

War crimes

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This article examines the status of crimes against humanity in New Zealand and international law at the time of the Second World War. It argues, on the basis of an historical examination of the laws and customs of war, that crimes against humanity were established in customary international law over 100 years before the War. This conclusion effectively eliminates any question of retroactive punishment of these crimes at Nuremberg and, by extension, more recent war crimes trials. The article then examines the status of crimes against humanity in New Zealand municipal law. It considers whether crimes against humanity form part of New Zealand law under the common law doctrine of incorporation or whether it would be necessary to legislate for trials for these crimes to take place here. The article concludes by suggesting the form any New Zealand legislation should take on the basis of a comparative analysis of war crimes legislation in other jurisdictions.

I INTRODUCTION

In one of the most significant pronouncements in legal history, the International Military Tribunal of Nuremberg declared that the definition of crimes against humanity contained in its Charter was "the expression of international law existing at the time of its creation".¹ However, because the Tribunal did not prove how this was so, the status of crimes against humanity in international law at that time has remained one of the most controversial questions in international law. The question will arise in New Zealand should allegations of the presence of Nazi war criminals lead to war crimes trials here.

Part one of this paper examines whether crimes against humanity were crimes under international law before the Second World War.² Most work in this area, if it does not expressly doubt the existence of crimes against humanity at this time,³ either treats the issue as having been settled at Nuremberg,⁴ which was not the case, or asserts their

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1 *Judgment of the International Military Tribunal of Nuremberg* (Cmd 6964; 1946) 140.

2 The general legal issues raised by the presence of Nazi war criminals in New Zealand were explored in Gilbertson "Legal Implications of the Presence of Nazi War Criminals in New Zealand" (1991) 6 AULR 552.

3 See especially Schwarzenberger *International Law* (Stevens & Sons, London, 1968) vol 2, 496-499.

4 See for example Brownlie *Principles of Public International Law* (4 ed, Clarendon Press, Oxford, 1990) 561-564; Starke *Introduction to International Law* (10 ed, Butterworths, London, 1990) 552.

existence on the basis of the "general principles of law recognised by the community of nations".⁵

Schwelb attempts to give crimes against humanity a more specific basis in international law.⁶ He traces developments after the nineteenth century when references to "the laws of humanity" and "crimes against humanity" began to find their way into international legal documents. Such references suggest crimes against humanity existed at this time. Instead of examining the meaning of these phrases in their historical context, however, Schwelb simply imputes the Nuremberg definition of crimes against humanity. He does not investigate where these phrases come from, what they mean and how they relate to each other in their historical context.

This paper argues that these phrases have antecedents in the early history of the law of war. Leading academics describe a gradual move in the practice of states away from treating civilians as legitimate objects of attack in war to according them a protected status under customary international law. A specific body of rules evolved for their protection. It is argued that these rules eventually became known as "the laws of humanity" and that violations eventually became known as "crimes against humanity". This analysis is supported by the developments leading up to and following Nuremberg. By linking early and later historical developments with the work of Schwelb, this article gives the concept of crimes against humanity a specific meaning and a basis in customary international law over one hundred years before the Second World War.

Part two of this article considers whether legislation is needed to incorporate crimes against humanity into New Zealand law, and the form any legislation should take.

The argument that legislation is necessary⁷ overlooks an ancient doctrine of the common law, known as the doctrine of incorporation, whereby customary international law automatically forms part of the common law. The writings of Lauterpacht have been accepted by most writers as establishing that the doctrine applies in modern law, despite some dicta to the contrary.⁸ If this doctrine applied in New Zealand to crimes against humanity there would be no need for legislation.

It is argued, however, that the doctrine did not apply in New Zealand to crimes against humanity, although it may have applied to other areas of customary

5 For a recent application of the "general principles" approach see the Canadian case of *R v Finta* (1989) 61 DLR (4th) 85. The "general principles of law" approach is satisfactory while maintained at a certain level of generality. It is sustainable where the act constituting the crime against humanity corresponds with municipal law crimes. Murder and rape are examples of acts in this category. However, the approach breaks down as a coherent theory where acts constituting crimes against humanity, such as torture, starvation, deportation, and denationalisation either fit awkwardly into municipal law concepts or have no counterparts in municipal law at all.

6 "Crimes Against Humanity" (1946) 23 Brit YB Int L 178.

7 See generally Public Issues Committee of the Auckland District Law Society "Legal view on Nazi war criminals" (1990) 15 Northern Law Review 11.

8 See below n 83.

international law. Customary international law will not be incorporated into municipal law if clearly overridden or excluded by an Act of Parliament. The effect of certain sections of the New Zealand Crimes Act was to exclude the incorporation of international law relating to crimes against humanity so that crimes against humanity did not form part of New Zealand law at the time of the Second World War.

Consequently, legislation is needed to enable the prosecution of crimes against humanity in New Zealand. Arguably, such legislation would not offend the principle against retroactivity, stated in section 26(1) of the New Zealand Bill of Rights Act 1990. Section 26(1) is derived from Article 15 of the International Covenant on Civil and Political Rights. Article 15 permits the punishment of conduct that was criminal under international law at the time it was committed. Article 15 allows states to apply international law through the agency of their municipal courts to punish international law crimes at any time; it is not necessary for the international crime to have been criminal under municipal law at the time of its commission. For these reasons it is argued that legislation enabling the prosecution of Nazi war criminals for crimes against humanity committed in Eastern Europe during the Second World War would not violate New Zealand law. The article compares war crimes legislation in Australia, the United Kingdom and Canada, and considers the form any New Zealand legislation should take.

II HISTORY OF "CRIMES AGAINST HUMANITY"

A *Early History*

The origin of "crimes against humanity" lies in the emergence of definitive rules of international law prohibiting violence against civilian populations in time of war. These rules emerged in the customary practice of states over the course of many centuries to mitigate the grosser excesses of warfare.⁹ The earliest codified statement of these rules, the *Lieber Instructions*, appeared during the American Civil War.¹⁰ These prescribed, *inter alia*, that "[a]ll wanton violence committed against persons in the invaded country ... all robbery or sacking, even after the taking of a place by main force, all rape, wounding, maiming or killing of such inhabitants are prohibited under the penalty of death".

Pictet observes that states had not always been so discriminating in their practice. Excesses against civilians were particularly pronounced in the warfare of the Middle Ages.¹¹ These were largely caused by the ideology created by the doctrine of the *bellum*

9 On matters of historical background see generally Pictet *Development and Principles of International Humanitarian Law* (Nijhoff, Geneva, 1985); Pictet *Humanitarian Law and the Protection of War Victims* (Henry Dunant Institute, Geneva, 1975).

10 *Lieber Instructions* (1863) Articles 16, 22, 37, 42, 43, 44, 47, promulgated as General Orders No 100, 24 April 1863, as quoted in Green *Essays on the Modern Law of War* (Transnational Publishers, New York, 1985) 87 (emphasis added).

11 Pictet, above n 9, 5-18.

justum or "just war".¹² Under this doctrine, wars were fought in the name of God, and the opposing side was seen not merely as an opponent but as an enemy of God.¹³ War was regarded as a contention between the whole populations of belligerent states.¹⁴ No distinction was drawn between lawful and unlawful objects of attack. Every subject of one belligerent could be killed or enslaved by the other belligerent at will.¹⁵

Some attempt to mitigate the harshness of the doctrine was made by the Catholic Church.¹⁶ Christian states were prohibited from waging war during certain periods, from using certain methods of warfare, and from inflicting violence on certain categories of population. These prohibitions only applied to wars between Christian states; absolute warfare otherwise prevailed. The willingness to resort to unrestrained violence in this period set in motion a chain reaction of negative reciprocity that inevitably brought with it widespread and often indiscriminate death and destruction.

According to Green, this situation began to change during feudal times with the rise of the state as an entity and the development of the modern state system.¹⁷ Internal rules of law developed for regulating the power of the state in relation to its citizens were externalised in the form of rules of international law regulating the power of states in their relations with each other.

