

**Legal Implications of the
Presence of Nazi War Criminals
in New Zealand**

Tristan Gilbertson

Joint Winner of the Law Review Prize for 1991

INTRODUCTION

This article examines the legal issues raised by the presence of Nazi war criminals in New Zealand. It is structured in two parts. The first section outlines the jurisdictional bases for the trial of suspected Nazi war criminals in New Zealand. It traces the historical development of international humanitarian law, and outlines the major factors and historical processes leading to a distinct regime of international criminal law after the Second World War. The second section analyses the options available to the New Zealand Government in proceeding against suspected war criminals. Consideration is given to the human rights and practical problems of proceeding against suspects 40 or more years after the crimes were committed.

PART 1: JURISDICTION

(1) Jurisdiction Over War Crimes

New Zealand statutes recognise no such class of offence as a war crime, and New Zealand criminal statutes do not in any case generally extend their sanction to crimes committed wholly outside of New Zealand.¹ However, this does not mean that New Zealand has no jurisdiction in respect of suspected war criminals at all.² What it does

¹ With certain limited exceptions: crimes on board ships and aircraft, Crimes Act 1961, ss 5-8; crimes against internationally protected persons, Crimes (Internationally Protected Persons and Hostages) Act 1980; aircraft hijacking and related actions, Aviation Crimes Act 1972; acts of torture, Crimes of Torture Act 1989.

² As is contended by the Public Issues Committee of the Auckland District Law Society, "Legal view on Nazi war criminals" in *Northern Law Review*, Vol 15, No 5, June 1990, 11.

mean is that no such jurisdiction exists in municipal law. The position under international law is an entirely different matter.

There are two competing theories as to jurisdiction over war crimes in international law: the universal theory, and the restrictive theory.

According to the universal theory of jurisdiction, jurisdiction to try war crimes in international law proceeds directly from the universal nature of these crimes. War crimes violate the interests of the international community and are accordingly considered to be *delicta juris gentium*, or crimes against the law of nations. In the absence of an international tribunal to judge these crimes, international law invests the legislative and judicial organs of each state with the power to punish them, regardless of the place in which they were committed or the nationality of the accused person or the victim. Jurisdiction to try suspected war criminals automatically vests in New Zealand as a member of the international community on this interpretation of the law.

However, a straightforward application of the theory of universal jurisdiction would conflict with the general rule of international law that an act must be judged in the light of the law contemporary with it, and not in the light of the law in force at the time when a dispute in regard to it arises or falls to be settled.³ The criminality of the alleged acts of the accused is therefore to be determined by the rules of international law in force during the latter part of the Second World War. This requirement necessarily rules out recourse to universal jurisdiction over war crimes which, as shall be seen, is a distinctly post-war development. It was not sufficiently well established in state practice to constitute a rule of customary international law at the time when these crimes were committed. And in its absence, according to the restrictive theory of jurisdiction, the customary and conventional rules of war prevailing at the time apply to determine the question of jurisdiction.⁴

By the outbreak of war in 1939, it had been fully established in general international law that an injured belligerent was entitled to punish enemy personnel who had violated the rules and usages of war.⁵ The right to punish arose by virtue of the commission of the illegal act and automatically vested in all members of the opposing military camp, who were deemed to have been injured thereby. However, the right to punish war crimes was qualified by two provisos to the general rule. First, while commission of the unlawful act created the right, the power of the injured belligerent to exercise that right, that is, the jurisdiction of the injured belligerent, arose only in respect of those criminals who had fallen into the belligerent's hands. Jurisdiction was conditional upon custody. Secondly, the right to exercise jurisdiction only continued for the duration of the war, and expired with the conclusion of the peace unless, by the express terms of the peace treaty, the period was deemed to continue.⁶

³ *Island of Palmas Case* (Netherlands v US) [1928] 2 RIAA 829; see also Jessup [1938] 32 AJIL 735.

⁴ This result is linked to the maxim *nullum crimen nulla poena sine lege*, *infra* at 17–21.

⁵ Stone, *Legal Controls of International Conflict* (2nd ed 1959), 360.

⁶ See Hall, *The Laws of War* (4th ed 1885), Part III Chap II as quoted in Lord Wright, *infra* at note 14, at 42.

State practice had long established that the type of crime subject to these jurisdictional rules included acts of rape and murder committed against the civilian populations of occupied territories. Such acts were recognised as prohibited by customary international law, which had evolved in the long-standing practices of belligerents.⁷

By the outbreak of the Second World War the majority of the customary rules of war had been codified in treaties and conventions.⁸ The code of particular importance is the Hague Convention of 1907 on the Laws and Customs of War on Land. In the annex to the Convention are 56 articles which enumerate and define the specific laws, rights and duties of war. These articles restate and expand *de lege ferenda* the category of crimes recognised in customary law into clear and definitive rules of wartime conduct.

In 1919 the Commission on Responsibilities for the First World War⁹ found that the Hague Convention and the customary rules of war together branded as criminal the following conduct with regard to civilian populations:

- (1) Murders and massacres; systematic terrorism.
- (3) Torture of civilians.
- (4) Deliberate starvation of civilians.
- (5) Rape.
- (6) Abduction of girls and women for the purpose of enforced prostitution.
- (7) Deportation of civilians.
- (8) Internment of civilians under inhuman conditions.
- (9) Forced labour of civilians in connection with the military operations of the enemy.
- (12) Attempts to denationalise the inhabitants of occupied territory.
- (13) Pillage.
- (14) Confiscation of property.
- (26) Use of deleterious and asphyxiating gases.

It is now generally accepted¹⁰ that by 1939 the Hague Convention had itself passed into the corpus of customary international law through constant and uniform state usage and acceptance of its provisions. The propositions stated above thereby became binding on all states by virtue of their customary status. Allied and Axis powers were therefore accountable for their actions during the course of the war under the same body of law.

Accountability under international law during the latter part of the Second World War extended to individuals as well as states. The prosecution and punishment of individuals for war crimes by military tribunals was well established in the practice of belligerents.¹¹ The Hague Convention provided an anomaly in this respect as it did

⁷ Starke, *Introduction to International Law* (10th ed 1989) 552.

⁸ *Ibid.*

⁹ A Commission composed of various legal sub-commissions appointed in January 1919 by the Preliminary Peace Conference of Paris for the purpose of "inquiring into the responsibilities relating to the war": Lord Wright, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948), 32-41.

