" in international law is a generic term which refers to crimes of persecution, that is, persecution on political, racial or religious grounds, and to crimes of extermination. It is important to note that the difference between war crimes and crimes against humanity lies in the context in which they are committed. Traditionally, the laws and customs of war governed only conduct between belligerents or between a belligerent and the inhabitants of an occupied country. This is a reflection of the fundamental doctrines of sovereignty and non-intervention between states. Crimes against humanity, on the other hand, are not so confined. They may be carried out by a national against another national of the same country, and in peacetime. Conduct may therefore constitute both a war crime and a crime against humanity.

The Commonwealth submitted that s 7 of the Act embraces both kinds of crime at international law. The submission continued in this way. War crimes, including crimes against humanity which also amount to a war crime, are reflected in s 7(1) and (2). And if the terms of sub-s (3) are satisfied, the conduct may be prosecuted under that sub-section also. Those crimes against humanity which would not also have amounted to a war crime are particularly reflected in s 7(3).

War crimes

There is no doubt that war crimes were crimes in international law during World War II. The fourth Hague Convention of 1907, the international Convention concerning the Laws and Customs of War on Land (the Hague Convention), was ratified by Germany and Russia as well as the major Allied powers. The first Article of the Convention required the contracting states to issue instructions to their land forces in conformity with the Regulations respecting the Laws and Customs of War on Land annexed to the Convention (the Hague Rules). See *Manual of Military Law*, 7th ed (1929) (Great Britain); *Manual of Military Law 1941*, Australian ed (hereafter "*Australian Military Manual*"); the "Kriegsbrauch in Landkriege", instructions issued to the German armed forces following the Hague Conventions.

The matters dealt with by the Hague Rules included: the status of belligerents, the humane treatment of prisoners of war, and Arts 42–56 dealt with rules of conduct of a hostile state in occupied territory. Article 46 provided that, where a territory is occupied, "family honour and rights, individual life, and private property, as well as religious convictions and worship, must be respected". Article 50 read:

"No collective penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which it cannot be regarded as collectively responsible."

The Hague Convention and its annexed Rules provided an undisputed reference in peace negotiations between Germany and the Allies after World War I.

With respect to war crimes, the International Military Tribunal (IMT) exercised jurisdiction over major war criminals after World War II on the basis of Art 6(b) of its Charter (the Nuremberg Charter). That Article defines war crimes as:

"...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 population *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" (emphasis added).

Article 6(b) does not extend beyond the treatment of civilian populations in occupied territory: see *Re Altsötter (The Justice Trial)* (1947) 14 Annual Digest 278 at 282. The IMT claimed that the law contained in Art 6(b) represented existing international law:

"With respect to war crimes, ...the crimes defined by Art 6, Section (b), of the Charter were already recognised as war crimes under international law. They were covered by Arts 46, 50, 52, and 56 of the Hague Convention of 1907, and Arts 2, 3, 4, 46 and 51 of the Geneva Convention of 1929": judgment of the International Military Tribunal (Nuremberg), reproduced in (1947) 41 *American Journal of International Law* 172 at 248.

It was argued before the IMT that this law did not apply generally because Art 2 of the Hague Convention expressly stated that its provisions bind only contracting parties and do not apply if all parties to an international conflict are not parties to the Convention. Several countries involved in World War II were not parties to the Hague Convention. However, in its judgment the IMT said, at 248–9:

"The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. ...but by 1939 these rules laid down in the convention were

recognised by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Art 6(b) of the Charter."

The United Nations General Assembly subsequently adopted, in December 1946, by a unanimous vote, Resolution 95(I) which affirmed the principles of international law "recognised by" the Nuremberg Charter and the IMT's judgment.

So, by 1939 the Hague Convention had been in existence for 32 years. By 1941, 41 states had signed the Convention; 25 had deposited ratifications, including Germany (with the reservation of Art 44 of the Rules) though not Australia: *Australian Military Manual*, p 340. The Convention provided a reference after the major world conflict which occurred during that time and its provisions have been widely reflected and disseminated in various states' military manuals. In light of the precision of these rules and the length of time they had been in existence, together with states' reliance on them, there is sufficient evidence that a contravention of these conventional laws of war amounted to an offence in customary international law at the commencement of World War II.

