

SUSPECTED WAR CRIMINALS IN AUSTRALIA: LAW AND POLICY

GIDEON BOAS* AND PASCALE CHIFFLET†

The current conflicts in Syria and Iraq have for the first time in many years brought to public consciousness the issue of war criminals in Australia. Australia has historically dealt with this issue in a reactive fashion and with varying success, through the domestic prosecution of offenders, immigration screening procedures and extradition. These approaches have, however, generally been incongruent in theory and application. This article examines the issue of war criminals in Australia and demonstrates that Australia has an incomplete and largely dormant enforcement apparatus, a problematic immigration regime and a poor record of extraditing war criminals. Australia is in need of a coordinated and coherent policy and legal responses that re-emphasise the role of domestic investigations and prosecutions, if it is to rise to the challenge of 'putting an end to impunity' and assert itself as a nation committed to international criminal justice.

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* BA, LLB (Monash), LLM, PhD (Melb); Associate Professor, Faculty of Law, Monash University; Barrister, Victorian Bar.

† LLB (Hons), BA, LLM (Pantheon-Sorbonne); Lecturer, La Trobe Law School, La Trobe University; former Legal Officer at the International Criminal Tribunal for the Former Yugoslavia. The authors would like to thank Monash University for the Monash Research Accelerator Grant that contributed to the research for this article. Thanks also to Benjamin Nelson and Lisa Lee for their research assistance.

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I INTRODUCTION

The presence of suspected war criminals¹ in Australia is an issue that has challenged policymakers for decades. As a nation geographically remote from conflict, Australia has seen relatively little political or community interest in enforcing its international obligations regarding war crimes.² In spite of this, Australia has a surprisingly rich if episodic history of investigation and prosecution of crimes of mass atrocity. Much of this history has developed in response to periods of international pressure, spasmodic media interest and intermittent public disquiet at the presence of suspected war criminals in Australia. Whether suspected war criminals reside in Australia continues to be of significant domestic concern, with the recent conflicts in Syria and Iraq raising issues of national security, criminal justice and immigration.

Domestic responses to suspected war criminals are either specific or general in nature; Australia's approach has been to develop specific and ad hoc responses that are inherently reactive, or tailored to achieve certain objectives.³ The investigations and prosecutions of suspected war criminals have been largely confined to the periods immediately after the Second World War, and subsequently in the late 1980s. Australia's obligations pursuant to international treaties specifically dealing with war crimes and other crimes of mass atrocity have been incorporated into domestic legislation with a measure of

¹ In this article, 'war criminals' will refer to individuals suspected of committing war crimes, crimes against humanity or genocide.

² This being said, it should be noted that Australia is not socially remote from these conflicts, as the phenomenon of Australian nationals fighting in Syria and Iraq confirms. Compare this for example with the position of the United Kingdom and its relative proximity to the Balkans: see below nn 230–1 and accompanying text.

³ See, eg, Tim McCormack, 'Australia's Unresolved War Crimes Challenge' in Philip Crisp (ed), *So You Want to Be a Leader: Influential People Reveal How to Succeed in Public Life* (Hybrid Publishers, 2015) 398.

inconsistency over time, and gaps still remain in the supporting legislative framework. In addition to these intermittent responses, suspected war criminals have also been dealt with more generally, and with uncertain enthusiasm, through existing immigration and extradition avenues.

This article provides a comprehensive account of the responses developed in Australia to address the presence of war criminals — domestic prosecution, immigration screening and extradition — as well as the policy considerations underpinning these responses. It is apparent that the current avenues available for dealing with suspected war criminals are incongruent in theory and application. Accordingly, this article proposes the adoption of an unambiguous policy position on the issue of suspected war criminals in Australia and the implementation of a coordinated war crimes framework in support. It is argued that existing legislative gaps must be addressed and that there be a renewed focus on investigations and prosecutions, particularly as Australian investigators, prosecutors and courts are now able to draw on the considerable expertise and experience that has evolved in international and domestic war crimes prosecution over the past two decades.