¹⁰ See generally Lord Wright's treatise, *ibid.*

¹¹ Even as far back as the practice of the Greek city-states. See the commentary on the history of war crimes trials generally in Woetzel, *The Nuremberg Trials in International Law* (1962) 17 *et seq.*

not expressly impose responsibility on individuals. However, since it did not prohibit individual responsibility, it was generally conceded¹² that as a matter of interpretation the Convention was to be construed in the light of the long-standing practice of imposing individual punishment, so that the liability of Governments was additional to and coexistent with the responsibility of individual criminals. This interpretation was seen as being consistent with art 1 of the Preamble to the Convention which declared that the Convention was necessarily subject to development and revision as new necessities were realised or operated. The efficacy of this part of the law would have been undermined by any other construction. Accordingly, the United States Supreme Court held in *Ex parte Quirin*,¹³ (a case contemporaneous with the Eastern European atrocities) that it was established law that Military Courts have power to punish individuals for violations of the laws of war, and that they have jurisdiction to recognise offences specified in the Hague Convention, and similar offences, so as to give full scope to its governing purposes.

Thus in the latter part of the Second World War there was a complete system of law in place to determine the question of jurisdiction over war crimes. This system of law is clearly discoverable in the books of authority and on examination of the state practice of that period.¹⁴ On the basis of the substantive content of that law, it is possible to state the jurisdictional equation as it relates to New Zealand as follows:

THE RULE

The individual perpetrator of war crimes is accountable to an injured belligerent for his actions under international law provided:

- (a) The crimes fall within the definition of war crimes.
- (b) The suspect is subject to the rules of war.
- (c) The injured belligerent has custody of the suspect.
- (d) The period of jurisdiction has specifically been extended in the peace treaty.

THE RULE APPLIED TO THE NEW ZEALAND SUSPECTS

- (1) Their crimes clearly fall within the meaning of war crimes *stricto sensu*.
- (2) The suspects either by way of membership of or by way of affiliation or collaboration with the German occupation forces acted as agents of the German Reich and were accordingly subject to the laws of war applicable to the same.
- (4) The continued right of jurisdiction over war crimes was expressly reserved to the Allies as a term of the peace treaty.¹⁵
- (5) New Zealand was an Allied belligerent.
- (6) The suspects have fallen into New Zealand hands.

¹² Lord Wright, *supra* at note 9, at 549-550.

¹³ 317 US 1 (1942).

¹⁴ Lord Wright, "War Crimes Under International Law" in (1946) 62 LQR 40, 44 considered them "almost obvious platitudes".

¹⁵ That is, Germany's unconditional surrender.

THE RESULT

As a member of the Allied camp New Zealand became an injured belligerent for the purposes of the rule upon the commission of the crimes. All other requirements of jurisdiction being satisfied, New Zealand may lawfully under international law convene a tribunal to prosecute those crimes according to the laws and usages of war.

(2) The Emergence of Crimes Against Humanity and Universal Jurisdiction

The trial of the major Nazi war criminals by the International Military Tribunal of Nuremberg 1945-1946 was an expression of this jurisdictional equation as it related to the victor states. The jurisdiction of the Allies to punish the Nazi leaders for violations of the laws and customs of war was based on the traditional right of each belligerent to try violators in its own tribunals. It was stressed by the Tribunal that its Charter, which vested in it the collective right of the Allies to try the Nazi war criminals, did nothing more than assert that traditional right. The Allied powers did together what any one of them might have done singly. The trial represented the exercise of an Allied right of jurisdiction over war crimes. It did not, therefore, at least initially, constitute authority for the exercise of universal jurisdiction by all states over war crimes.

Of the rules of law created by the Charter of the International Military Tribunal, the definition of war crimes proved least controversial. War crimes in relation to civilian populations were defined in art 6(b) of the Charter as follows:

War crimes, namely, violations of the laws and customs of war. Such crimes shall include but not be limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian populations of or in occupied territory.

It was generally accepted at the time that this definition restated the law relating to war crimes as it then stood.

The legality of art 6(c) of the Charter, however, was for a long time widely doubted. This provision conferred upon the Tribunal jurisdiction in respect of a species of crime called "crimes against humanity", which it defined as follows:

Crimes against humanity, namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds . . . whether or not in violation of the domestic law of the country where perpetrated.

Doubt specifically surrounded the extent to which crimes against humanity were preceded in customary international law.

It seems that the first expression in positive law of jurisdiction over these crimes is found in the Treaty of Sevres (art 230), which granted to the Allies of World War One the right to punish crimes against humanity committed by the Turkish Government against its own citizens. The Treaty was cited by proponents of art 6(c) as evidence of recognition that crimes against humanity had always been known in customary law but that it took the experience of the War before it became necessary

to collectively group them under a specific term. The opposing view saw the Treaty of Sevres as constituting at the most a limited precedent for crimes which were seen as a specialised outgrowth of the limited category of crimes against civilian populations recognised in war law proper.¹⁶ On this view there was a certain degree of overlap between war crimes *stricto sensu* and crimes against humanity, but they were otherwise entirely without precedent.

However, it was quite pointless to search the history books or strain the precedents of customary law in an attempt to justify or invalidate the emergence of a separate category of such crimes in the Charter. Both attempts assumed that the Charter created international law, which it did not. To the extent that the Charter created any type of law at all, it was German municipal rather than international law that was created. The making of the Charter and the crimes designated therein was an exercise of sovereign legislative power by the countries to which the German Reich had unconditionally surrendered.¹⁷ Complete sovereignty over the German State vested in these countries upon surrender, so that the designation of crimes against humanity as crimes under the Charter was an expression of the legislative competence of the victor powers to enact criminal legislation for Germany and to create a special court to administer their laws. However, while the right of the victor powers to legislate for Germany was derived from international law, that fact did not elevate the provisions of the Charter itself to the status of international law. Nor did the view of the Tribunal that in legislating for Germany the victors restated existing international law. For even if that were true, the Charter would still simply have transformed international law into domestic law. In the final analysis, the Charter created and had the effect of nothing more than a municipal Statute. Whether or not crimes against humanity under the Charter created new international law is not a relevant consideration, as the law created by the Charter was not international law at all.

The Nuremberg Charter nevertheless marked the beginning of efforts to affirm a new *opinio juris*, which gradually took shape through the actions of the United Nations as well as through State practice, so that the Charter rapidly acquired the status of international law which it lacked before.

Shortly after the end of the war, in a Resolution¹⁸ adopted unanimously by the General Assembly of the United Nations, the member States of the United Nations "affirmed" the principles embodied in the Charter of the Nuremberg Tribunal and its judgment as international law. Thereafter, numerous General Assembly Resolutions¹⁹ confirmed the interest of the world community in the prevention and punishment of such crimes. As regards the mechanics of the transformation, there is nothing new in the assertion that "even if a particular resolution of the General Assembly is not binding, the cumulative impact of many resolutions when similar

¹⁶ See generally Papadatos, *The Eichmann Trial* (1964), 46.