The relevant questions to be asked with respect to a war crime in this narrow sense, then, concern the scope of that crime and whether the Act, on its proper construction, properly implements its prosecution. Those questions will be considered later.

Crimes against humanity

As already noted, "crime against humanity" is a generic term in international law encompassing different kinds of maltreatment of civilian populations, including those of the same nationality as the perpetrator. The Commonwealth submitted that there are, in international law, three classes of crimes against humanity: crimes of persecution, which are reflected in s 7(3)(a)(i); crimes of extermination, reflected in s 7(3)(a)(ii); and other serious crimes against members of any civilian population. The Commonwealth said that it was "probably" the case that crimes of persecution and other serious crimes against civilian populations must be committed in the execution of or in connection with war or occupation to be a crime at international law. In the case of crimes of extermination, on the other hand, it was said that no such connection is – and presumably the Commonwealth meant, also, was – required. Although the submission referred to conduct in execution of or in connection with "war or occupation", the thrust of the argument seemed to be in conformity with the limitation imposed on crimes against humanity by Art 6(c) of the Nuremberg Charter, to be discussed later. That is to say, crimes against humanity, apart from crimes of extermination, must have been committed in execution of or in connection with war *crimes* or the *crime* of waging aggressive war.

There is little doubt that crimes against humanity, in each of these classes, now exist in international law either as treaty law or, probably, as a

matter of customary international law: cf Meron, "The Geneva Conventions as Customary Law", (1987) 81 *American Journal of International Law* 348. But the question is whether crimes against humanity were crimes in international law before 1945.

There was no international agreement creating a crime against humanity. If the crime existed, it was a matter of customary law. A customary law comprises two elements: (i) general practice by states; and (ii) *opinio juris*, in other words, expressed opinion that such a crime exists. Material sources produced before 1945 are evidence of both of these elements; those produced after 1945 are evidence of *opinio juris* only, as they are statements of opinion as to the state of international law in the past. A survey of the material is useful.

Although the Hague Convention and the Hague Rules did not themselves deal with the conduct of belligerents towards their own citizens, there is some suggestion in the Convention that its provisions (and therefore those of military manuals produced in consequence) were not intended to cover the field of legal protection accorded to civilian populations. The preamble to the Convention includes the so-called Martens clause:

"Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the *principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of the public conscience"* (emphasis added).

As can be seen, there is an acceptance that binding humanitarian norms existed apart from the rules dealt with by the Convention itself.

After World War I the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties presented a report to the Preliminary Peace Conference at Versailles in March 1919 (reproduced in (1920) 14 *American Journal of International Law* 95). The Commission made findings as to the progress of the War and made recommendations for prosecutions and for the establishment of an international tribunal. Several times in its report the Commission used the term "laws of humanity" or "dictates of humanity" or similar phrases. For example, one conclusion drawn by the Commission, at 117, was:

"All persons belonging to enemy countries... who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."

In relation to the tribunal to be set up to try the crimes the Commission said, at 118:

"Two classes of culpable acts present themselves:

(a) Acts which provoked the world war and accompanied its inception.

(b) Violations of the laws and customs of war and the laws of humanity."

In *Re Altstötter*, as reported in 2 L Rep Trials War Crims 1, the USMT said, at 46:

"Since the World War of 1914–1918, there has developed in many quarters evidence of... an international interest and concern in relation to what was previously regarded as belonging exclusively to the domestic affairs of the individual State; and with that interest there has been... an increasing readiness to seek and find a connection between domestic abuses and the maintenance of the general peace."

Reference was also made to instances in which states had intervened to prevent abuse by another state of its own subjects, including French intervention to check religious atrocities in Lebanon in 1861 and national protests directed towards Romania and Russia with respect to aggression against Jews and towards Turkey on behalf of persecuted Christian minorities.

Oppenheim, *International Law*, 3rd ed (1920), vol I, expressed doubt that there was, then, "really a rule of the Law of Nations" which permitted intervention on humanitarian grounds. However, he said, p 229:

"Many jurists maintain that intervention is... admissible, or even has a basis of right, when exercised in the interest of humanity for the purpose of stopping religious persecution and endless cruelties in time of peace and war. That the Powers have in the past exercised intervention on these grounds, there is no doubt. Thus Great Britain, France, and Russia intervened in 1827 in the struggle between revolutionary Greece and Turkey."