Warfare was one of the first areas to be regulated by these new rules. The *bellum justum* doctrine was replaced by a secular theory of warfare.¹⁸ States were conceded an unqualified right to resort to war, a *jus ad bellum*, and attention came to be focused on the conduct of the war, the *jus in bello*.¹⁹ Armed conflict came to be regulated by rules.

The first such rules evolved among the orders of knighthood²⁰ and later extended to the practice of armies.²¹ A formative practice was begun that, by the eighteenth century, had crystallised into rules of customary international law. Duties of humanity were laid down with regard to the treatment of civilians.²² Green notes that these rules

12 As to which see McCoubrey *International Humanitarian Law: The Regulation of Armed Conflict* (Dartmouth, Aldershot, 1990) 6-11.

13 See, for example, St Augustine *De Civitate Dei*, (413-426), XIX 15, quoted in Pictet, above n 11, 14.

14 Lauterpacht (ed) *Oppenheim's International Law* (8 ed, Longman, London, 1955) vol 2, 202-209.

15 See, for example, Thomas Cajetan, quoted in Pictet, above n 11, 15.

16 Bierzanek "The Prosecution of War Crimes" in Bassiouni and Nanda (eds) *A Treatise of International Criminal Law* (Thomas, Springfield, 1973) vol 2, 559-562.

17 Above n 10, 84.

18 McCoubrey, above n 12, 9.

19 Bierzanek, above n 16, 560.

20 See the commentary on the Breisach Trial of 1474 in Schwarzenberger, above n 3, 68 ff.

21 McCoubrey, above n 12, 9-10.

22 Pictet, above n 11, 18-27.

were at first economic in character²³ but were later extended to protect women, children and other non-combatants.²⁴ It became the established rule that if the civilian sections of a population did not participate in fighting they were to be exempt from deliberate attack.²⁵

The existence of these rules was confirmed by the leading publicists of the time. Wheaton stated the general rule in these terms:²⁶

[N]o use of force against an enemy is lawful, unless it is necessary to accomplish the purposes of war. The custom of civilised nations, founded upon this principle, has therefore exempted the persons of the sovereign and his family, the members of the civil government, women and children, cultivators of the earth, artisans, labourers, merchants, men of science and letters, and, generally, all other public or private individuals engaged in the ordinary civil pursuits of life, from the direct effect of military operations, unless actually taken up in arms, or guilty of some misconduct in violation of the usages of war, by which they forfeit their immunity.

The reason for this immunity was stated by Hall in these terms:²⁷

[T]he attainment of the immediate objective of crushing the armed force opposed to [a belligerent] is not helped by the slaughter or ill-usage of persons who are either unable to take part in hostilities, or as a matter of fact abstain from engaging in them; and although the adoption of such measures might tend, by intimidating the enemy, to persuade him to submit, their effect is looked upon with reason as being too little certain or immediate to justify their employment.

These principles of humanity found particular application in the wars of the nineteenth century.²⁸ In his campaigns the Duke of Wellington refrained from making direct war on civilians. In the American Civil War, generals such as McLellan and Lee called upon their troops to respect the persons, property, and honour of the civilian population. On invading Saxony in 1866, Prince Frederick Charles proclaimed that his war was not with the people, but with the government. In 1870, during the Franco-Prussian war, the King of Prussia instructed his forces to respect the persons and property of the civilian population.²⁹ Instructions to the same effect were issued in the

23 Green, above n 10, 84-85. See the decree of Maximilian II, *Artikel auf Teutsche Landsknechte*, Article 53, quoted in Green, above n 17, 85; the decree of Gustavus Adolphus, *Churfürstlich Brandenburgisches Kriegsrecht* (1690) Article 59, quoted in Green, above n 17, 85; and the decree of Friederich of Saxony, *Kriegsvölkerrecht-Leitfaden für den Unterricht* (1661) Part IV, para III, quoted in Green, above n 17, 85.

24 Green, above n 17, 85.

25 Westlake *Chapters on International Law* (University Press, Cambridge, 1894) 245-253.

26 *Elements of International Law* (Clarendon Press, Oxford, 1936, reprint of the original edition of 1866) 359.

27 *International Law* (4 ed, Clarendon Press, Oxford, 1895) 470.

28 Keith (ed) *Elements of International Law* (6 ed, Stevens and Sons, London, 1929) 714-715.

29 Quoted in *Elements of International Law*, above n 28, 714-715.

Sino-Japanese war of 1895, the Russo-Japanese war of 1904, and the Boer War of 1899-1902. Only the Balkan wars of 1912-1913 were marked by excesses against non-combatants in violation of well-established rules of international law.

B *International Conventions*

Through a series of international instruments entered into after 1850,³⁰ these customary rules of warfare were transformed into rules of conventional international law.

The St Petersburg Declaration of 1868 acknowledged that "the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy". The purpose of recognising such a restriction was stated to be to "conciliate the necessities of war with *the laws of humanity*".³¹

The Brussels Conference of 1874 issued a Declaration providing that "the laws of war do not recognise in belligerents an unlimited power in the adoption of means of injuring the enemy". Most importantly, it affirmed that "family honour and rights, and the lives and property of persons, as well as their religious convictions must be respected".³²

These instruments together provided the basis for the Hague Regulations of 1899 and 1907 on the laws and customs of war on land.³³ These Regulations provide that "the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited".³⁴ More detailed rights are enumerated in respect of the civilian populations of occupied territories. In particular "family honour and rights, the lives of persons, and private property, as well as religious convictions and practices

30 For a historical analysis, see Best *Humanity in Warfare: The Modern History of the International Law of Armed Conflict* (Methuen, London, 1983); see also Pictet, above n 11, 29-71; Green, above n 10, 88-94; McCoubrey, above n 12, 113-139.

31 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (St Petersburg Declaration), signed at St Petersburg, 11 December 1868, 18 *Martens Nouveau Recueil de Traités* 474 (emphasis added).

32 Project of an International Declaration Concerning the Laws and Customs of War (Declaration of Brussels) [Brussels Conference on the Laws and Customs of War, No 18], 27 August, 4 *Martens Nouveau Recueil* (2d) 219. These rules were subsequently reaffirmed by the Institute of International Law *The Laws of War on Land*, Institute of International Law, Oxford Session, 1880.

33 Convention with Respect to the Laws and Customs of War on Land (First Hague, II), signed at The Hague, 29 July 1899, 26 *Martens Nouveau Recueil* (2d) 949, 32 Stat 1803, TS No 403; Convention respecting the Laws and Customs of War on Land (Second Hague, IV), signed at The Hague, 18 October 1907, 3 *Martens Nouveau Recueil* (3d) 461, 36 Stat 2277, TS No 539. On the Hague Regulations see generally McCoubrey, above n 12, 145-170.

34 Hague Convention on the Laws and Customs of War on Land 1907, above n 34, Art 25.

are to be respected",³⁵ private property is to be immune from pillage and confiscation,³⁶ and the principle of individual responsibility for wrongdoings is affirmed, so that "no general penalty, pecuniary or otherwise, is to be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible".³⁷

However, because the Hague Regulations were only intended to deal with relations between the armed forces of belligerent states, specific provision was not made in respect of civilians generally. This was declared to remain within the province of customary rules and usages:³⁸

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the role of the principles of the law of nations, as they result from usages established among civilised peoples, from *the laws of humanity*, and the dictates of the public conscience.

Civilians were to remain under the rules evolved in customary international law for their protection. There is an acceptance that binding humanitarian norms existed apart from the rules dealt with by the Convention itself. These rules were affirmed as obligations in positive international law and were henceforth to be known as "the laws of humanity".