¹⁷ So held the International Military Tribunal: Cmd 6964, 38.

¹⁸ Resolution 3 (1) of 13 February 1946.

¹⁹ As to which see Weiss, "Time Limits for the Prosecution of Crimes Against International Law", (1982) 53 *BritYB Int L* 163, at note 171.

in content, voted for by overwhelming majorities and frequently repeated over a period of time may give rise to a general *opinio juris* and thus constitute a norm of customary international law".²⁰ More important, however, is the fact that the votes of States in support of these resolutions constitute a recognition by the majority of States that the substantive aspects of the Charter and judgment of Nuremberg have become part of positive law.²¹ Indeed, it is probably the case that by voting for the Resolutions, the Members of the United Nations have even estopped²² themselves from denying that crimes against humanity are based on rules of customary international law.²³

The necessary concomitant of this development was the extension of universal jurisdiction to such crimes, which accordingly became *delicta juris gentium*. As long ago as the fifteenth century, Grotius had asserted the ideal of such a jurisdiction:²⁴

It must also be known that kings and any who have rights equal to the rights of kings may demand that punishment be imposed not only for wrongs committed against them or their subjects but also for all such wrongs as do not specifically concern them, but violate in extreme form, in relation to any persons, the law of nature or the law of nations.

However, until the rapid transformation of the Nuremberg principles into rules of customary international law after World War Two, piracy was the only clear-cut instance in state practice²⁵ of a *delict juris gentium* conferring universal jurisdiction on all states.²⁶ The legal validity of the extension of universal jurisdiction to war crimes has been questioned by reason of this perceived lack of precedent. However, any lack of precedent is more apparent than real. War crimes are very different from acts of piracy, but they are both by universal declaration *delicta juris gentium*, or crimes against international law. War criminals may not be pirates, but like pirates they are by universal condemnation *hostis humani generis*, or international criminals. The substantive nature of these crimes is the same. Once this much is admitted, universal jurisdiction over war crimes today follows for the same reason as universal jurisdiction over piracy in past centuries — as a matter of simple necessity. For it is

²⁰ Judge Dillard, separate opinion in the *Western Sahara* advisory opinion, [1975] ICJ Reports 19 et seq.

²¹ Brownlie, *International Law and the Use of Force by States* (1963), 193.

²² Schwarzenberger, *Manual of International Law* (5th ed 1967), 212.

²³ Schwarzenberger, *idem*, submits that it is even possible to include in this estoppel States which subsequently joined the UN, or non-member States which, like Germany, accepted the principles of the UN Charter on a consensual basis. All such States took these steps in full knowledge of the *lex societatis* of the UN.

²⁴ *De Jure Belli et Pacis* (1646), Book II Chap 20.

²⁵ As to which, see *Historical Survey of the Question of Universal Criminal Jurisdiction* (United Nations Secretariat, 1949), 1 et seq.

²⁶ According to Blackstone: "[T]he crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke (3 Inst 113), *hostis humani generis*. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inflict that punishment on him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property." *Commentaries on the Laws of England* (1783), Book IV, Chap 5, 71.

well known that so long as no international court which can punish exists, nor any supranational power which can enforce the execution of its judgments, all international crimes must be subject to universal jurisdiction which alone allows — and then not always — their effective punishment. From this point of view, then, there is no difficulty in regarding piracy as a valid precedent for the post-war extension of universal jurisdiction, which is justified in any case by the problems of enforcement in the international arena.

Post-war developments in international law therefore led to the establishment of crimes against humanity as *delicta juris gentium* in customary international law, whatever may have been the position in customary law before that time. Crimes against humanity as defined in the Nuremberg Charter became universally punishable by all states after the time of their transformation into norms of customary international law. However, the question of the autonomy and punishability of such crimes in pre-war customary law remains outstanding.

At this point, discussion returns to the assertion by the International Military Tribunal that the principles enunciated in its Charter represented international law as it existed at the time of its creation. This view takes as its starting point the fact that the sources of international law include not only treaties and custom but also “the general principles of law recognised by the civilised nations”. This refers to the higher principles in the hierarchy of legal orders which are inherent in humankind’s consciousness of the law and which are therefore generally recognised in the positive municipal law of civilised nations.²⁷ Therefore, where a legal principle is so generally accepted by various nations as to be a common denominator of practically all civilised systems, it is justifiably applicable by an international tribunal.

In *Attorney-General of Israel v Eichman*,²⁸ the Supreme Court of Israel in affirming the view of the International Military Tribunal, stated the essential features of crime in international law to be:²⁹

- (a) injuries to essential international interests;
- (b) endangering the very foundations of the international community and its security;
- (c) the violation of universal moral values and of humanitarian principles as safeguarded in the penal systems of the civilised nations.

Considered from this viewpoint, the crimes set out in art 6(c) of the Charter of the International Military Tribunal undoubtedly constituted crimes against international criminal law before the enactment of the Charter. For it is certain that the opinion of law of civilised peoples had for a long time before considered the physical extermination and other brutal treatment of human beings as serious crimes which were severely punishable by municipal criminal laws.

On the authority of the Nuremberg Judgment and the decision of the Israeli Supreme Court, therefore, crimes against humanity were clearly considered as crimes before the Second World War, and art 6(c) of the Charter is applicable to the

²⁷ Statute of the International Court of Justice, Art 38 (1)(c).

²⁸ (1961) 36 ILR 277.

²⁹ Papadatos, *supra* at note 16, at 68.

crimes committed by suspected Nazi war criminals.

This position was affirmed in subsequent developments concerning genocide.

(3) Crimes of Genocide as Autonomous Crimes

While the doubt surrounding crimes against humanity appears to have been resolved, uncertainty still surrounds the status of crimes of genocide in customary international law.

On this point there are two conflicting views.

According to the first, genocide was already an established crime in international law before the Second World War. This claim rests on the proposition that various elements of pre-existing customary law were simply drawn together under the name "genocide", so that the name but not the constituent elements of the offence were new.

According to the second, the concept of the systematic biological destruction of a nation or of an ethnic group was not known to international law before the rapid developments following the Second World War. The term "genocide" was specifically coined in response to the systematic effort of Nazi Germany from 1941 to destroy the Jewish population of Europe in pursuance of what was known as "the final solution of the Jewish question". Genocide therefore emerged as a completely autonomous crime only with the International Convention on the Prevention and Punishment of Genocide of 1948.