And Bluntschel, *Das Moderne Volkerrecht der Civilisierten Staaten*, 3rd ed (1878), (quoted in *Re Altstötter* [L Rep Trials War Crims], at 47) said, at 270: "States are allowed to interfere in the name of international law if 'humanity rights' are violated to the detriment of any single race."

Next, the conduct which forms the substance of a "war crime" for the purposes of the Act, namely, murder, manslaughter, wounding, kidnapping and various sexual offences under Australian municipal law, attracted criminal sanctions before 1945 in most, if not all, of the states which were parties to World War II. This does not constitute that conduct an international crime but it is evidence of state practice concerning conduct between nationals of the same country. In determining whether a rule of justice may be declared an international law, it is relevant that each individual state condemns the conduct the subject of the rule: cf *Re List*, at 633.

At the end of World War II, crimes against humanity were dealt with in the following way. Article 6(c) of the Nuremberg Charter of 1945 defined "crimes against humanity" as:

"... 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" (emphasis added).

The paragraph contains two important limitations. First, a crime against humanity must comprise conduct directed at a civilian population. Isolated acts against individuals, unconnected with a larger design to persecute or exterminate a population, are not within the definition of the crime, whether committed by an individual or by a state authority: see, for instance, *Re Alstötter*, [Annual Digest] at 284. The second limitation is that crimes against humanity must have been committed "in execution of or in connection with any crime within the jurisdiction of the tribunal", that is, war crimes (Art 6(b)) or crimes against peace or waging aggressive war: Art 6(a). The second limitation applies both to acts of persecution and to acts of extermination. As to the grammatical change made to Art 6(c), which makes the intention of the contracting parties to this effect unequivocal, see Schwelb, "Crimes Against Humanity", (1946) XXIII *The British Year Book of International Law* 178 (hereafter "Schwelb"), at 193–5. Only crimes against humanity committed during the period of the war were held to be capable of founding a conviction because only those acts could be seen to satisfy the limitation. In its judgment, the IMT concluded, at 249:

"To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the tribunal. The tribunal is of the opinion 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. The tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and in so far as the inhumane acts charged in the indictment, and committed after the beginning of the war, did no constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity."

The IMT judgement does not throw much light on what "in execution of or in connection with" means. The tribunal found that conduct amounting to a crime against humanity either *was* a war crime or was done in execution of or in connection with a *crime against peace*. And, if done during the war, that connection seems to have been assumed. Be that as it may, Art 6(c) of the Charter evidences a conceptually distinct crime where the conduct constituting the crime is, in a practical sense, associated with other conduct which amounts to a war crime or a crime against peace.

On 20 December 1945 the Control Council for Germany, comprising representatives of Britain, the United States, France and USSR, enacted a law

for the punishment of persons guilty of, inter alia, "crimes against humanity". This law, generally known as Control Council Law No 10 (CC Law No 10), was passed to effect the prosecution of war criminals other than the major actors dealt with by the IMT. Article II 1(c) of CC Law No 10 defined crimes against humanity in substantially the same terms as did the Nuremberg Charter but, significantly, did not contain the words "in execution of or in connection with any crime within the jurisdiction of the tribunal".

The USMT, whose jurisdiction emanated from CC Law No 10, said in *Re Altstötter*, [Annual Digest] at 282:

"The [Nuremberg] Charter, the IMT Judgment, and CC Law 10 ... constitute authoritative recognition of principles of individual penal responsibility in international affairs which ... had been developing for many years. Surely CC Law 10, which was enacted by the authorised representatives of the four greatest powers on earth, is entitled to judicial respect when it states, 'Each of the following acts is *recognised* as a crime'."

Although the USMT drew a general conclusion concerning CC Law No 10, the context of the statement is a discussion about Art 6(b) of the Nuremberg Charter and its equivalent, Art II 1(b) of CC Law No 10, not about crimes against humanity. However, later, at 285, the tribunal said:

"Whether the crime against humanity is the product of statute or of common international law, or as we believe, of both, we find no injustice to persons tried for such crimes. They are chargeable with knowledge that such acts were wrong and were punishable when committed."