C *The First World War*

In 1919 the Preliminary Peace Conference of Paris created a Commission to investigate and report on "breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land, on sea, and in the air during the present [1914-1918] war".³⁹ The Majority of the Commission found that the Axis powers had carried on the First World War "by barbarous or illegitimate methods in violation of the established laws and customs of war and the clear *dictates of humanity*".⁴⁰ It reported that "in spite of the explicit regulations, of established customs, and of the clear *dictates of humanity*, Germany and her Allies have piled outrage upon outrage".⁴¹ It concluded that "all persons of enemy countries who have been guilty of offences against the laws and customs of war or the *laws of humanity* are

35 Above n 34, Art 46.

36 Above n 34, Arts 46 and 47.

37 Above n 34, Art 50.

38 Above n 34, Preamble (emphasis added).

39 *Violations of the Laws and Customs of War*, Report of the Majority and Dissenting Reports of American and Japanese members of the Commission on Responsibilities, Conference of Paris, 1919, as quoted in Schwelb, above n 6, 180. International legal instruments relevant in this period are reviewed in Schwelb, above n 6, 179-188.

40 Above n 6, at 180-181 (emphasis added).

41 Above n 6, at 180 (emphasis added).

liable to criminal prosecution", and recommended the establishment of tribunals for this purpose.⁴²

The American members of the Commission objected to the inclusion of references to "the laws and principles of humanity" in the report. "War was and is", they pointed out, "by its very nature inhuman, but acts consistent with the laws and customs of war, although these acts are inhuman, are nevertheless not the object of punishment by a court of justice. A judicial tribunal only deals with existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity".⁴³

It is clear, however, that the majority report dealt with legal principles rather than moral precepts when it referred to "the laws of humanity". This is illustrated by the "List of Crimes Committed by the Governments and Troops of the Central Empires and their Allies in Violation of the Laws and Customs of War and the *Laws of Humanity*" annexed to the Commission's report, which condemns as criminal the following acts on civilian populations:⁴⁴

- Murders and massacres; systematic terrorism.
- Torture of civilians.
- Deliberate starvation of civilians.
- Rape.
- Abduction of women and girls for the purpose of enforced prostitution.
- Deportation of civilians.
- Internment of civilians under inhuman conditions.
- Forced labour of civilians in connection with the military operations of the enemy.
- Attempts to denationalise inhabitants of occupied territory.
- Pillage.
- Confiscation of property.
- Use of deleterious and asphyxiating gases.

Such acts had long been proscribed by international law as violations of both the laws of war and the laws of humanity. The minority report assumed that the "laws of war" referred to legal concepts while the "laws of humanity" referred to non-binding moral precepts. However, as has been seen, these were in fact two different ways of referring to the same body of law. The legal rules relating to the protection of civilians were called both "the laws of war" and, after the St Petersburg Declaration and the Hague Conventions, "the laws of humanity". While the laws of humanity had their origin in

42 Above n 6, at 181 (emphasis added).

43 Above n 6, at 181-182.

44 Lord Wright *History of the United Nations War Crimes Commission and the Development of the Laws of War* (HMSO, London, 1948) 32-41 (emphasis added); see also Sandoz "Penal Aspects of International Humanitarian Law" in Bassiouni (ed), *International Criminal Law* (Transnational Publishers, New York, 1987) vol 2, 209, 226-228.

moral concepts, they had since been transformed, through the mechanism of state practice, into properly constituted rules of international law. They should not have been undermined merely for having a moral foundation.⁴⁵

As a result of American objections, however, there was no reference to "the laws of humanity" in the Treaties of Versailles, Saint-Germain-en-Laye, Trianon, and Neuilly-sur-Seine. Only the Treaty of Sevres with Turkey went further;⁴⁶ it provided for the punishment of the massacres of the Armenian population of Turkey by the Turkish authorities. These massacres were condemned in a declaration by the Governments of France, Great Britain and Russia on 28 May 1915 as "*crimes against humanity and civilisation* for which all members of the Turkish Government will be held responsible together with its agents implicated in the massacres".⁴⁷

Consequently, the result was that no trials for violations of the laws of humanity took place after the First World War. The European Allies and the majority of the War Crimes Commission nevertheless strengthened previous centuries of legal development by expressly affirming the existence of "the laws of humanity" in customary international law. This was to prove significant after the Second World War.

D *The Second World War*

In the face of the unprecedented brutality of the Nazi regime, the European Allies which had affirmed the existence of crimes against humanity after the First World War maintained that position during and after the Second World War. The United States, which had previously opposed the prosecution of crimes against humanity, aligned its position with that of the other Allies.

The common position of the Allies was acknowledged on 17 December 1942 when the Governments of Belgium, Czechoslovakia, Greece, Luxembourg, the Netherlands, Norway, Poland, the United States of America, the United Kingdom, the Union of Soviet Socialist Republics and Yugoslavia, and the French National Committee issued a declaration condemning the "barbarous and inhuman treatment to which Jews were being subjected in Nazi-occupied Europe".⁴⁸

The Inter-Allied Commission on War Crimes had earlier asserted that international law, and in particular the Hague Conventions of 1907 on the laws and customs of war on land, did not permit belligerents in occupied territories to commit acts of violence

45 See, on the question of law and morals, Wright "War Crimes Under International Law" (1948) 62 LQR 40, 40-42.

46 Schwelb, above n 6, 182.

47 Above n 6, 181 (emphasis added). However, political unrest in Turkey caused the Treaty of Sevres to be abandoned. It was replaced by the Treaty of Lausanne which not only failed to provide for the punishment of war crimes in general, but contained an amnesty for all political crimes committed between 1914 and 1922.

48 Above n 6, 84.

against civilians.⁴⁹ Similar statements were issued by Allied leaders throughout the course of the war.⁵⁰ These statements foreshadow the extension of the retributive power of the Allies to include a specific category of crimes committed against civilian populations corresponding to violations of the laws of humanity in customary international law. This appears most clearly towards the end of the war in the instruments dealing with the surrender of the Axis powers. Article 29 of the Instrument of Surrender of Italy imposed the obligation to apprehend and surrender into the hands of the United Nations not only "Benito Mussolini, his Chief Fascist Associates and all persons suspected of having committed war crimes", but also persons suspected of "*analogous offences*".⁵¹ The expression "war crimes and analogous offences" also appears in Article 11 of the Berlin Declaration regarding the defeat of Germany.⁵² Article 5 of the Agreement of the Machinery in Control of Austria speaks directly of persons wanted for "war crimes" and "*crimes against humanity*".⁵³ In the Agreement regarding the Political and Economic Principles to Govern the Treatment of Germany in the Initial Control Period concluded at the Potsdam Conference, it was stated that "war criminals and those who have participated in planing or carrying out Nazi enterprises involving or resulting in atrocities or was crimes shall be arrested and brought to judgment".⁵⁴ "Nazi enterprises involving or resulting in atrocities" as distinguished from those "involving or resulting in war crimes" correspond to violations of the laws of humanity as distinguished from violations of the laws and customs of war more generally.

It was therefore acknowledged that the laws of humanity exist and provide an objective measure of acceptability of state conduct towards civilian populations in time of war. The position of the laws of humanity under customary international law may, on the basis of an historical examination to this point in time, be summarised as follows:

- (1) The laws of humanity consist of humanitarian principles in respect of civilian populations incorporated into the practice of belligerents and transformed through the mechanism of state practice into rules of customary international law.
- (2) The laws of humanity are an auxiliary category of the laws and customs of war dealing specifically with the protected status of civilian populations.
- (3) It is possible to infer from the circumstances in which a crime against humanity has been held to exist that a crime against humanity is a war crime against a

49 Quoted in the *Hetherington Report - Report of the War Crimes Inquiry* (1989; Cmnd 744) 17.

50 The relevant material is reviewed in Schwelb, above n 6, 183-188, and in the *Hetherington Report*, above n 49, 16-25.

51 Schwelb, above n 6, 185 (emphasis added).

52 Above n 6, 185.

53 Above n 6, 185 (emphasis added).

54 Above n 6, 187.

civilian population committed on a scale sufficient to attract the interest of the international community.

- (4) By the outbreak of the Second World War acts of the following type had been categorised as violations of the laws of humanity:
- Murders and massacres.
 - Systematic terrorism.
 - Persecutions on racial or religious grounds.
 - Torture.
 - Deliberate starvation.
 - Rape.
 - Enforced prostitution.
 - Internment under inhuman conditions.
 - Forced labour.
 - Denationalisation.
 - Pillage.
 - Confiscation of property.
 - Denial of due process.