Despite what might seem preferable from a moral point of view, the argument for the second view initially appeared stronger in a technical sense, resting as it did on points overlooked by the alternative view. The alternative view ignores the fact that genocide is a group rights concept. Genocide is directed against a national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group. Genocide concerns the right of the group to survive. This group rights concept was new to international law and only evolved as part of the post-war refocus of international law precipitated by Nazi atrocities. The first proposition further ignores the fact that only some of the constituent elements of the present crime of genocide existed in customary and conventional international law before the war. To the extent that genocide is murder, the core element of the crime already existed in the laws of war relating to acts of murder against civilian populations. It was possible to commit genocide as an offence under the laws of war insofar as genocide is the murder of civilians. But the motive behind the act, the attempted biological extermination of a national group, was not a constituent element of such an offence. There was liability only for the act. It took post-war developments urged by the devastating loss of six million human lives in Nazi-occupied Europe before acts of murder for the express purpose of the biological destruction of a national group on racial, religious, or national grounds became a fully constituted crime in its own right.

The first test of both views occurred at Nuremberg where the crime of genocide was proffered by the prosecution against the Nazi leaders. The prosecution alleged

in the Indictment that the defendants "conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups, particularly Jews, Poles and Gypsies and others".³⁰ However, the Tribunal did not take up the prosecution's invitation to recognise the crime. In its statements dealing with the substance of the charge of genocide,³¹ the Tribunal did not make any reference to the actual term and conception of genocide. This is probably a reflection of the fact that, notwithstanding the charges in the Indictment, genocide was not designated as an offence under the Charter, which the Tribunal was bound to apply. This omission is in turn significant in a document which purported, and was declared by the Tribunal, to codify existing international law. Instead, the Tribunal incorporated its references to the charge of genocide into the judgment through the provisions relating to war crimes and crimes against humanity. Genocide as alleged by the prosecution was treated by the Tribunal as a subsidiary aspect of those particular crimes, rather than as an autonomous crime in its own right.

If this is the case, it follows that it was the second view that was affirmed as international law in the subsequent transformation of the principles of the Nuremberg Charter and judgment into customary international law.³²

However, the General Assembly of the United Nations overturned the emerging interpretation by adopting a Special Resolution on Genocide on 11 December 1946, the main part of which reads as follows:³³

1. Whereas, genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings, and such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations;
2. Whereas, many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part;
3. And whereas, the punishment of the crime of genocide is a matter of international concern;

The General Assembly

Affirms that genocide is a crime under international law which the civilised world condemns, and for the commission of which principals and accomplices, whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds, are punishable.

The Resolution was a clear statement by the majority of states that whatever the legal technicalities might have been, the record of consistent and systematic inhumanity revealed at Nuremberg demanded a punishable autonomous crime of genocide.

Such a crime was created two years later by the International Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General

³⁰ The Indictment presented to the International Military Tribunal Sitting at Berlin on 18th October, 1945. HM Stationery Office Cmd 6696, 14.

³¹ The relevant extracts appear in Lord Wright, *supra* at note 9, at 196-199.

³² *Supra* at note 9, at 10.

³³ Resolution 368 (IV) of 11 December 1946, General Assembly Journal No 75 Supp A-64, Add 1, 945.

Assembly on 9 December 1948.

A comprehensive criminal regime over crimes of genocide was instituted by the Convention. The preamble to the Convention declares that in all periods of history "genocide has inflicted great losses on humanity", and that it is the aim of the contracting parties to eliminate genocide through international cooperation. The first article of the Convention declares genocide a crime whether committed in time of peace or war. The second and third articles define genocide as the crime of destroying, or committing conspiracy to destroy, a national, ethnic, racial, or religious group. The fourth article establishes the principle that punishment for genocide shall apply to guilty "constitutionally responsible rulers", public officials, and private individuals. The fifth article imposes on the signatory nations the obligation of enacting legislation to give effect to the provisions of the Convention and to provide suitable penalties for persons found guilty of genocide. Other articles exclude genocide from the category of political crimes and explicitly deny to persons accused of genocide immunity from extradition so that, in terms of article 6, the accused shall be tried "by a competent tribunal of the state in which the act was committed," or by such international tribunal as may have the necessary jurisdiction.

An autonomous crime of genocide was undoubtedly created in conventional international law by the Genocide Convention; but as the Convention did not presume to confirm established principles of custom, the question of the autonomy of genocide in customary international law remained unresolved.

However, the pronouncements of the International Court of Justice and the Supreme Court of Israel might since be regarded as having authoritatively resolved the question. In the *Reservations to the Convention on Genocide, Advisory Opinion*³⁴ the International Court opted in favour of the first view when it held that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."³⁵ The Court further stated that "[t]he Genocide Convention was . . . intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution [No 96(1)] which was unanimously adopted by fifty-six States."³⁶ The *Reservations Case* was subsequently followed in *Attorney-General of Israel v Eichmann*,³⁷ the first major trial for crimes of genocide to be held after the Convention came into force. In that case, the Supreme Court of Israel upheld the opinion of the District Court³⁸ that "the Convention reaffirms the deep conviction of all peoples that genocide is a crime under international law and that the principles inherent in the Convention are acknowledged by the civilised nations as being binding upon all nations, regardless of any treaty obligation; that is to say, they constitute rules of custom in international law." In the result, both cases have entrenched the first view and confirmed the

³⁴ [1951] ICJ Reports 15, given at the request of the UN General Assembly.

³⁵ *Ibid.*, 23.

³⁶ *Ibid.*

³⁷ (1961) 36 ILR 277.

³⁸ (1961) 36 ILR 5.

existence of a universal crime of genocide in customary international law outside and independent of the Genocide Convention of 1948.

The Genocide Convention only applies *in futuro* and has no retroactive effect to cover the genocide committed by the Nazis. The obligations in the Convention do not concern the past. They merely have a practical purpose and aim at the realisation of prevention and punishment of genocide in the future.³⁹ Customary law governs crimes which preceded the Convention. This much was admitted by the Israeli tribunal which accepted that the provisions of the Genocide Convention did not relate back to the exterminations administered by Eichmann⁴⁰ for the purpose of constituting them crimes of genocide under the Convention or of prescribing the mode of their trial and punishment.

Although it was not necessary to do so, the Israeli Court went on to conclude that even if the Convention did apply to Eichmann's crimes, the Court would not have had jurisdiction over him. The Court's conclusion involved a literal construction of art 6 of the Convention. Article 6 provides that persons charged with genocide shall be tried by a competent tribunal of the State in whose territory the crime was committed, or by an international penal tribunal with appropriate jurisdiction. Eichmann's crimes were not committed in Israel and in fact preceded the creation of that State. The Court considered that it would have been bound by a literal interpretation of the Article as extinguishing the universal jurisdiction over crimes of genocide otherwise conferred by customary law.