II DOMESTIC APPROACHES TO SUSPECTED WAR CRIMINALS

A Prosecution

1 *1945–51: Post-Second World War Crimes Trials*

In the period immediately after the Second World War, Australia was responsible for the military trials of more than 800 Japanese soldiers for war crimes.⁴ The search for post-conflict justice was driven by popular horror at reports of mass atrocity crimes committed against Australians close to home. Domestic antipathy towards the Japanese was shaped before the Second World War by racism, encouraged by the White Australia policy and its accompanying rhetoric.⁵ During the war, acute outrage at reports of specific Japanese crimes fuelled this sentiment, as did the images of returning Australian prisoners of

⁴ D C S Sissons, *The Australian War Crimes Trials and Investigations (1942–51)* (2006) 19–20 <<https://www.ocf.berkeley.edu/~changmin/documents/Sissons%20Final%20War%20Crimes%20Text%2018-3-06.pdf>>.

⁵ Michael Carrel, 'Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints' in David A Blumenthal and Timothy L H McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (Martinus Nijhoff Publishers, 2008) 239, 240–1.

war.⁶ Chief Justice William Webb of the Supreme Court of Queensland was commissioned to conduct an official inquiry into Japanese war crimes.⁷ The first and second Webb inquiries revealed evidence of numerous mass atrocity crimes committed against Australians, Chinese, American and Indian forces, as well as Papuan and Pacific Islander civilian populations and forces of other Allied nations.⁸

The United Nations War Crimes Commission ('UNWCC') was formed on 20 October 1943, with Allied nations agreeing to the investigation of war crimes and coordination of members' efforts.⁹ Australia's contribution in the Pacific was to comprise a part of this effort. Once hostilities ended on 15 August 1945, international interest in prosecution was strong amongst the Allied powers and there was also a growing domestic desire for the trial of enemy combatants within Australia. The *War Crimes Act 1945* (Cth) ('*War Crimes Act*') was introduced on 4 October 1945 and extraordinarily, passed both Houses of Parliament in a single day.¹⁰

The *War Crimes Act* facilitated the trials of suspected Japanese war criminals. 'War crimes', until the Act was amended in 1989,¹¹ were defined as violations of the laws of war, and any offences listed by the Board of Inquiry headed by Webb.¹² The temporal period of the *War Crimes Act* commenced from 2 September 1939 onwards,¹³ and the Act sought to prosecute war crimes committed against persons who were resident in Australia at any given time, British subjects or Allied citizens.¹⁴ Australian Military Forces under-

⁶ See *ibid* 241–2.

⁷ Sissons, above n 4, 5.

⁸ See *ibid* 5–6 for a discussion of the first and second Webb inquiries. Subsequently, the third commission of inquiry was made with slightly expanded terms of reference. It included Chief Justice William Webb, Justice Alan Mansfield of the Supreme Court of Queensland and Judge Richard Kirby of the District Court of New South Wales: at 7.

⁹ M E Bathurst, 'The United Nations War Crimes Commission' (1945) 39 *American Journal of International Law* 565, 568. For more information on the UNWCC, see Symposium, 'The United Nations War Crimes Commission and the Origins of International Criminal Justice' (2014) 25 *Criminal Law Forum* 1.

¹⁰ National Archives of Australia, *World War II War Crimes — Fact Sheet 61* <<http://www.naa.gov.au/collection/fact-sheets/fs61.aspx>>. The *Regulations for the Trial of War Criminals 1945* (Cth) were also enacted on 25 October 1945. See also Commonwealth, *Parliamentary Debates*, Senate and House of Representatives, 5 October 1945, 6463 (William Ashley).

¹¹ *War Crimes Amendment Act 1988* (Cth) s 5.

¹² *War Crimes Act* s 3 (definition of 'war crime').

¹³ *Ibid* s 3 (definition of 'any war').

¹⁴ *Ibid* s 12.

took the investigations, prosecutions and trials of Japanese war criminals between 1945 and 1951,¹⁵ and more than 300 war crimes trials were held in Australian military courts.¹⁶ In 1961, Attorney-General Sir Garfield Barwick announced on behalf of the Menzies Government that the war crimes trials were to come to an end, and that this chapter had closed for Australia.¹⁷ After this high volume and frenetic phase of war crimes prosecutions, the *War Crimes Act* lay dormant until the late 1980s.