E The Nuremberg Charter

It is precisely this conception of crimes against humanity that is expressed in Article 6(c) of the Nuremberg Charter:

Crimes against humanity: namely, murder, extermination, enslavement, deportation to slave labour, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The Article 6(c) definition accords with the position under customary international law in the following respects:

- (1) The core elements of the crime consist in acts of murder, extermination, enslavement, deportation to slave labour, and persecution on political, racial or religious grounds. While the Article 6(c) definition does not include offences against property, it is possible that property offences fall within the words "and other inhumane acts" which indicate that the definition is exemplative rather than exhaustive.⁵⁵

55 Lauterpacht "The Law of Nations and the Punishment of War Crimes" (1944) 21 Brit YB Int L 58, 79.

- (2) There is a degree of overlap between crimes against humanity as defined in Article 6(c) and war crimes as defined in Article 6(b):

War crimes: namely, violations of the laws and 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 populations 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 nor justified by military necessity.

Thus, as Goodhart observes, the prosecution relied on the facts pleaded under the count relating to war crimes in support of the count relating to crimes against humanity, and the Judgment of the International Military Tribunal proceeded on the assumption that war crimes and crimes against humanity overlap, and that where they do so, no independent legal considerations arise.⁵⁶

- (3) The concept of crimes against humanity is restricted to acts against civilian populations committed on a large scale:
- (i) The word "civilian" indicates that the term "crimes against humanity" is restricted to inhumane acts committed against civilian populations as distinct from members of the armed forces.
 - (ii) The word "population" indicates that a large body of victims is contemplated and that single or isolated acts against individuals, while they may constitute war crimes, are outside the scope of crimes against humanity.

The United States Military Tribunal for Germany, in construing the corresponding provision in its statute, held that "isolated cases of atrocities or persecutions" were excluded.⁵⁷ Article 6(c) of the Charter appeared to diverge from customary international law where it purported to apply the concept of crimes against humanity to acts committed "*before*" the war, thereby eliminating the connection with a state of war required by customary international law. However, the Tribunal noted that the apparent scope of the phrase "before or during the war" was limited by the requirement that a crime against humanity be committed "in execution of or in connection with" a war crime or a crime against peace.⁵⁸ In its application to civilian populations of enemy and occupied territories Article 6(c) as interpreted by the Tribunal was simply declaratory of existing principles of international law.

The Charter only truly diverged from existing international law where it purported to apply the concept of crimes against humanity to "*any* civilian population". The

56 "The Legality of the Nuremberg Trials" (1946) 85 Juridical Review 1, 5-19.

57 *Re Altstotter (The Justice Trial)* (1947) 2 L Rep Trials War Crims 284-285.

58 Above n 1, 65.

extension of the boundaries of the crime to include acts committed by a belligerent against its *own* population was the real innovation in the Nuremberg Charter and Judgment.

F Universal jurisdiction and the limits of state sovereignty

International law seems to have been moving towards the accountability of states for actions against their nationals for some time before the outbreak of the Second World War. This trend was observed by the United States Military Tribunal in *Re Altstotter (The Justice Trial)*:⁵⁹

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 general peace.

The justification for this trend is found, not in any rule of humanitarian intervention,⁶⁰ but in the jurisdictional rules of international criminal law itself. Crimes against international law violate the interests of the international community and are accordingly considered to be *delicta juris gentium*, or crimes against the law of nations, over which any state may exercise jurisdiction, the criminal being *hostis humani generis*, or an enemy of humankind. International law recognises a "universal" jurisdiction in respect of such crimes.⁶¹

This universal jurisdiction was first recognised in relation to the offence of piracy.⁶² The reasons for it were given by Vattel:⁶³

[W]hile the jurisdiction of each State is in general limited to punishing crimes committed on its territory, an exception must be made against those criminals who, by the character and frequency of their crimes, are a menace to the public security everywhere and proclaim themselves enemies of the whole human race. Men who are

59 Above n 57, 290. The Treaty of Sevres was the first expression in positive law of this trend. Earlier instances in which states have intervened to prevent abuse by another state of its own nationals include French intervention to check religious atrocities in Lebanon in 1861 and diplomatic protests directed to Roumania and Russia on aggression against Jews and to Turkey on behalf of persecuted Christian minorities.

60 The existence of which, according to Oppenheim *International Law* (3 ed, Longmans, London, 1920) vol 1, 229, was doubtful.

61 See further, United Nations Secretariat *Historical Survey of the Question of Universal Criminal Jurisdiction* (New York, 1949); Gilbertson, above n 2, 558-559.

62 *Re Piracy Jure Gentium* [1934] AC 586, 589 (PC) affirming the comments of Judge Moore in *The S S Lotus* (1927) 2 WCR 20, 67; see also Blackstone's commentary on the crimes of piracy, *Commentaries on the Laws of England* (London, 1783) Book IV, Chap 5, 71.

63 *The Law of Nations* (1758) Chap XIX, Sec 233, as quoted in Beres "Genocide and Genocide-Like Crimes" in Bassiouni (ed) *International Criminal Law* (Transnational Publishers, New York, 1987) vol 1, 271, 274-275.

by profession poisoners, assassins, or incendiaries may be exterminated wherever they are caught; for they direct their disastrous attacks against all Nations, by destroying the foundations of their common safety.

This passage makes it clear that a crime against international law is constituted when conduct is identified which, because of its magnitude, offends all humanity, not only those in a particular locality, and when the nature of the conduct creates the need for international accountability. It is also clear that, because of the need for enforcement through the agency of municipal courts, the very nature of this conduct means that the individual responsible must be subject to universal jurisdiction. The actions of war criminals necessarily fall within this category.

When, therefore, war crimes became constituted as crimes in international criminal law at some time in the eighteenth century, universal jurisdiction automatically attached to them. It also necessarily attached to crimes against humanity which, as has been seen, were an auxiliary category of war crimes, and which, by definition, comprise conduct abhorrent to all the world. The result is that the doctrine of state sovereignty does not shield the perpetrators of such crimes.⁶⁴

It may therefore be concluded that:

- (1) In its application to civilian populations of *enemy and occupied territories*, Article 6(c) was declaratory of existing principles of international law.
- (2) The application of Article 6(c) to *nationals of belligerent states* was not prevented by the doctrine of state sovereignty and had always been within the scope of the concept of crimes against humanity.
- (3) The Charter was remarkable not for creating any new principle of law but for affirming *political* acceptance at the international level of the limits of the sovereignty of the state. That was an idea as old as international law itself.⁶⁵

G *Opinio Juris*

The enactment of crimes against humanity in the Charter of the International Military Tribunal was not an isolated act.⁶⁶ It was repeated in Article 5 of the Charter of the International Military Tribunal for the Far East established in 1946 for the

64 See the closing speech of Sir Hartley Shawcross, the British Chief Prosecutor, in *Speeches of the Chief Prosecutors at the close of the case against the individual defendants* (Cmnd 6964; 1946) 63-64.

65 According to Grotius: "It must also be known that kings and any who have rights equal to 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." *De Jure Belli et Pacis* (1646) Book II, Chap 20.

66 Lauterpacht *International Law and Human Rights* (Stevens, London, 1950) 35-38.

prosecution of Far Eastern war criminals.⁶⁷ The Paris Peace Treaties of 1947 with Italy, Romania, Hungary, Bulgaria and Finland provided for the surrender, *inter alios*, of persons accused of "war crimes" and "crimes against humanity".⁶⁸ The Four Powers in occupation of Germany enacted legislation providing for the prosecution of crimes against humanity committed in Germany by war criminals not tried at Nuremberg.⁶⁹ The existence of the concept of crimes against humanity thus came to be accepted not only by the Allies but by the former Axis powers as well.