However, it must be doubted that the General Assembly intended to limit the right of states to try what in the same document it acknowledged to be an international crime. If it is admitted that the rule established by art 6 controls the matter in an exclusive way, and that persons accused of genocide should be tried solely by the competent court of the country in whose territory the crime was committed — or by an international criminal court which for the time being does not exist — the very purpose of the Convention would be frustrated⁴¹ since it is the state itself which is the principal responsible party for genocide committed on its territory.

The territorial jurisdiction established by art 6 is really best considered an obligatory minimum which in no way limits the rights of the signatory states to punish.⁴² This right can be freely exercised within the framework of international customary law. Consequently the Convention constitutes no obstacle to the application of universal jurisdiction for the punishment of this crime. Even if this Convention had a retroactive effect and covered the genocide committed by the Nazis, which is not the case, it could by no means exclude the application of any other

³⁹ Papadatos, *supra* at note 16, at 49-50; *contra*, Fawcett, "The Eichmann Case" (1962) 38 Brit YB Int Law 181, 205-206.

⁴⁰ As former Chief of the Jewish Affairs Section of the Gestapo responsible for co-ordinating the extermination of between 4,200,000 and 4,600,000 Jews in concentration camps throughout Europe: Harris, *Cases and Materials On International Law* (3rd ed 1983), 223-225.

⁴¹ Papadatos, *supra* at note 16, at 49.

⁴² *Contra*, Woetzel, *supra* at note 11, at 156-158.

jurisdiction, such as universal jurisdiction, which is the only way to ensure effective punishment of genocide under present-day conditions.

Consequently, while the International Convention on the Prevention and Punishment of the Crime of Genocide cannot be invoked at any trial of fugitive Nazi war criminals, the provisions of the Convention itself, contrary to the opinion of the Israeli Supreme Court, are probably not further precluded from the universal jurisdiction of all states in appropriate cases.

(4) Summary of Jurisdictional Rules

THE RULES

There have been changes of enormous importance in the post-war development of international law. There has been an overall convergence between the hitherto separate concerns of human rights and the laws of war. War laws of only limited application before 1939 rapidly evolved into a comprehensive regime of specialised offences of universal application. War law became the basis upon which was superimposed the autonomous universal crimes of war crimes *stricto sensu*, crimes against humanity, and crimes of genocide. Fundamental human rights came to be conceived not as an internal question of each state but as the concern of the international community. This view was consecrated in rapid succession by the Universal Declaration of Human Rights of 10 December 1948, by the Geneva Conventions of 1949, and by the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950. Subsequent international instruments have further consolidated the rights secured in this period. The cumulative result is that the punishment of crimes *juris gentium* directly concerns each nation which, in punishing them, protects the interests of the international community at the same time as it safeguards its own interests.

New Zealand as the *forum deprehensionis* of suspected perpetrators of these international crimes has a dual interest, both as an injured belligerent under the laws of war, and as an individual member of the international community whose interests have been violated, to prosecute such persons.

It can therefore be concluded with regard to jurisdiction that:

- (a) Jurisdiction vested in New Zealand for violation of war crimes *stricto sensu* as an injured belligerent with custody of the accused.
- (b) A concurrent universal jurisdiction also vests in New Zealand for prosecution of war crimes *stricto sensu*.
- (c) Universal jurisdiction vests in New Zealand for the prosecution of crimes against humanity.
- (d) Universal jurisdiction vests in New Zealand for the prosecution of crimes of genocide in customary international law.
- (e) No jurisdiction vests in New Zealand for prosecution of offences under the International Convention on the Prevention and Punishment of Crimes of Genocide 1948 committed before that Convention became law in 1951.

THE RULES APPLIED

Having established the right of New Zealand to prosecute suspected Nazi war criminals, there is nothing now to prevent the exercise of that right in respect of the full category of crimes articulated after the Second World War. Not even the general rule⁴³ that an act is to be judged by the law in force at the time of its commission constitutes a bar to the exercise of jurisdiction. For by general declaration those crimes were already established crimes in customary international law at the time they were perpetrated against the civilian populations of Nazi-occupied Eastern Europe.

However, even assuming, as for the time being shall be done, that crimes against humanity and crimes of genocide were revolutionary developments in international law, the legality of the current criminal regime and its applicability to Nazi war criminals would not fall into question. It is possible for these laws to be retroactive in effect without tainting them with illegality. International law differs from municipal law in this respect.

The principle against the retroactive application of criminal law has become the basis of the legality of criminal laws and penalties in municipal legal systems. No person should be criminally liable for any act unless the act was specifically proscribed and punishable by law at the time it was committed: *nullum crimen nulla poena sine lege*. The principle traces its modern origins back to the French Revolution where it was taken up in an attempt to protect individual liberty from arbitrary interference by despotic rulers.⁴⁴ Blackstone identified the Roman emperor Caligula as one such despot "who", he says, "wrote his laws in a very small character and hung them up upon high pillars, the more effectively to ensnare the people." Blackstone went on to say:⁴⁵

There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when after an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it; here it is impossible that the party could foresee that an action innocent when it was done, should be afterwards converted to guilt by subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro* and be notified before their commencement.

Blackstone identifies the basic fault in retroactive criminal laws as being the impossibility of an accused who acts when there is no law against the act foreseeing that the act will subsequently be made criminal. It is the injustice inherent in this which leads to the principle against retroactivity.⁴⁶

The only international instrument which purports to enshrine Blackstone's objections and prohibit retroactive criminal punishment is the International Covenant on Civil and Political Rights,⁴⁷ which states in relevant part:

⁴³ Supra at note 4.

⁴⁴ Weiss, supra at note 19; at 174.

⁴⁵ Quoted by Public Issues Committee, supra at note 2, at 12.

⁴⁶ Ibid.

⁴⁷ While the Universal Declaration of Human Rights 1948 also prohibits retroactivity, this instrument only states an ideal and is neither contractual nor binding in nature.

- 15(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.
- 15(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed was criminal according to the general principles of law recognised by the community of nations.

However, until such time as this Covenant may become customary international law, its provisions are not binding outside the contractual sphere of its application.

In the meanwhile, there is no positive rule of international law forbidding retroactive criminal punishment in accordance with the maxim *nullum crimen nulla poena sine lege*. There are three main reasons why this is so.

First, the maxim is not sufficiently recognised as a rule of law in legal systems generally in order for it to constitute a norm of customary international law.⁴⁸ Where the principle has been adopted into a legal system,⁴⁹ it is usually with exceptions and qualifications.⁵⁰ In fact in many countries it is not even a rule of law at all.⁵¹ Its standing in such countries is merely as a policy of interpretation. If a penal statute can be interpreted either way, its non-retroactive interpretation will be preferred. But a statute unambiguously retroactive will be law in the absence of an express rule to the contrary. The maxim is consequently far from universal in state usage and practice.