2 War Crimes Prosecutions in the Post-1980s Period

In the 1980s, journalist Mark Aarons brought public attention to the issue of former Nazi war criminals being resident in Australia.¹⁸ After the consequential public outcry, the Hawke Government commissioned an inquiry led by senior public servant Andrew Menzies ('Menzies Review').¹⁹ Menzies concluded that as a result of 'very substantial gaps' in the post-Second World War immigration screening programs,²⁰ it was likely that significant numbers of Nazi war crimes suspects were present in Australia.²¹ Various commentators have noted that the publicity surrounding the issue of suspected war criminals being resident in Australia was the main reason for the Government's policy orientation towards war crimes prosecutions.²² Menzies referred to a new generation of Australians who were 'at first dimly aware of the atrocities committed in the war period but in recent years increasingly conscious of the depravity and scale of these crimes.'²³ On 24 February 1987, Attorney-General Lionel Bowen stated before Parliament that 'justice must be done, no matter

¹⁵ Carrel, above n 5, 243–5.

¹⁶ Ibid 245.

¹⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 22 March 1961, 452.

¹⁸ Mark Aarons, *War Criminals Welcome: Australia, a Sanctuary for Fugitive War Criminals Since 1945* (Black Inc, 2001) 462, citing ABC Radio National, *Nazis in Australia*, April – May 1986 (Mark Aarons).

¹⁹ A C C Menzies, *Review of Material Relating to the Entry of Suspected War Criminals into Australia* (Australian Government Publishing Service, 1987).

²⁰ Ibid 86.

²¹ Ibid 177.

²² See, eg, Ronnie Edelman et al, 'Prosecuting World War II Persecutors: Efforts at an Era's End' (1992) 12 *Boston College Third World Law Journal* 199, 210; Glenn O'Neil, 'Prosecuting War Criminals in Australia' (1991) 16 *Legal Service Bulletin* 20, 20; Gillian Triggs, 'Australia's War Crimes Trials: All Pity Choked' in Timothy L H McCormack and Gerry J Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law International, 1997) 126; *ibid* 11.

²³ Menzies, above n 19, 11.

how much time has passed since the events in question.²⁴ As a result of the Menzies Review and related media attention, the Government established a Special Investigations Unit ('SIU') in 1987.²⁵ The SIU was placed within the Attorney-General's Department and was headed by Robert Greenwood QC.²⁶ The SIU was a specialist body tasked to investigate and gather evidence about whether allegations against suspected war criminals, having since migrated to Australia, were substantiated.²⁷

The main objective of the SIU was to seek and obtain admissible evidence of the commission of war crimes as defined in the *War Crimes Act 1945*, as amended, for the purpose of charges being laid and prosecutions being undertaken in the ordinary criminal courts of Australia.²⁸

The SIU was the first specialist unit of its kind in Australia, and it had been handed an enormous undertaking requiring multidisciplinary and cross-jurisdictional work, in the absence of existing infrastructure or protocols.²⁹ The SIU focused on the identification of alleged suspects through domestic and international inquiries, extensive archival searches and interviews with potential witnesses.³⁰ The SIU's sources included the Menzies Review, Mark Aarons, the Soviet Procurator, Jewish organisations in Australia, other governments (United States, Canada, United Kingdom and the Netherlands), Australian parliamentarians, law enforcement agencies and members of the general public.³¹

There were various international pressures on the Hawke Government. After the Second World War, there was an international push towards the creation and implementation of human rights and international criminal justice principles. The formation of the United Nations,³² and the adoption of the *Convention on the Prevention and Punishment of the Crime of Genocide*

²⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 1987, 595.

²⁵ Fergus Hanson, 'Confronting Reality: Responding to War Criminals Living in Australia' (Policy Brief, Lowy Institute, February 2009) 3.

²⁶ Attorney-General's Department (Cth), *Report of the Investigations of War Criminals in Australia* (Australian Government Publishing Service, 1993) 3.

²⁷ *Ibid* 601.

²⁸ *Ibid* 4.

²⁹ *Ibid* 14.

³⁰ *Ibid* 42–4.

³¹ *Ibid* 171.

³² *Charter of the United Nations*.