In *Re List* the defendants were charged with crimes which all came within the scope of war crimes in international law. But the USMT discussed CC Law No 10 generally, saying, at 634:

"The crimes defined in Control Council Law No 10 ... were crimes under pre-existing rules of international law – some by conventional law and some by customary law."

There were, therefore, significantly different claims by the USMT, operating under the authority of CC Law No 10, and by the IMT, operating under the authority of the Nuremberg Charter, as to the state of international law before 1945. The former tribunal claimed that a crime against humanity was an independent crime under customary international law; the latter tribunal required its connection with a war crime or a crime against peace. The differences may, as Dr Egon Schwelb points out, reflect the difference in the legal nature of the two instruments and in the status of the two tribunals created to exercise jurisdiction: Schwelb, pp 218–19. The IMT was, in addition to being an occupation court for Germany, also, to some extent, an international judicial body administering international law. Being an international judicial organ, the IMT's jurisdiction in domestic matters of Germany was circumscribed. The zonal tribunals applying CC Law No 10, on the other hand, were arguably in the nature of local courts administering

primarily municipal law and therefore not limited by the settled boundaries of international law: cf *Re Alstötter*, [Annual Digest] at 278–9, 287 where the USMT itself concluded that it exercised international jurisdiction.

One more kind of evidence relating to crimes against humanity should be considered: enabling legislation of countries which do not have territorial jurisdiction in international law with respect to war criminals from World War II, and the resulting prosecutions of those persons in municipal courts some time after 1945. These sources are evidence of *opinio juris* of states though their law-making capacity, as practice, is not relevant when considering the state of internal law in the past.

In 1950, the Israeli Parliament enacted legislation for the prosecution of, inter alia, crimes against humanity, defined substantially in accordance with CC Law No 10: the Nazi and Nazi Collaborators (Punishment) Law 1950 (Israel). *Attorney-General (Israel) v Eichmann* was prosecuted under this legislation. The court concluded, at 283, that the crimes for which the appellant was convicted, including crimes against humanity, "must be regarded as having been prohibited by the law of nations since 'time immemorial'".

In 1987 the Canadian Parliament amended the Canadian Criminal Code to provide for the prosecution of war crimes and crimes against humanity. The conduct in the definition of crimes against humanity is similar in scope to that in Art 6(c) of the Nuremberg Charter; but no connection with other crimes is required. The Canadian definition, however, does require conduct amounting to a crime against humanity to constitute a "contravention of customary international law or conventional international law" or to be "criminal according to the general principles of law recognised by the community of nations": s 7(3.76). This latter formulation corresponds to the terms of the relevant Canadian constitutional provision.

R v Finta (1989) 61 DLR (4th) 85, in the Ontario High Court of Justice, held the Canadian legislation to be constitutionally valid, in that it was not retroactive and because crimes against humanity, as defined in the legislation, existed in international law before 1945. This conclusion was based on a survey of conventions and agreements and other relevant material: see at 97–103. However, the court's opinion as to the limits of a crime against humanity is not clear. In part, the decision was based on the judgment of the IMT. Callaghan ACJHC said, at 101, that he accepted the reasoning of the IMT:

"... who indicated... that 'by 1939 these rules laid down in the [Hague] Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war'."

But, as Brennan J points out in his judgement in the present case, the words quoted referred only to war crimes as defined in Art 6(b) and not to crimes against humanity defined in para (c). Also, as noted earlier, "crimes

against humanity" are defined very broadly in the Canadian legislation. Callaghan ACJHC concluded, at 101:

"I am of the opinion that war crimes and crimes against humanity were, by 1939, offences at international law *or criminal according to the general principles of law recognised by the community of nations"* (emphasis added).

The distinction between "general principles" of law and international law, although corresponding to the distinction made in the relevant Canadian constitutional provision (and in equivalent international law, for example, in Art 15 of the International Covenant on Civil and Political Rights), was not spelt out.