Secondly, acceptance of the maxim requires a legal system of written rules set up by a legislative organ. The maxim cannot be given legal force without exhaustive authoritative advance statement of the criminal law. It is impossible for international law to meet this requirement.⁵² Movements to formulate an international criminal code with technical legislative force are still unrealised. Until such time as they are, international law proceeds on a case-by-case basis. It is developed by international treaties and particularly by custom which cannot provide for its rules the formality and fixedness required by the maxim *nullum crimen nulla poena sine lege*.⁵³ International criminal law must operate and develop in what is an extremely fluid reality and one which is for the most part not amenable to rigid control. Constrained within the narrow framework of the maxim, it would be unable to follow this ever-changing reality and would thus fail to accomplish its regulatory function.⁵⁴

⁴⁸ Papadatos, *supra* at note 16, at 63.

⁴⁹ As it has in New Zealand in the Crimes Act 1962, s 10A: **Criminal enactments not to have retrospective effect** - Notwithstanding any other enactment or rule of law to the contrary, no person shall be liable in any criminal proceedings in respect of an act or omission by him if, at the time of the act or omission, the act or omission by him did not constitute an offence.

⁵⁰ The exception is the Constitution of the United States of America which prohibits the retroactivity of any criminal law.

⁵¹ Even in England there is no constitutional limit to the power of the legislature to make *ex post facto* laws, no matter how strong may be the policy observed by its Legislature in the making of criminal statutes: *The Queen v Griffiths* [1891] 2 QB 145, 148; *Phillips v Eyre* (1871) LR 6 QB 1, 25.

⁵² Weiss, *supra* at note 19, at 174-176.

⁵³ Wright, "The Law of the Nuremberg Trial - Part II" in Baird (ed) *From Nuremberg to My Lai* (1972), 39-40.

⁵⁴ Stone, *supra* at note 5, at 368-371.

Thirdly, the essential conflict created by retroactivity is the conflict between two postulates of justice: of fundamental justice on the one hand and of formalism on the other.⁵⁵ In such a conflict it is evidently the higher principle which shall prevail. The higher principle must be the punishment of Nazi crimes which is universally recognised to be more important than respect for the principle of the non-retroactivity of the criminal law,⁵⁶ which is in any case destined to be only partially fulfilled in the present day international legal order, and still remains open to many exceptions.

The very nature of international criminal law as well as its present undeveloped state and the requirements for its development therefore make it impossible to recognise the maxim *nullum crimen nulla poena sine lege* in the form in which it exists in the various municipal legal systems where it is applied.

However, while this may justify the existence of retroactive criminal offences in general international law, it does not in turn justify the prosecution of such crimes in New Zealand. New Zealand is contractually bound as a party to the International Covenant on Civil and Political Rights by art 15 of that Covenant⁵⁷ which prohibits crimes of retroactive effect. Accession to the obligations imposed by the terms of the Covenant effectively cancels out New Zealand's right to invoke the justification in general international law for the existence and use of retroactive crimes.

Article 15 of the Covenant could therefore conceivably pose an obstacle to the prosecution in New Zealand of crimes against humanity and crimes of genocide, were those crimes truly retroactive in effect.

However, although the *municipal* law concept of non-retroactivity is not recognised in international law, the basic concept of non-retroactivity is. International law recognises the maxim *nullum crimen nulla poena sine lege* to the extent that it is reasonably able to do so. The maxim is recognised in its simplest sense: that the authors of war crimes were aware, or must be objectively held to have been aware, at the time the acts were perpetrated, of their criminal nature in the broad sense of the word: there is no *ex post factoism* in the law of murder.⁵⁸ This is legality in its simplest meaning: that the author of the act be aware at the time it is committed of its unlawful nature: *nullum crimen sine jure*.⁵⁹ By forbidding *ex post facto incrimination* international criminal law accords some recognition to the maxim *nullum crimen nulla poena sine lege* without at the same time inhibiting its potential for growth through judicial interpretation of existing law. On this view, there is therefore nothing strictly retroactive about crimes against humanity and crimes of genocide such that art 15 would constitute a valid obstacle to their successful prosecution in New Zealand.

⁵⁵ Papadatos, *supra* at note 16, at 65-66.

⁵⁶ This does not result in circumventing the law on moral grounds in order to punish as the Public Issues Committee, *supra* at note 2, at 15, has contended, but results instead from the very nature of the law itself.

⁵⁷ Cited *supra* at 17.

⁵⁸ *In Re Ohlendorf (Einsatzgruppen Trial) Case No. 217*, (1948) 15 Annual Digest and Reports of Public International Law Cases 656, 658 per Judge Musmanno.

⁵⁹ To this effect see Papadatos, *supra* at note 16, at 66.

For these reasons then, even if crimes against humanity and crimes of genocide were new crimes derived from war crimes *stricto sensu* (the case-law suggests they are not), there is nothing to prevent the New Zealand Government from exercising its right to prosecute suspected Nazi war criminals for the full category of war crimes *stricto sensu*, crimes against humanity, and, if they are attributable to any particular accused, crimes of genocide, as these crimes were articulated after the Second World War.

PART 2: OPTIONS FOR GOVERNMENT ACTION

How the New Zealand Government will elect to proceed in this matter is far from certain at the present time, but it seems that the following options might be contemplated:

- (1) To do nothing
- (2) Extradition
- (3) Deportation
- (4) Trial

A brief overview of each option is given below, with reference to the recent findings of the Public Issues Committee of the Auckland District Law Society.⁶⁰

(1) To do nothing

Failure to act is not a valid option.

While under general international law the exercise of state jurisdiction is a right rather than a duty,⁶¹ conventional obligations assumed by states may by their terms compel the exercise of that jurisdiction. Certain international conventions ratified by New Zealand impose obligations to this end.

First, by the Geneva Conventions of 1949 New Zealand undertook to enact legislation to punish "grave breaches" of the Conventions, to search for alleged offenders, and to bring them "regardless of their nationality, before its own courts", although it may hand them over for trial "to another High Contracting Party concerned".⁶² Although there is no clause in the Conventions connecting grave breaches of their provisions with the law as to war crimes or crimes against humanity, certain of the grave breaches defined in art 50, 51, 130, and 147 of the Conventions constitute war crimes or crimes against humanity or both.⁶³ As a contracting party New Zealand clearly undertook to punish those who have

⁶⁰ *Supra* at note 2.

⁶¹ Akehurst, *A Modern Introduction to International Law* (1971), 129-133.

⁶² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August, 1949; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, art 50, Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, art 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art 146.