(‘*Genocide Convention*’),³³ *Geneva Conventions*³⁴ and numerous human rights treaties,³⁵ as well as the precedential establishment of the International Military Tribunals in Nuremberg and the Far East,³⁶ were indicative of this international movement. Australia’s war crimes investigations and prosecutions constituted a part of this international effort to achieve post-conflict justice. In his speech to Parliament, Bowen stated that the Australian Government ‘shares the abhorrence felt by all civilised nations at the serious criminal activities committed in the course of the Second World War, and considers that justice must be done, no matter how much time has passed since the events in question.’³⁷

Australia was also under pressure to be seen as acting as other countries had acted in their own domestic prosecutions of war criminals. Israel, Canada, the United States, France, the Soviet Union and West Germany had undertaken domestic prosecutions of war criminals.³⁸ For example, the United States started up an Office of Special Investigations in 1979 to investi-

³³ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

³⁴ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (‘*Convention I*’); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (‘*Convention II*’); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (‘*Convention III*’); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (‘*Convention IV*’) (collectively ‘*Geneva Conventions*’).

³⁵ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

³⁶ *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, opened for signature 8 August 1945, 82 UNTS 280 (entered into force 8 August 1945) annex (‘*Nuremberg Charter*’); *Special Proclamation by the Supreme Commander for the Allied Powers: Establishment of an International Military Tribunal for the Far East* [1946] TIAS 20 (entered into force 19 January 1946) annex (‘*Charter of the International Military Tribunal for the Far East*’).

³⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 1987, 595.

³⁸ O’Neil, above n 22, 20, 22.

gate allegations of war criminals in their jurisdiction.³⁹ The Canadian Government set up a commission of inquiry into war criminals in 1985: the Deschênes Commission.⁴⁰ Australia's involvement on an international level was also perceived by Greenwood as having benefits in terms of an increased diplomatic standing in areas including Germany, Israel and Eastern Europe, and an enhanced international reputation due to its commitment to prosecute suspected war criminals.⁴¹ Therefore while Australia was joining these countries in its pledge to enforce international criminal justice, the Government was also motivated by the diplomatic benefits such actions would bring.

In January 1989, the *War Crimes Amendment Act 1988* (Cth) came into force, and extensively revised the original *War Crimes Act* ('amended *War Crimes Act*'). The amended preamble read as follows:

WHEREAS:

- (a) concern has arisen that a significant number of persons who committed serious war crimes in Europe during World War II may since have entered Australia and become Australian citizens or residents;
- (b) it is appropriate that persons accused of such war crimes be brought to trial in the ordinary criminal courts in Australia; and
- (c) it is also essential in the interests of justice that persons so accused be given a fair trial with all the safeguards for accused persons in trials in those courts, having particular regard to matters such as the gravity of the allegations and the lapse of time since the alleged crimes ...⁴²

In a conscious effort to achieve the appropriate standards of justice, the forum for prosecutions was domestic criminal courts as opposed to military courts.⁴³ The Act's temporal period encompassed 'war' which was narrowly defined as the period from 1 September 1939 to 8 May 1945 ('in so far as it occurred in Europe').⁴⁴ As the amended *War Crimes Act* was specifically targeted to

³⁹ Nicholas P Weiss, 'Somebody Else's Problem: How the United States and Canada Violate International Law and Fail to Ensure the Prosecution of War Criminals' (2012) 45 *Case Western Reserve Journal of International Law* 579, 592.

⁴⁰ Grant Purves, 'War Criminals: The Deschênes Commission' (Current Issue Review No 87-3E, Library of Parliament, Parliament of Canada, 16 October 1998) 3 <<http://www.parl.gc.ca/Content/LOP/researchpublications/873-e.htm>>.

⁴¹ Attorney-General's Department (Cth), above n 26, 23–4.

⁴² Amended *War Crimes Act* Preamble.

⁴³ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 1987, 594–5 (Lionel Bowen).

⁴⁴ Amended *War Crimes Act* s 5 (definition of 'war'); see also at ss 7, 9.

address the concern that suspected war criminals had since migrated to Australia,⁴⁵ the personal jurisdiction was limited to the prosecution of 'Australian citizen[s]' or 'resident[s] of Australia or an external Territory'.⁴⁶ The amended *War Crimes Act* defined 'serious crimes' at s 6, to include crimes of murder, manslaughter, causing grievous bodily harm, wounding, rape, indecent assault, abduction, deportation and internment of a person to death or slave labour camps, alongside varying levels of criminal responsibility. A war crime was defined as a serious crime committed during 'war' (as defined in the restricted terms of s 5).⁴⁷