The United Kingdom War Crimes Act 1991 provides for prosecutions for murder, manslaughter or culpable homicide committed between 1 September 1939 and 5 June 1945 in a place which was then part of Germany or under German occupation and which "constituted a violation of the laws and customs of war": s 1(1). Thus no question directly arises as to crimes against humanity. The conclusions contained in *War Crimes: Report of the War Crimes Inquiry*, Cm 744, (1989) (the Hetherington Report) informed the preparation of the United Kingdom legislation. The report concluded, at para 5.43:

"In 1939 there was no internationally accepted definition of crimes against humanity, as there was of violations of the laws and customs of war. The Nuremberg definition of 1945 appears partly to be based on the principle that some crimes are so patently against the laws of all civilised nations as to be regarded as crimes in international law, prosecutable by any nation. ...[However] while the moral justification for trying crimes against humanity at Nuremberg is understandable, the legal justification is less clear."

So, there is support in Israel's legislation for the existence at the relevant time of crimes against humanity defined according to CC Law No 10. Also, Canadian legislation, defining crimes against humanity broadly, has been held to be an accurate reflection of the law at the time. But the United Kingdom legislation, by omission, carries the implication that crimes against humanity were not formulated sufficiently before 1945 to be binding rules of law.

Crimes against humanity – conclusion

It is impossible, perhaps, to say definitively what were the limits of crimes at international law between 1939 and 1945. This is not merely because of the state of historical record, but because of the nature of international law. The sources of international law and their relative status are not, and were not then, finally fixed. Documents such as those emanating from the United Nations and states' legislation are strong authority, but there is no hierarchy of judicial and legislative organs creating a system of binding precedent as in municipal law. For example, practice contrary to express intention does not necessarily attract legal sanction; and its status – the status of contravening

practice – is unsettled also. Since no permanent international court of criminal justice exists to determine authoritatively the scope of international criminal law or to enforce sanctions for its breach, agreements and other documents evidencing international crimes do not function in the same way as statutes in municipal law. This is the case especially where crimes develop from customary practice of nations, but even where treaties exist between states.

The absence of consistent enforcement and sanction means that documents evidencing international criminal laws cannot be scrutinised with the same intensity for the exact limits of the provisions they contain. It is not only unrealistic but incorrect to take an excessively technical approach. In *Re Piracy Jure Gentium* [1934] AC 586, Lord Sankey said, at 588–9:

"Speaking generally, in embarking upon international law, their Lordships are to a great extent in the realm of opinion, and in estimating the value of opinion it is permissible not only to seek a consensus of views, but to select what appear to be the better views upon the question."

There is a certain unease and evident moral, and legal, tension surrounding the question of crimes against humanity. This shows itself in various ways, as in the sometimes peremptory dealing with the question by the tribunals. See, for example, the statement of the USMT in *Re Altstötter*, at 282 (already quoted), after a discussion of war crimes in the narrow sense:

"Surely CC Law 10, which was enacted by the authorised representatives of the four greatest powers on earth, is entitled to judicial respect when it states, 'Each of the following acts is recognised as a crime'."

And also the readiness of the IMT to make the connection between the conduct in question and other crimes within its jurisdiction. The tension is further illustrated in the divergence of views represented in the current war crimes legislation in Israel, Canada and the United Kingdom.

Upon analysis, the moral tension is seen to be between a desire to ensure that fundamental justice is not avoided by an overly technical scrutiny and a fundamental objection to individuals being called to account by victors in a war according to laws which did not exist at the time; a fear, also, of justice being undermined. When analysed legally, and from the perspective of the time, the tension is seen to be between two fundamental notions: on the one hand, the doctrine of sovereignty with its concomitant principle of non–intervention between nations; and, on the other, fundamental principles of human rights, including the right of a people to be protected by the world community if abused by a sovereign power. Certainly, with the development of principles of human rights and the joint responsibility for their protection since, and largely as a result of, World War II, the limitations of a strictly defined doctrine of sovereignty, and exclusive rights with respect to the welfare of a group of people, have become increasingly evident: see, for example, Brilmayer, *Justifying International Acts*, (1989), ch 5 and ch 7. However, humanitarian norms and the laws of war themselves, being rules

limiting the means of aggression not rules permitting violence, arise from a desire to preserve humanity and humaneness in relations between all people. They are themselves, in this sense, humanitarian norms.