⁶³ Fawcett, "The Eichmann Case" (1962) 38 *Brit YB Int L* 181, 207.

committed grave breaches, which necessarily includes the Nazi war criminals whose very crimes precipitated the Conventions. This obligation is without condition.

The second source of obligation arises under the Genocide Convention of 1948, and in particular the duty of states to prosecute persons for genocide whether committed in time of peace or in time of war in their national courts on the basis of legislation providing effective penalties. This obligation is similarly unconditional.

Furthermore, it may be that continued and manifold expressions of interest by the international community in the punishment of war crimes, crimes against humanity, and crimes of genocide have created a source of obligation *erga omnes*, where "in view of the importance of the rights involved, all States can be held to have a legal interest in their protection".⁶⁴ If this is the case, the obligation to prosecute and punish war criminals extends beyond the bounds of the contractual obligations assumed by New Zealand and is mandatory and universal.

Whichever is the case, it is clear that New Zealand has an international obligation to prosecute or to at least do some other positive act (such as extradition to the *forum delicti commissi*) with regard to suspected Nazi war criminals, and that the Public Issues Committee was wrong when it dismissed the option to do nothing as "[carrying] with it no legal implications worthy of discussion".⁶⁵

(2) Extradition

The Extradition Act 1965 governs the situation where a foreign country seeks extradition of a suspected offender alleged to have committed an extraditable offence in that country who is resident in New Zealand at the time extradition is sought, whether the suspect is a New Zealand citizen or not.

The essential requirement for the applicability of the Extradition Act is the existence of an extradition treaty between New Zealand and the *forum delicti commissi* in question. Once a treaty has been concluded, an Order in Council must be passed by the Governor-General in Council, and the Extradition Act is then applicable to extradition attempts by that foreign country. Under s 4 of the Act, where a treaty and consequent Order in Council are in force, extradition may be sought irrespective of whether the alleged crime occurred prior to the making of the treaty, or indeed prior to the enactment of the legislation. It is also immaterial whether or not any New Zealand court has jurisdiction in respect of the alleged crime.

Where extradition is in principle available by reason of the existence of a treaty and Order in Council, there are a number of restrictions on the power of New Zealand courts to order extradition in a particular case. These restrictions are imposed in the first place by ss 5 and 5A of the Extradition Act, and in the second place by the provisions of the particular treaty.

Section 5 provides that an offender shall not be surrendered to a foreign country

⁶⁴ *Barcelona Traction Case* [1970] ICJ Reports 3.

⁶⁵ Public Issues Committee, *supra* at note 2, at 11.

if the offence is one of a political character, or if the request for surrender has in fact been made with a view to punishing the offender for an offence of a political character. Again, if the law of the foreign country in question fails to provide for a prohibition on the extradited person being tried for any further offence, other than that on which extradition is based, without an opportunity being given for the person first to leave the country, extradition may not take place. Given that the Genocide Convention 1948 went so far as to expressly exclude crimes of genocide from the category of political offences, it may well be such crimes otherwise constitute political offences. By virtue of two amendments to the Extradition Act in 1989, the Minister of Justice is also given a discretion to prevent extradition if the Minister has substantial grounds for believing that the offender would be in danger of being subjected to torture or at risk of the death penalty being imposed. War crimes legislation in force in the countries in question provide for the imposition of the death penalty if charges are proved.

Orders in Council currently exist in relation to treaties with Latvia, Lithuania and Serbia. The treaty with Serbia was concluded in June 1901, but Serbia itself no longer exists as a separate state, and now forms part of present day Yugoslavia. The treaty with Latvia was concluded in October 1925, and the treaty with Lithuania in May 1927. New Zealand itself is not a party to these treaties. They were all entered into by the British government and automatically applied to New Zealand as a colony or dominion at the relevant time. It is uncertain in international law whether extradition treaties made by colonial powers remain binding on their former colonies.⁶⁶ However, statute resolves the issue for New Zealand. Section 21 of the Extradition Act preserves the operation of these early Orders in Council.

Whether the original treaties are still in force as between the United Kingdom and the countries concerned is important, as s 3(2) of the Extradition Act provides that the Order in Council in question shall cease to have effect if the treaty itself ceases to have effect. Many British extradition treaties were terminated by the outbreak of the First or Second World War and have not been renewed subsequently.⁶⁷ It must be open to serious doubt whether the treaty with Serbia at least can have survived the First World War and the re-drawing of the map of Europe which extinguished its existence as an autonomous state. The original treaties completely ignore current legal and political realities in all three countries.

Even assuming that the treaties are still in force and apply currently to those territories where war crimes have allegedly been committed, the specific terms of the treaties themselves would have to be complied with for extradition to be available.

The terms of the two treaties with Lithuania and Serbia grant the contracting states a discretion to refuse to surrender their own citizens. Article 3 of the treaty with Latvia goes even further and states:

⁶⁶ Akehurst, *supra* at note 61, at 135.

⁶⁷ *Ibid.*

In no case nor in any consideration shall the high contracting parties be bound to surrender their own subjects, whether by birth or naturalisation.

Other restrictions common to all three treaties in addition to those contained in the Extradition Act include the requirement that the court of the extraditing state must satisfy itself that there is *prima facie* evidence of guilt before ordering extradition for purposes of trial. Sworn depositions may be used for that purpose.

Still the most overriding restriction is imposed by the British practice of listing by name in the treaty document itself the extraditable offences to which the treaty is to apply. Such treaties are quickly outmoded as new crimes emerge. War crimes, crimes against humanity, and crimes of genocide are absent from the relevant lists in the original treaties and do not therefore constitute extraditable offences under the same.

It seems that extradition to the *forum delicti commissi* for war crimes, crimes against humanity, and crimes of genocide could not proceed, at least not without substantial difficulty, under the current regime of extradition treaties. In order to facilitate extradition, it would be necessary for the government to negotiate a proper and up-to-date treaty with the states involved. If this were done, then by virtue of s 4 of the Extradition Act, extradition could, if warranted in particular cases, lawfully take place in accordance with the Act.⁶⁸ This presupposes a willingness on the part of the *forum delicti commissi* to negotiate new treaties in order to receive suspects for trial. Current political turmoil in Eastern Europe may make this impossible, notwithstanding that trial there would be *forum conveniens*. The *forum delicti commissi* has the most real and substantial connection with crimes committed on its territory. Most witnesses, physical and documentary evidence are located there. Witnesses and evidence could only be assembled and brought to New Zealand at considerable cost. If, however, it is not possible to negotiate new treaties so as to extradite suspects, the international obligations assumed by New Zealand require that trials proceed here, notwithstanding that New Zealand is *forum non conveniens*.

(3) Deportation

Deportation is not a valid option.