The SIU conducted 841 investigations from which it identified 27 cases of suspected war criminals, but due to insufficient evidence these persons were not prosecuted.⁴⁸ Ultimately the SIU referred four cases to the Commonwealth Director of Public Prosecutions ('CDPP'), of which the three matters of Ivan Polyukhovich, Heinrich Wagner and Mikolay Berezovsky were prosecuted.⁴⁹ These post-1980 war crimes prosecutions were heavily criticised in the media, due to the combination of a failure to secure convictions and the \$30 million cost of the investigations and prosecutions.⁵⁰ A clear obstacle was the unreliability or unavailability of eyewitness evidence in light of the time that had passed since the alleged events.⁵¹ This initial lack of success caused the SIU to become a victim of Keating Government funding cuts and it was

⁴⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 1987, 595 (Lionel Bowen).

⁴⁶ Amended *War Crimes Act* s 11. For judicial discussion on the retroactivity of World War II war crimes legislation see, eg, *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 574–90 (Brennan J), 663–77, 687–92 (Toohey J). For a thorough discussion of the case see James A Thomson, 'Is It a Mess? The High Court and the War Crimes Case: External Affairs, Defence, Judicial Power and the *Australian Constitution*' (1992) 22 *University of Western Australia Law Review* 197.

⁴⁷ See amended *War Crimes Act* s 7.

⁴⁸ Attorney-General's Department (Cth), above n 26, 45, 552.

⁴⁹ *Ibid* 55.

⁵⁰ See, eg, Maryann Stenberg, 'Cleared, but Polyukhovich Counts Cost', *The Age* (Melbourne), 20 May 1993, 7; Paul Lloyd, 'Testing Time for Justice', *The Advertiser* (Adelaide), 5 January 2000, 19; Catharine Lumby, 'Sins of the Grandfathers', *The Bulletin* (Sydney), 18 January 2000, 15; Wayne Howell, 'Slipping Through the Net', *Herald Sun* (Melbourne), 5 January 2000, 2; Bernard Lane, 'War Crimes Inquiries that Went Nowhere', *The Australian* (Sydney), 4 January 2000, 2; Janine MacDonald, 'War Crimes Unit Closed after Five Years, No Results', *The Age* (Melbourne), 5 January 2000, 2; Peter Krupka, 'Nazi Hunt's Costly Record', *The Australian* (Sydney), 24 July 1999, 8.

⁵¹ See, eg, Gideon Boas, 'War Crimes Prosecutions in Australia and Other Common Law Countries: Some Observations' (2010) 21 *Criminal Law Forum* 313, 319.

forced to abandon the prospect of a prosecution against a fourth suspect, Karlis Ozols.⁵²

3 *The Current State of War Crimes Prosecutions*

At present, the amended *War Crimes Act* has not been abolished but it is practically inoperative. The particularity of the temporal and geographic periods in the Act limits its application to prosecution of persons suspected of committing war crimes in the European theatre of the Second World War.⁵³ During the post-1980 domestic prosecutions, one major obstacle (with attendant criticism and concern) was the commencement of proceedings more than 45 years after the alleged commission of war crimes.⁵⁴ The progression of time has seen the passing of most Nazi war crimes suspects,⁵⁵ and there appears to be no reasonable possibility that the amended *War Crimes Act* may be used in any future prosecutions in its present form.

On 26 September 2002, new provisions for the prosecution of genocide, crimes against humanity and war crimes came into operation under div 268 of the *Criminal Code Act 1995* (Cth) (*'Criminal Code'*),⁵⁶ as part of Australia's ratification of the *Rome Statute of the International Criminal Court* (*'Rome Statute'*).⁵⁷ Division 268 provides for a number of offences that deal with war crimes (including torture⁵⁸ and inhumane treatment),⁵⁹ genocide,⁶⁰ and other crimes against humanity such as rape,⁶¹ sexual slavery⁶² and persecution.⁶³

⁵² David Humphries, 'How Australia Became a Haven for War Criminals', *The Sydney Morning Herald* (Sydney), 10–11 April 2010, 11.

⁵³ Amended *War Crimes Act* s 5 (definition of 'war').

⁵⁴ Gillian Triggs, 'Australia's *War Crimes Act*: Justice Delayed or Denied?' (1990) 64(3) *Law Institute Journal* 153, 157; President Michael Kirby, 'War Crimes Prosecution — An Australian Update' (1993) 19 *Commonwealth Law Bulletin* 781, 786.