Shortly after trials under these instruments had begun, the member states of the United Nations in a Resolution adopted unanimously by the General Assembly "affirmed" the principles embodied in the Charter of the Nuremberg Tribunal and its judgment as international law.⁷⁰ Numerous General Assembly Resolutions have since confirmed the interest of the world community in the prevention and punishment of such crimes.⁷¹ The votes of states in support of these resolutions constitute a recognition by the majority of states that crimes against humanity were crimes against international criminal law before the Second World War and remain so today.⁷²

The exercise of law-making power by states confirms the view asserted in the United Nations that crimes against humanity were crimes under international law before the Second World War. Baxter notes that European states subject to Nazi occupation or attack invariably prosecuted suspected war criminals for crimes against humanity under legislation enacted for that purpose.⁷³ Even states which did not have territorial jurisdiction over war criminals from the Second World War have enacted similar legislation to enable the prosecution of persons responsible for crimes against humanity found on their territory.

In 1950, the Israeli Parliament enacted the Nazi and Nazi Collaborators (Punishment) Law 1950 for the prosecution of, *inter alia*, crimes against humanity (defined

67 As to which see Schwelb, above n 6, 214-216.

68 On the draft versions of these treaties see Schwelb, above n 6, 212-214.

69 As to which see Schwelb, above n 6, 216-220.

70 Resolution 3(1) of 13 February 1946. For the view that the Charter did not itself *create* international law see Gilbertson, above n 2, 557.

71 As to which see Weiss "Time Limits for the Prosecution of Crimes Against International Law" (1982) 53 Brit YB Int L 163, 190 n 171.

72 Brownlie *International Law and the Use of Force by States* (Clarendon Press, Oxford, 1963) 193. By voting for the Resolutions, the Members of the United Nations have probably estopped themselves from denying that crimes against humanity were recognised offences in customary international law before the Second World War. For, as Judge Dillard said in his separate opinion in the *Western Sahara* advisory opinion [1975] ICJ Reports 19, "Even if a particular resolution of the General Assembly is not binding, the cumulative impact of many resolutions when similar 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".

73 "The Municipal and International Law basis of Jurisdiction over War Crimes" (1951) 28 Brit YB Int L 382-393.

substantially in accordance with the Nuremberg Charter).⁷⁴ In *Attorney-General v Eichmann*, the first prosecution under this legislation, the Court concluded that the crimes for which Eichmann was convicted, including crimes against humanity, "must be regarded as having been prohibited by the law of nations since 'time immemorial'".⁷⁵

In 1987 the Canadian Parliament amended the Canadian Criminal Code so as to provide for the prosecution of war crimes and crimes against humanity.⁷⁶ The conduct in the definition of crimes against humanity is similar in scope to that in Article 6(c) of the Nuremberg Charter, with the exception that no connection with other crimes is required. The Canadian definition does, however, 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", thereby importing the restrictions imposed by customary international law.

In *R v Finta*, the first prosecution under the amended Code, the Ontario High Court held the Canadian legislation to be constitutionally valid. Callaghan ACJ, after surveying conventions and agreements and other relevant material, endorsed the judgment of the International Military Tribunal and concluded that "crimes against humanity were, by 1939, offences at international law".⁷⁷

In 1988 Australia enacted the War Crimes Amendment Act (Cth) to enable the prosecution of persons accused of having committed war crimes and crimes against humanity in Germany and Nazi-occupied Eastern Europe.⁷⁸ The High Court of Australia held by a majority, when the validity of the legislation was challenged, that "the Act is in accord with what international law understands as war crimes and crimes against humanity at the relevant time".⁷⁹

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 at the time was part of Germany or under German occupation and

74 For an outline of the Israeli legislation see Baxter "Jurisdiction over War Crimes and Crimes Against Humanity" in Bassiouni and Nanda (eds) *A Treatise of International Criminal Law* (Thomas, Springfield, 1973) vol 2, 65, 80-86.

75 (1961) 36 ILR 277, 283. For commentary on this case see generally Papadatos *The Eichmann Trial* (Stevens, London, 1964).

76 For an outline of the relevant amendments see Green "Canadian Law, War Crimes and Crimes Against Humanity" (1988) 59 Brit YB Int L 217, 228-232.

77 Above n 5, 101.

78 For an outline of the Australian Act see generally Triggs "Australia's War Crimes Act: justice delayed or denied?" (1990) 64 Law Institute Journal 153-157; on the question of prosecutions see generally Brezniak "War criminals and plane bombers: Questions for our criminal justice system" (1989) 27 Law Society Journal 52.

79 *Polyukhovich v Commonwealth* (1991) 101 ALR 545, 667, per Toohey J; see also note "The High Court and War Crimes Legislation" (1991) 61 ALJ 701.

which "constituted a violation of the laws and customs of war".⁸⁰ The absence of any reference to crimes against humanity was the result of the findings of the *Hetherington Report* which concluded:⁸¹

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.

There is therefore support in Israel's legislation for the existence at the relevant time of crimes against humanity in customary international law. The Canadian and Australian legislation have also been held to be an accurate reflection of the law at the time. Only the United Kingdom legislation, by omission, carries the implication that crimes against humanity were not sufficiently formulated before 1945 to be binding rules of international law. The *opinio juris* of the majority of states is, however, that crimes against humanity were crimes at that time.

III MUNICIPAL CRIMINAL LAW

There is, therefore, a strong basis for asserting that crimes against humanity were crimes against international law at the time they were committed against German Jews and the civilian populations of Nazi-occupied Eastern Europe. However, even though they were not statutory offences in New Zealand at the relevant time, legislation may not be necessary before trials for crimes against humanity could proceed here.⁸²

A *The Doctrine of Incorporation*

It is a rule of English Law that customary rules of international law are deemed to be part of the law of the land, and will be applied as such by English Municipal Courts, subject to the following qualifications:

- (a) That such rules are not inconsistent with Acts of Parliament; and
- (b) That once the scope of such customary rules has been determined by English Courts of final authority, all English Courts are thereafter bound by that determination, even though a divergent customary rule of international law later develops.

80 On the legislative history of the United Kingdom Act see generally James "War Crimes and the House of Lords" (1990) 154 *Justice of the Peace* 590-591.

81 Above n 50, 54.

82 Public Issues Committee of the Auckland District Law Society, above n 7. For a contrary view, see Gilbertson, above n 2, 564.

This statement of the rule is somewhat narrower than that which was formerly applicable. In the eighteenth century, by a doctrine known as the Doctrine of Incorporation, customary international law was deemed automatically to be part of the common law. According to Blackstone:⁸³

[T]he law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be part of the law of the land. And those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be part of the civilised world.

This doctrine was favoured not only by Blackstone but also by Lord Mansfield and other judges in the eighteenth century.⁸⁴ Lauterpacht demonstrates that during the nineteenth century the doctrine was reaffirmed in a succession of decisions given by distinguished common law and equity judges.⁸⁵ In the latter stages of the nineteenth century, however, the rule was modified to reflect the growth after 1830 of a doctrine of *stare decisis* and the doctrine of parliamentary sovereignty.⁸⁶ This modified doctrine was stated by Lord Atkin in *Chung Chi Cheung v R*.⁸⁷

83 *Commentaries on the Laws of England* (1765), Book IV, Chap 5, as quoted in Lauterpacht "Is International Law Part of the Law of England?" (1939) 25 *Transactions of the Grotius Society* 51-88.

84 Lauterpacht, above n 91, 540-547; see, for example, *Triquet v Bath* (1764) 3 Burr 1478 where Lord Mansfield expressly approved the view of Lord Talbot in *Barbuit's Case* (1737) Cas Temp Talb 281 that "the law of nations, to its full extent, is part of the law of England"; *Lockwood v Coysgarne* (1765) 3 Burr 1676 where Lord Mansfield held that "the law of nations is in full force in these kingdoms"; and *Heathfield v Chilton* (1767) 4 Burr 2015 where Lord Mansfield held that "the law of nations will be carried as far in England, as any where".

85 Above n 83, 540-547; see, for example, *Emperor of Austria v Day and Kossuth* (1861) 30 LJ Ch 690, 700 where Lord Campbell LC declared that "a public right, recognised by the law of nations, is a legal right; because the law of nations is part of the common law of England. These propositions are supported by unquestionable authority".