War criminals will have wrongfully obtained New Zealand citizenship by concealing their past activities as quislings, collaborators, or members of the Nazi police or armed forces. There is provision in the Citizenship Act 1977 for a New Zealand citizen (other than a New Zealand citizen by birth) to be deprived of citizenship if the Minister of Internal Affairs is satisfied that the citizenship was procured by "fraud, false representation, or wilful concealment of relevant information, or by mistake". If citizenship is revoked in this way, it would then be open for a suspected war criminal to be deported pursuant to the provisions of the Immigration Act 1987. In that event, however, the suspect would be under no obligation to return for trial to the *forum delicti commissi*. Deportation would make it possible for

⁶⁸ Public Issues Committee, *supra* at note 2, at 13-15.

the suspect to flee to another country and escape the law. In allowing this possibility New Zealand would be in breach of its international obligations to ensure that war crimes do not go unpunished. Supervised deportation to the *forum delicti commissi* by police escort would avoid this result, but would be nothing more than a disguised means of extradition without treaty. Supervised deportation is of doubtful legality under international law and should be avoided.

(4) Trial

It was assumed by the Public Issues Committee that it would be necessary to legislate before suspected Nazi war criminals could be tried in New Zealand. If any legislation is needed to effect this purpose, it would be needed only to empower the courts with the necessary jurisdiction to apply international criminal law. The New Zealand courts would then function as agent of the international legal order which for the time being has no special international criminal court of its own. A brief enactment along the following lines would be probably be sufficient:

PROSECUTION OF INTERNATIONAL CRIMES ACT 1991

An Act to enable the application of international criminal law in the superior courts of New Zealand

WHEREAS New Zealand recognises and affirms its rights, duties and obligations under international law and

WHEREAS offences against international criminal law constitute a threat to the interests of the international community of nations

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled as follows:

1. Short title and commencement— (1) This Act may be cited as the Prosecution of International Crimes Act 1991.

2. Crimes subject to this Act— (1) New Zealand reserves to itself in accordance with international law the right to prosecute and punish such international crimes as are recognised or shall from time to time be recognised as constituting crimes against international criminal law.

(2) For the purposes of subsection (1) of this section, a crime against international criminal law shall be taken to include, but not be limited to—

- (a) violations of the laws and customs of war; and
- (b) crimes against humanity; and
- (c) crimes of genocide

as these crimes have been and may continue to be defined in the customs and conventions of international criminal law.

3. Crimes are to be tried— (1) The crimes which are subject to section 2 of this Act shall be tried in a court of law duly convened for that purpose in accordance with the provisions of sections 4 to 8 of this Act.

4. Mode of trial— (1) Every accused person shall be tried by Judges appointed under section 5 of this Act with a jury.

- 5. Constitution of tribunal** — (1) Trial of all crimes against international criminal law shall be by, either —
- (a) A criminal court of not less than three Judges of the High Court or Court of Appeal of New Zealand; or
 - (b) An international criminal court of not less than three Judges convened by New Zealand; or
 - (c) An international criminal court of not less than three Judges convened by the United Nations Organisation at the request of New Zealand.
- (2) Every tribunal convened under subsection (1) of this section shall include at least one Judge of the High Court or Court of Appeal of New Zealand.
- 6. Law to be applied** — (1) In the prosecution and punishment of crimes subject to this Act:
- (a) The substantive law to be applied shall be customary and conventional international criminal law.
 - (b) All matters of evidence and procedure shall be governed by the municipal law of New Zealand.
- (2) Notwithstanding any other enactment or rule of law to the contrary, the High Court of New Zealand shall have jurisdiction to apply the customary and conventional rules of international criminal law exclusive of the municipal law of New Zealand for the purpose of the prosecution and punishment of crimes against international criminal law in accordance with the provisions of this Act.
- 7. Questions of law** — A tribunal convened under section 3 of this Act shall have exclusive authority to determine what is a customary or conventional rule of international criminal law.
- 8. Interpretation** — A tribunal convened under section 3 of this Act shall have exclusive authority to interpret the terms and provisions of this Act.
- 9. Saving** — Nothing in this Act shall be taken to alter or affect the provisions of the Extradition Act 1965.

There are several distinct advantages to this particular formulation of jurisdiction:⁶⁹

1. It is expressed in general terms so as to make it applicable to all international crimes wherever and whenever committed.
2. Provision is made for ongoing developments in international criminal law to be applied through the Act.
3. It avoids the criticism of being special legislation directed at dealing with the isolated case and group of suspected Nazi war criminals currently resident in New Zealand.
4. At the same time it satisfies in one general regulatory enactment the obligation assumed by New Zealand under various international instruments to enact legislation in order to punish the crimes set out in s 2(2) of the model Act.

⁶⁹ Cf the criticisms of the Public Issues Committee, *supra* at note 2 at 12.

5. It provides for the constitution of an international tribunal where appropriate.
6. It provides for consultation with or the direct involvement of the United Nations where appropriate.
7. It avoids the difficult and complicated procedure⁷⁰ of selectively modifying and adapting international criminal law into municipal law.

It does not, however, avoid the difficulties involved in conducting criminal trials in New Zealand some 40 years after the event, particularly the difficulties of identification of the accused and of evidence enfeebled by the passage of time. However, no case is likely to proceed to trial unless there is sufficient evidence to support a conviction. It is foreseeable that a number of cases will be abandoned at the investigation stage for insufficiency of evidence. Those cases that proceed to trial will be subject to the full range of safeguards built into the trial process which is designed to test the memory of witnesses and the reliability and strength of the evidence. With due process applying it may be difficult to obtain convictions.

However, the difficulty of obtaining convictions is no reason for not dealing with the problem. It is in the best interests of the international community that trials proceed. This is because justice must be seen to be done, because trials have an educative function in relation to human rights generally, and because it is an injustice in itself to allow those responsible for serious war crimes to remain unpunished. The fact that fugitive Nazi war criminals have eluded detection and capture for over 40 years may weaken the chance of obtaining convictions against them, but it in no way diminishes the enormity of their crimes or makes them any less culpable than the Nazi war criminals captured immediately after the war. International criminal law and its deterrence aspect can only be strengthened and developed by prosecuting international criminals wherever and whenever they may be found. Failing to do so can only weaken and encourage disrespect for the law. If extradition of suspects is excluded as a possible course of Government action, New Zealand's international obligations and the interests of the international community demand that war crimes trials proceed in this country.

⁷⁰ See Green, "Canadian Law, War Crimes and Crimes Against Humanity", (1988) 59 *Brit YB Int L* 217; "The Municipal and International Law Basis of Jurisdiction over War Crimes", (1951) 28 *Brit YB Int L* 382.