With this analysis in mind, I have reached the following conclusions. There is, on a survey or relevant material, evidence of the existence before 1939 of a consciousness of acts which offend fundamental human rights; these may be called crimes against humanity. This is to be found in diplomatic instances and legal commentary in the nineteenth century; in the report to the Preliminary Peace Conference of 1919; in the Martens clause in the Hague Convention (by implication); and in the consistency of sanction of similar crimes in municipal laws of individual states. Crimes which extended, conceptually, beyond war crimes were contemplated. But before 1939 there was no real indication of the boundaries of these crimes. Reference is made to the "laws of humanity" or the "dictates of conscience" but the scope of the offence does not emerge. Two statements of the scope of crimes against humanity appeared in the Nuremberg Charter and CC Law No 10 in 1945, containing an important difference between them. Given that the IMT was most clearly exercising international jurisdiction and that no precise definition of the crime had emerged prior to that time, the narrower view of the crime contained in the Nuremberg Charter must be preferred.

It follows that, at the relevant time, conduct which amounted to persecution on the relevant grounds, or extermination of a civilian population, including a civilian population of the same nationality as the offender, constituted a crime in international law only if it was proved that the conduct was itself a war crime or was done in execution of or in connection with a war crime.

The conduct in respect of which the plaintiff is charged is the murder of a number of persons, either Jews or those suspected of being partisans or communists. The paragraphs of the information relating to those suspected of being partisans or communists allege expressly that the conduct was in pursuance of a policy of annihilation "contrary to the laws of the war", in other words that the conduct was a war crime. The paragraphs relating to Jewish people allege that the murders were committed during and in the course of the German occupation of the Ukraine, and either in pursuing Germany's policy of persecution of Jewish people or with intent to destroy Jewish people. In so far as the information alleges a murder in pursuance of Germany's policy of persecution, the conduct is done in execution of or in connection with a war crime in international law, the war crime being Germany's planned persecution in occupied Europe of people by reason of their race, or their political or religious beliefs. In so far as the information alleges a murder with intent to destroy the Jewish people, the conduct is alleged to have been committed "during and in the course of" the German occupation. "In the course of", which reflects the terminology of s 7(1) of the Act, implies, in this context, more than a temporal connection between the murder and the occupation. If it meant otherwise, it would add nothing to

"during" the occupation. The allegation is sufficient, therefore, to amount itself to a war crime, as well as a crime against humanity. If, for any reason, the allegation of murder with intent to destroy the Jewish people is insufficient, in context, to amount to a war crime, the information would fail to describe conduct which amounted to a crime against humanity as defined in international law at the relevant time and would fail to be within the universal jurisdiction to prosecute that crime. On its face, however, the conduct alleged against the plaintiff constituted a war crime or a crime against humanity at the relevant time.

Jurisdiction – terrorist crimes committed against Australian nationals abroad – jurisdiction of Australian courts

On 22 August 1991 the Minister for Justice, Senator Tate, said in the course of an answer to a question without notice (Sen Deb 1991, pp 931–2):

I understand that Senator O'Chee has made representations to the Attorney-General as to whether it might be possible for Australian courts to exercise jurisdiction over those who carry out terrorist acts against Australians overseas. ...

Whilst the Government is giving consideration to those representations, some matters need to be kept in mind. One is the sheer difficulty of the court exercising its jurisdiction in a way which is familiar to us. In other words, how does an Australian court examine the evidence in relation to an incident which occurred overseas? How do we get witnesses back to Australia, or take evidence overseas in relation to events which are the subject of the allegation and prosecution? I would have thought that the many days spent by this chamber in relation to similar problems when we considered the war crimes legislation would indicate the grave difficulty of ensuring the fair trial of those who are accused of committing an offence overseas – the question of getting evidence before the jury. ...

As far as extradition of such accused persons from overseas jurisdictions to Australia is concerned, I think there would be some difficulty in ensuring that all countries would agree to such extradition. The real value of having such a proposal accepted would be in putting pressure on those overseas countries either to prosecute or to extradite, and there is some merit in that. Therefore Australia is a party to several international conventions which do provide, in limited circumstances, for precisely that sort of regime.