86 Starke *Introduction to International Law* (10 ed, Butterworths, London, 1990) 235. Some theorists maintain that the Doctrine of Incorporation was abandoned by the Court for Crown Cases Reserved in *R v Keyn (The Franconia)* (1876) 2 Ex D 63. The general consensus of opinion now, however, appears to reflect Lauterpacht's view, above n 83, 546 that the majority in *Keyn* did not require express assent or a functional transformation by Act of Parliament for international law to be enforceable in Municipal Courts. Any doubts created by *Keyn* were removed when the doctrine was reaffirmed by the Court of Appeal at the beginning of the twentieth century in *West Rand Central Gold Mining Co v R* [1905] 2 KB 391, 406 per Lord Alverston CJ.

87 [1939] AC 160, 168. This rule prevailed until the recent decisions of the English Court of Appeal in *Trendtex Trading Corporation v Central Bank of Nigera* [1977] 2 WLR 356 and *Maclain Watson v Department of Trade & Industry* [1988] 3 WLR 1033 introduced a degree of uncertainty in the law. The Court of Appeal expressly affirmed that "the Doctrine of Incorporation is correct" and that "the rules of international law,

The Courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.

The New Zealand Crimes Act 1961 contains a number of statutory barriers to the reception of international criminal law in New Zealand in circumstances where the act constituting the international crime was committed outside New Zealand. The first barrier is presented by section 9 of the Crimes Act 1961 which states:⁸⁸

No one shall be convicted of any offence at common law.

Under the doctrine of incorporation, general principles of international law are incorporated *into* the common law *through* the agency of a common law rule. The question arises whether the exclusion of common law offences expressed in these sections applies to principles of international law so incorporated.

The object of the incorporation doctrine is to accord recognition to international law. It follows, according to Lauterpacht, that the international rule retains its international character following the act of incorporation.⁸⁹ On this view, crimes against humanity, following their adoption by the common law, remain distinct from common law crimes generally. The section 9(1) exclusion would then not affect the incorporation of international criminal law with respect to international crimes committed outside New Zealand.

This interpretation is to be preferred. It is a recognised rule of construction in English law that Acts of Parliament and statutory instruments are to be interpreted so as not to conflict with international law.⁹⁰ An Act of Parliament may only override international law if there is the clearest indication of parliamentary intention to do so.

as existing from time to time do form part of our English law" (*Trendtex*, 362, per Lord Denning MR reversing his earlier opinion in *R v Secretary of State for the Home Department, ex parte Thakrar* [1974] 2 WLR 593, 597). However, it also went a step further by doubting that the doctrine of *stare decisis* applies in cases involving principles of customary international law. Lord Denning MR emphasised that international law "knows no rule of *stare decisis*" so that where international law had changed the Court could implement that change "without waiting for the House of Lords to do it" (*Trendtex*, 366). The true principle, according to Shaw LJ, is that "the English Courts must at any given time discover what the prevailing international rule is and apply that rule" (*Trendtex*, 388).

88 The equivalent provision of the 1908 Act, s 5, is cast in similar terms.

89 Lauterpacht, above n 91, 84-85; see also Brierly "International Law in England" (1935) 51 LQR 24; n 83 Westlake "Is International Law a Part of the Law of England?" (1906) 22 LQR 14.

90 For an early example of the application of this Rule see *The Annapolis* (1861) Lush 295, 308 per Dr Lushington quoted in Lauterpacht, above n 83, 543.

Morgenstern notes that this threshold has been so high that in over 200 years there have been only two cases where this intention was found to be clear.⁹¹

The New Zealand Crimes Act 1961 appears to evidence a similar intention. Two provisions of the Crimes Act appear to preclude a construction consistent with international law. Section 5(1) of the Act provides:⁹²

This Act applies to all offences for which the offender may be proceeded against and tried in New Zealand.

The effect of these provisions is to bring all crimes, including international crimes, within the province of the Act.

Section 6 of the Act then provides that:⁹³

[N]o act done or omitted outside New Zealand is an offence, unless it is an offence by virtue of any provision of this Act or of any other enactment.

The express effect of this section is to exclude any extra-territorial jurisdiction, except as may be accorded by statute. The exception to the general rule of construction, that statutes shall be construed in accordance with international law then applies. Because the Crimes Act is clear and unambiguous, it must be applied even though to do so would be inconsistent with international law.⁹⁴

It must therefore be concluded that international criminal law relating to crimes against humanity does not form part of the criminal law of New Zealand. Legislation is required to prosecute crimes against humanity in New Zealand. The need for legislation to introduce the offence means that it is not possible to entirely avoid the question of retroactivity.

B Retroactivity

The principle against the retroactive application of criminal law has become the basis of the legality of criminal laws and penalties in most municipal legal systems.⁹⁵

91 Morgenstern "Judicial Practice and the Supremacy of International Law" (1950) 27 Brit YB Int L 42, 70. In *Polites v The Commonwealth* (1945) 70 CLR 60 the High Court of Australia upheld the validity of regulations made pursuant to a statute providing for the conscription of aliens, although it was recognised that these were contrary to an established rule of international law. In *Co-operative Committee on Japanese Canadians v Attorney-General for Canada* [1947] AC 87 the Judicial Committee of the Privy Council held that, because it was unable to construe the Canadian War Measures Act in accordance with international law, it was forced to apply the Act in a manner inconsistent with it.

92 The equivalent provision of the 1908 Act, s 3, is almost identical.

93 The equivalent provision of the 1908 Act, s 5, is cast in similar terms.

94 Compare *Croft v Dunphy* [1933] AC 156, per Lord Macmillan.

95 See generally Hall, "Nulla Poena Sine Lege" (1937) 47 Yale LJ 165.

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.⁹⁶ 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:⁹⁷

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 inherent injustice in this which leads to the principle against retroactivity.⁹⁸

The principle against the retroactive application of criminal laws is enshrined in the Universal Declaration of Human Rights and other international instruments,⁹⁹ and is said by many writers to have passed into the corpus of customary international law.¹⁰⁰ The most recent expression of the principle is contained in Article 15 of the International Covenant on Civil and Political Rights:

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.

96 Weiss "Time Limits for the Prosecution of Crimes Against International Law" (1982) Brit Y B Int L 163, 174; see also Williams *Criminal Law: The General Part* (2 ed, Stevens, London, 1961) 580.

97 Quoted by Public Issues Committee, above n 7, 12.

98 Above n 7, 12.

99 See Universal Declaration of Human Rights 1948, Art 11(2); European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 7; American Convention on Human Rights 1969, Art 9; African Charter on Human and Peoples' Rights 1981, Art 7.

100 *Polyukhovich v Commonwealth*, above n 79, 584 per Toohey J. See also Reshetov "The Temporal Operation of Norms on Criminal Responsibility" in Ginsburgs and Kudriavtsev (eds) *The Nuremberg Trial and International Law* (M Nijhoff, Boston, 1990) 111-113.

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.

It is important, however, to recognise the exact scope of the prohibition found in this Article. The prohibition is of laws that alter the legal *consequences* of earlier conduct by making criminal an act or omission that was not criminal when it was committed.¹⁰¹ Legislation enabling the punishment of crimes against humanity committed during the Second World War would not be retroactive in this sense. These were crimes under international law at the time they were committed. The acts constituting such offences also attracted the sanction of criminal laws generally. The only element that did not exist at the time was the jurisdiction of the New Zealand courts which, by virtue of sections 5(1) and 6 of the Crimes Act 1961, were precluded from exercising universal jurisdiction over international crimes committed outside New Zealand. Legislation enabling the exercise of universal jurisdiction in respect of such crimes would be *retrospective* rather than *retroactive*. These terms are often used interchangeably but, as Callaghan ACJ explained in *R v Finta*, in fact have different meanings.¹⁰²

A *retroactive statute* makes criminal an act which was *innocent* according to national and international law when it was committed. The effect of the statute is to create a substantive crime where none existed before.