In other words, where there are particular aspects of terrorism, if the overseas country does not prosecute, then Australia – if a party to a particular convention – can ask for the person who is accused to be extradited for trial in Australia. These conventions include the International Convention Against the Taking of Hostages; the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including diplomatic agents; and the Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation. ...

Jurisdiction – enforcement of foreign judgments in Australian courts – legislations – *Foreign Judgments Act 1991*

On 29 May 1991 the Attorney-General, Mr Duffy, introduced the Foreign Judgments Bill 1991 into Parliament. He explained the purpose of the Bill as follows (HR Deb 1991, 4218–9):

> The Foreign Judgements Bill will provide a framework for the enforcement of foreign civil judgments in Australia by a simple registration process. This Bill will replace existing State and Territory legislation governing registration and enforcement of foreign civil judgments in State and Territory supreme courts. It will also implement arrangements agreed with New Zealand as part of closer economic relations, and an agreement entered into with the United Kingdom last year.
>
> Having Commonwealth legislation rather than separate State and Territory laws will provide greater efficiency in negotiating and implementing arrangements with other countries for enforcement of judgments and will permit better use of resources. The introduction of Commonwealth legislation has received general support from State and Territory Ministers. Consultative arrangements that have been developed between the Commonwealth and the States and Territories will continue. The Commonwealth will consult the States and Territories before entering into any arrangement with another country for enforcement of civil judgments.
>
> At present foreign judgments can be enforced in Australia either by bringing an action at common law based on the judgment or by registering the judgment in a State or Territory supreme court or State or Territory supreme court or State or Territory law. Most State and Territory laws providing for enforcement of foreign judgments are substantially uniform, being based on the United Kingdom Foreign Judgments (Reciprocal Enforcement) Act 1933.
>
> The uniform legislation is based on the principle of reciprocity. It provides for registration in the supreme court of a State or Territory of money judgments given by the superior court of a foreign country to which the legislation is applied. The legislation may be applied by instrument with respect to a foreign country where that foreign country gives substantial reciprocity of treatment to judgments of the relevant State or Territory supreme court.
>
> A judgment is not registrable under the uniform legislation unless it is final and conclusive, is for a sum of money – other than a sum in respect of a revenue debt, fine or other penalty – and is enforceable by execution in the foreign country. Once registered, a judgment has the same force and effect for the purposes of execution as if the judgment had been originally given in the registering court.
>
> The uniform legislation contains safeguards which enable registration of a judgment to be set aside in certain circumstances. These include an

inappropriate assertion of jurisdiction by the foreign court, public policy and registration in contravention of the legislation.

The Bill is based on the legislative scheme reflected in the uniform States and Territory legislation. The problem with the current scheme has not been the legislation itself but rather the multiplication of effort involved in implementing and keeping arrangements up to date under the various State and Territory laws. Under the current scheme there is invariably a long delay in implementing arrangements in all jurisdictions.

Other problems that have arisen with a scheme based on State and Territory legislation are lack of uniformity in the arrangements made with other countries and lack of capacity adequately to deal with judgments of Australian Federal courts. Commonwealth legislation will facilitate negotiations, enable satisfactory arrangements to be made for judgments of all Australian superior courts, increase efficiency and reduce resource needs. At the same time, the State and Territory supreme courts will continue their role under the present law for enforcement of foreign judgments.

The Bill will widen the scope of the judgments enforceable under the current uniform scheme. In addition to providing for the enforcement of money judgments of foreign superior courts, the Bill provides for:

- enforcement of judgments of foreign inferior courts where the foreign country provides reciprocal treatment for Australian inferior court judgments – agreements on this have been reached with New Zealand and the United Kingdom;
- enforcement of foreign non-money judgments – for example, injunctions – also on the basis of reciprocity, by registration in the same manner as money judgements – agreement on this has been reached with New Zealand; and
- enforcements of New Zealand revenue judgments, including penalty components of such judgments, in the same manner as civil money judgments. Revenue debts include income tax, capital gains tax and customs duty.

Considerations of justice, convenience, greater certainty in international transactions and comity between nations show the desirability of the scheme reflected in this Bill. With the increased mobility of persons and money across borders, the need for, and benefits of, an effective capacity to enable a judgment given in one country to be enforced against assets in another country are obvious.

The Bill is a good example of the efficiencies that can be achieved through Commonwealth, State and Territory co-operation in allocation of functions. While the Commonwealth legislation will replace State and Territory legislation, the States and Territories will still be directly involved through the consultative process on proposed arrangements with foreign

countries and in the continued enforcement of foreign judgments in their courts.

It is not expected that this Bill will have a significant financial impact. The Bill will permit some resource savings for the Commonwealth, States and Territories by removing multiplication of effort involved in each State and Territory having to implement arrangements under its own law. In the short to medium term, savings at the Commonwealth level will be offset by the need to bring existing arrangements under the Commonwealth Act.

Jurisdiction – Immunity of foreign states from the jurisdiction of Australian courts – personal injuries – *Tokic v Yugoslavia*

On 21 June 1991 Mr Justice James delivered the following reasons for decision in the Supreme Court of New South Wales on a claim of foreign state immunity by Yugoslavia in proceedings brought by a person injured in a shooting outside the Yugoslav Consulate-General in Sydney on 27 November 1988 (Case No 14790/90, unreported):

His Honour: These are proceedings in which the plaintiff has sued the Government of Yugoslavia claiming damages for personal injury caused by an act or omission alleged to have occurred in Australia.

An application has been made to have the proceedings dismissed on the basis that the defendant is entitled to sovereign immunity. I have been referred to the Foreign States Immunities Act 1958, Commonwealth, s 13 of which provides so far as relevant that a foreign State is not immune in a proceeding insofar as a proceeding concerns personal injury to a person caused by an act or omission done or alleged to be done in Australia.

The plaintiff has produced a certificate under s 4 of the Act under the hand of the Acting Minister of State for Foreign Affairs and Trade, Commonwealth, certifying that on 27 November 1988 – the date on which the plaintiff's personal injury was allegedly incurred – the Socialist Federal Republic of Yugoslavia was a foreign State.

I have been referred by senior counsel for the plaintiff to the second reading speech in the Commonwealth Parliament when the States Bill – which became the Foreign States Immunities Act – was introduced, in which the Minister said words to the effect that one of the purposes of the Bill was to abolish the immunity of Foreign States from being sued for torts committed in Australia.

The legal representative who has appeared for the defendant has not produced any authority or made any submission that s 13 of the Foreign States Immunities Act does not have the meaning which it would appear to have.

In the circumstances, I dismiss the application by the defendant with costs.

Jurisdiction – United States Forces in Australia – application of customs and environmental laws

On 21 August 1990 the Minister for Defence, Senator Robert Ray, provided the following written answer in part to a question on notice (Sen Deb 1990, p 1891):

> The Australian Customs Service retains the right under the Customs Act to board and search aircraft, military or otherwise, of all other nations arriving in Australia. Under Article 13 of the 1963 Agreement concerning the Status of United States Forces in Australia (SOFA), the US has undertaken to conform to Australian laws and regulations.

On 14 August 1991 the Minister for Defence, Senator Ray, provided the following written answer, in part, to a question on notice (Sen Deb 1991, p 361):

> While there may well be US legislation applicable to US military activities in the United States and overseas, so far as the Australian Government is concerned the relevant environmental standards governing the activities of US military personnel in Australia are defined in Australian legislation. This is provided for in a Status of Forces Agreement between the Australian and United States Governments (Australian Treaty Series 1963 No. 10). Article 13 provides that the United States Government shall conform to relevant Commonwealth and State laws and regulations, and that United States personnel shall observe those laws and regulations. These include environmental laws and regulations. Our agreements with the United States regarding the operation of the Joint Defence Facilities make provision for this situation to apply also at the Joint Defence Facilities.
>
> The obligations of the US Government under the Status of Forces Agreement and arrangements governing the Joint Defence Facilities remain undiminished by any domestic United States procedural obligation on the US Department of Defense to make available compliance notices to Congress.
>
> There are no US military sites currently in Australia and there have not been any for very many years.