A *retrospective statute* operates to confer jurisdiction over an act which was *criminal* under international law when committed. The effect of the statute is to enable municipal courts to apply international law to the act constituting the international law crime.

International law contemplates the need for statutes allowing the retrospective application of international law in municipal courts. In a paper prepared before the end of the war in anticipation of the need for war crimes trials, Lauterpacht asserted that municipal legislation applying international law to war crimes would not be retroactive:¹⁰³

Once it is realised that the offenders are being prosecuted, in substance, for breaches of international law, then any doubts due to inadequacy of the municipal law of any given State determined to punish war crimes recede into the background. There is in this matter no question of any vindictive retroactivity arising out of the creation of crimes of which the accused could not possibly be cognisant. ...[T]here is no novelty about the principle that a belligerent is entitled to punish such perpetrators of war

101 For an assessment of the position at common law see *Calder v Bull* (1798) 3 US 385; see also Hall, above n 95; and Williams, above n 96.

102 Above n 5, 94.

103 Lauterpacht, above n 55, 65-67. According to the *Hetherington Report*, above n 49, 63: "[L]egal opinion at the time seems to have been that jurisdiction over violations of the laws and customs of war existed, and that there was a need to legislate only to *empower* the domestic courts to utilise the jurisdiction which was already available under international law".

crimes as fall into his hands; that ... in punishing war criminals the belligerent applies and enforces, in essence, the rules of the law of nations which are binding upon the individual members of the armed forces of all belligerents; and that there is no question of any retroactive application of the law from any material point of view.

The principle against *ex post facto* laws therefore prohibits legislation that alters the *substantive* legal consequences of earlier conduct. It does not prohibit legislation which alters the *procedural* consequences of earlier conduct when that conduct was criminal under international law when it was committed. It is for this reason that Article 15 of the International Covenant on Civil and Political Rights prohibits the criminalisation of conduct that was not contrary to "national *or* international law" *or* the "general principles of law recognised by the community of nations".

Article 15 of the Covenant on Civil and Political Rights was implemented in section 11(g) of the Canadian Charter of Rights and Freedoms. This was held in *R v Finta* to evidence a Parliamentary intention "that there should be retrospective legislation for offences under international law, or criminal according to the general principles of law recognised by the community of nations".¹⁰⁴ It is not immediately obvious that the corresponding provision in the New Zealand Bill of Rights Act 1990 is open to a similar interpretation. That section, section 26(1), provides:

No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

Unlike the Canadian Charter, the New Zealand Act does not embody the complete text of Article 15. No direct reference is made to "international law" or "general principles of law recognised by the community of nations". The exclusive test is stated to be "New Zealand" law at the relevant time. On its face section 26(1) appears to preclude enabling legislation in respect of crimes against humanity which, by virtue of sections 5(1) and 6 of the Crimes Act, did not form part of New Zealand law at the time of the Second World War. The question is whether by the omission of any reference to international law Parliament intended to exclude international law. The legislative history of the Bill of Rights offers no assistance.¹⁰⁵ The White Paper and the Select Committee Report make no mention of the matter; international law was neither expressly included nor deliberately excluded. How is the intention of Parliament to be discovered in such circumstances?

The leading writers on statutory interpretation confirm the existence of a well-established rule of construction that when domestic legislation is passed to give effect to an international convention the text of the treaty may be consulted as an aid to the interpretation of the legislation.¹⁰⁶

104 Above n 5, 95.

105 See generally Elkind and Shaw *A Standard for Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand* (Oxford University Press, Auckland, 1986).

106 Bennion *Statutory Interpretation* (Butterworths, London, 1984) 320-324; Burrows *Statute Law in New Zealand* (Butterworths, Wellington, 1992) 233-238; Cross

Recourse to the International Covenant on Civil and Political Rights reveals that:

- (1) Article 15 makes punishable acts or omissions that were criminal under international law or the general principles of law recognised by the community of nations at the time they occurred.
- (2) Article 15 was specifically drafted to counter any objections about the legality of prosecutions of Nazi war criminals.¹⁰⁷
- (3) Article 15 permits the retrospective extension of municipal criminal jurisdiction in order to prosecute Nazi and other international crimes.

It follows that the words of section 26(1) cannot be read in isolation. As Cooke P noted in *Ministry of Transport v Noort*, "the Bill of Rights is on the statute book and it is the duty of the Courts, as laid down by section 5(j) of the Acts Interpretation Act 1924, to give it such fair, large, and liberal construction and interpretation as will best ensure the attainment of its object according to its true intent, meaning and spirit".¹⁰⁸ Richardson J observed that one of the objects stated in the long title is to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".¹⁰⁹ Section 26(1) of the Bill of Rights, being based on Article 15 of the Covenant, should therefore be read subject to it. Taking account of international law in the manner intended by Article 15, section 26(1) should properly be read as follows:

No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under New Zealand or international law or the general principles of law recognised by the community of nations at the time it occurred.

Further support for this construction is found in the presumption that Parliament did not intend to legislate in violation of New Zealand's international obligations.¹¹⁰ Two international conventions ratified by New Zealand impose the obligation to exercise state jurisdiction in respect of Nazi war crimes.¹¹¹ Under the Geneva Conventions of 1949 New Zealand undertook to enact legislation to punish "grave breaches" of the

Statutory Interpretation (2 ed, Butterworths, London, 1985) 162-165; see also Brownlie, above n 4, 48-50.

107 *Matas Bringing Nazi War Criminals to Justice* (1985), noting A/C 3/SR 1007-1014, and in particular the remarks of Sir Samuel Hoare, SR 1009, 2 November 1960, paras 12-13.

108 *Noort v Ministry of Transport; Police v Curran* (1990-92) 1 NZBORR 97, 143.

109 Above n 108, 151.

110 *Ahmad v Inner London Education Authority* [1978] QB 36, 48 per Lord Scarman *Levave v Immigration Department* [1979] 2 NZLR 74, 79 per Somers J.

111 Although the exercise of state jurisdiction is a right rather than a duty under international law, conventional obligations assumed by states may by their terms compel the exercise of that jurisdiction: Akehurst *A Modern Introduction to International Law* (2 ed, Allen and Unwin, London, 1971) 129-133.

Conventions, to search for alleged offenders, and to bring them "regardless of their nationality, before its own courts", although it may also hand them over for trial "to another High Contracting Party concerned".¹¹² Although there is no clause in the Conventions connecting grave breaches with the law on war crimes or crimes against humanity, Fawcett notes that certain of the grave breaches defined in Articles 50, 51, 130, and 147 of the Conventions constitute war crimes or crimes against humanity or both.¹¹³ Under the Genocide Convention of 1948, New Zealand also assumed the duty to prosecute persons for genocide, the "supreme crime against humanity", whether committed in time of peace or in time of war in their national courts on the basis of legislation providing effective penalties. As a contracting party to both of these Conventions New Zealand clearly undertook to punish the Nazi war criminals whose very crimes precipitated the Conventions.

Whichever source of obligation is accepted, a construction of section 26(1) of the Bill of Rights which excludes the possibility of legislation enabling the prosecution of crimes against humanity would amount to a violation of international law. The construction importing reference to international law is therefore to be preferred. Although it therefore appears unnecessary to resort to the "justified limitations" section of the Bill of Rights in order to validate war crimes legislation, there would be no difficulty in doing so. It would be unconscionable to allow Nazi war criminals to shelter behind the provisions of the Bill of Rights when the international instrument it is based on provides for their punishment, and when international law applied to their actions, branded them as criminal and extended universal jurisdiction to the New Zealand courts at the relevant time.

C *New Zealand Legislation*

War crimes trials will require legislation to remove the jurisdictional bar contained in the Crimes Act. This legislation could take one of three forms:

- (1) An amendment to the Crimes Act allowing for the possibility of extra-territorial jurisdiction in respect of crimes against international law.

This would not be consistent with the approach of the Legislature to crimes subject to international conventions, which is to enact extraordinary legislation with extra-territorial effect.¹¹⁴

¹¹² 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 the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August, 1949, Article 50; Geneva Convention relative to the Treatment of Prisoners of War of 12 August, 1949, Article 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August, 1949, Article 146.

¹¹³ "The Eichmann Case" (1962) 38 Brit YB Int L 181, 207.

¹¹⁴ 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) A statute allowing for the prosecution of crimes against international law in which the relevant principles of international criminal law are reduced to a statutory formula.

As will be seen, the problem with this approach is that the validity of the legislation is thrown into doubt if the court does not accept it as a correct statement of international law.

- (3) A statute allowing for the prosecution of crimes against international criminal law which simply leaves substantive questions to be argued before and determined by the court.

A comparative analysis of war crimes legislation adopted in other jurisdictions reveals that this approach, which is consonant with the common law doctrine of incorporation, is to be preferred.

D Statutory Formulae

Following its amendment in 1987 the Canadian Criminal Code exposes to punishment by a Canadian court any person who:¹¹⁵

- (a) at any time before or after the commencement of the amendment;
- (b) commits a "war crime" or "crime against humanity" defined in accordance with the Nuremberg Charter;
- (c) outside Canada;
- (d) against a citizen of Canada or a citizen of a state allied with Canada in an armed conflict;
- (e) for which Canada could exercise jurisdiction over the person on the basis of the person's presence in Canada; and
- (f) subsequent to the time of the act the person is present in Canada;

And:

- (g) the person is a Canadian citizen or is employed by Canada in a civilian or military capacity; or
- (h) the person is a citizen of or is employed by a state that is engaged in an armed conflict against Canada; or
- (i) the victim of the act is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict.

115 Canadian Criminal Code, s 6.

The Australian War Crimes Amendment Act 1989 exposes to punishment by an Australian court any person who:

- (a) committed a "war crime" as defined in the Act;¹¹⁶
- (b) in Australia or outside Australia;¹¹⁷
- (c) between 1 September 1939 and 8 May 1945;¹¹⁸
- (d) in circumstances connected with any armed conflict in Europe between the dates mentioned, whether Australia was involved in that conflict or not;¹¹⁹
- (e) being an act that is a violation of the "laws, customs and usages of war" or a "crime against humanity" under international law;¹²⁰

And:

- (f) the person is an Australian citizen or resident when charged with the offence.¹²¹

The English War Crimes Act 1991 confers upon English Courts jurisdiction over:

- (a) offences of homicide;¹²²
- (b) committed as "violations of the laws and customs of war";¹²³
- (c) in Germany or German occupied territory;¹²⁴
- (d) during the period of the Second World War;¹²⁵
- (e) by persons who are now British citizens or United Kingdom residents;¹²⁶
- (f) irrespective of the nationality of the person at the time of the alleged offence.¹²⁷

E Comments

- (1) Only the English Act is clearly founded on the universal theory of jurisdiction.¹²⁸ The other statutes abandon a completely universal jurisdiction by restricting the category of potential offenders or victims or both.
- (2) The English and Australian Acts are designed to deal with the specific case of suspected Nazi war criminals resident in those countries. Only the Canadian Code is stated to apply to both past and future "war crimes" and "crimes against

116 War Crimes Amendment Act 1989 (Aust), ss 6, 7 and 9.

117 Sections 5 and 6.

118 Section 5.

119 Sections 5 and 9.

120 Sections 7 and 17.

121 Sections 11.

122 War Crimes Act 1991 (UK), s 1(1).

123 Sections 1(1)(b).

124 Sections 1(1)(a).

125 Sections 1(1)(a).

126 Section 1(2).

127 Section 1(1).

128 On the English Act see James, above n 80, 590-591; see also Steiner "Prosecuting War Criminals in England and France" [1991] Crim LR 180.

humanity". However, in adopting the pre-1939 Nuremberg definitions of these crimes, the future value of the Code is undermined by being unable to take into account future developments in the law.

- (4) In the English Act international law concepts are not defined and are left to bear their international law meaning. However, in the Australian and Canadian statutes international law is tied in various ways to municipal law.

Under the Canadian Criminal Code:¹²⁹

- (a) If the act constituted an international crime as defined; and
- (b) the act would have constituted criminal conduct in Canada had it been committed there;
- (c) the act is deemed to have been committed in Canada and trial and punishment proceed in the ordinary manner.

Under the Australian Act:

- (a) An act meeting the definition of "war crime" is made a punishable offence;¹³⁰
- (b) "War crime" is defined by reference to the term "serious crime";¹³¹
- (c) An act is a "serious crime" if when it was done it would have been a specified offence under Australian criminal law had it been committed in Australia.¹³²

The Canadian Code links international law to municipal law for procedural purposes only. It still applies international law to punish acts committed outside Canada which are crimes under international law. The Australian Act is objectionable for applying Australian rather than international law for the same purpose.

- (5) Definitions appear to have been given in the Australian and Canadian legislation because "it cannot be automatically assumed that the judge before whom an accused might appear is acquainted with principles or rules of international law"¹³³ and "a judge is likely to be more comfortable applying [domestic] law, and the defences available under that law, than the rules of international law".¹³⁴

However, *Polyukhovich* and *Finta* demonstrate that, no matter how carefully legislation is drafted, a court will always be forced to examine issues of international law when international law is the justification for the legislation.

129 Section 6.

130 Above n 116, s 7.

131 Above n 116, s 6.

132 Above n 133, s 6(1).

133 Green, above n 76, 231.

134 Triggs, above n 78, 154.

In such circumstances the safest course is to follow the example of the English Act and require the Court to investigate and determine the contents and scope of the relevant international rules. No definitions should be provided.

F New Zealand Legislation

The English, Australian and Canadian statutes are not entirely satisfactory precedents for New Zealand to follow. The New Zealand legislation should learn from the errors made in these jurisdictions. To this end the following formulation is suggested:¹³⁵

WAR CRIMES ACT 1995

An Act to confer jurisdiction on New Zealand Courts in respect of war crimes committed during the period of the Second World War.

1. Jurisdiction - (1) Proceedings for war crimes and crimes against humanity may be brought against a person in New Zealand irrespective of the nationality of that person at the time of the alleged offence if that offence -

- (a) was committed in the period beginning on 1 September 1939 and ending on 5 June 1945; and
- (b) constituted a violation of the laws and customs of war or a crime against humanity under international law.

This particular formulation of jurisdiction avoids the defects inherent in other war crimes legislation. In particular:

- (1) It is founded on the universal theory of jurisdiction and renders all those responsible for war crimes and crimes against humanity committed during the Second World War subject to the jurisdiction of the New Zealand Courts.
- (2) War crimes and crimes against humanity are left to bare their international law meaning. International law is applied to international law crimes through the agency of the New Zealand Courts in the manner intended by the universal theory of jurisdiction.

It does not, however, avoid the difficulties involved in conducting criminal trials in New Zealand some 50 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

135 As the Geneva Conventions Act 1958 deals with war crimes and crimes against humanity committed after the Second World War, New Zealand war crimes legislation need only deal with crimes from the Second World War.

witnesses and the reliability and strength of the evidence. With due process applying it may be difficult to obtain convictions.

More serious are the logistical difficulties involved in conducting trials in New Zealand. New Zealand would, by analogy with private international law concepts, be *forum non conveniens*.¹³⁶ The Eastern European *loci delicti commissi* have the most real and substantial connection with crimes committed on their 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.

However, difficulties of this sort are 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. Historical distance should not be allowed to disguise the fact that the New Zealand suspects are alleged to have committed some of the gravest possible violations of human rights.

The fact that fugitive Nazi war criminals have eluded detection and capture for over 50 years may make it difficult to proceed 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, Nazi or otherwise, whenever and wherever they may be found. If extradition of suspects is excluded as a possible course of government action,¹³⁷ New Zealand's obligations and the interests of the international community demand that war crimes trials proceed in this country. They may lawfully do so under legislation in the form suggested.

136 See generally Cheshire and North *Private International Law* (11 ed, Butterworths, London, 1987) 221-243.

137 As to which see Gilbertson, above n 2, 569-571.