⁵⁵ Allan Hall, 'Operation Last Chance: The Final Attempt to Track Down Ageing Nazi War Criminals before They Die', *Daily Mail* (online), 21 July 2013 <<http://www.dailymail.co.uk/news/article-2371457/Operation-Last-Chance-The-final-attempt-track-ageing-Nazi-war-criminals-die.html>>.

⁵⁶ *International Criminal Court (Consequential Amendments) Act 2002* (Cth) s 2.

⁵⁷ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002); Joanna Kyriakakis, 'Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth *Criminal Code*' (2007) 5 *Journal of International Criminal Justice* 809, 814.

⁵⁸ *Criminal Code* s 268.25.

⁵⁹ *Ibid* s 268.26.

⁶⁰ *Ibid* ss 268.3–268.7.

⁶¹ *Ibid* s 268.14.

⁶² *Ibid* s 268.15.

Despite this legislative rebirth, Australian war crimes investigations and prosecutions are stagnant and the CDPP has not commenced or conducted any prosecutions within the last decade for offences against either s 9 of the amended *War Crimes Act* or div 268 of the *Criminal Code*.⁶⁴ Since the closure of the SIU in 1992 (and its successor, the War Crimes Prosecution Support Unit, in 1994),⁶⁵ the responsibility for the investigation of such crimes has been delegated to various departments within the Australian Federal Police ('AFP'). It is currently allocated to the Crime Operations group, the successor of the now defunct Economic and Special Operations group.⁶⁶ Whilst Crime Operations is responsible for investigating war crimes, the portfolio also spans 33 other sectors, in areas as diverse as drug trafficking, illegal fishing and fraud.⁶⁷ In 2010, Fergus Hanson further noted that 'only three AFP officers had undertaken specialist war crimes training in the past decade.'⁶⁸

(a) *The Foreign Fighter Phenomenon*

The current lack of attention to war crimes investigations and prosecutions is alarming, because the issue of war criminals in Australia is not confined to the wars and conflicts of previous decades. The ongoing conflicts in Syria and Iraq, combined with the rise of the 'foreign fighter' phenomenon, continue to make the issue of war criminals in Australia a live one. It is estimated that at least 120 Australians are currently fighting with terrorist groups in Syria and Iraq,⁶⁹ up from 90 in January 2015⁷⁰ and 70 in 2014.⁷¹ Currently over 30

⁶³ Ibid s 268.20.

⁶⁴ Email from Fiona Thompson (Solicitor, CDPP) to Benjamin Nelson, 27 October 2015. At the time of writing, a case history search of prosecutions brought under these legislative provisions yields no results.

⁶⁵ Hanson, above n 25, 3, 3 n 6.

⁶⁶ AFP, *Annual Report 09–10* (2010) 47; Peter Drennan, 'National Security: Implications for Law Enforcement' (Speech delivered at the University of Canberra Lecture Series, Canberra, 30 April 2010) <<http://www.afp.gov.au/media-centre/speeches/2010/national-security-implications-for-law-enforcement>>. See also Attorney-General's Department (Cth), *Portfolio Budget Statements 2007–08* (2007) 181–2.

⁶⁷ AFP, *Case Categorisation and Prioritisation Model (CCPM)* (May 2010) <<http://www.afp.gov.au/~media/afp/pdf/c/ccpm-may-2010-pdf.pdf>>.

⁶⁸ Fergus Hanson, 'War Crimes Laws Are Flawed and Problematic', *The Sydney Morning Herald* (online), 8 March 2010 <<http://www.smh.com.au/federal-politics/political-opinion/war-crimes-laws-are-flawed-and-problematic-20100308-ps3w.html>>.

⁶⁹ Tony Abbott, '2015 Magna Carta Lecture' (Speech delivered at Parliament House, Canberra, 24 June 2015). See also Commonwealth, *Budget 2015: Protecting Australia* (2015) 1; Dan Conifer, 'ASIO Chief Duncan Lewis Says at Least 45 Australians Killed Fighting in Syria, Iraq',

foreign fighters are known to have returned to Australia from conflict zones with the Government anticipating this number to increase as the conflict continues.⁷²

The participation of Australian nationals in war crimes in these conflicts has also been recently documented.⁷³ Reports have emerged that deceased Australian fighters, Khaled Sharrouf⁷⁴ and Mohamed Elomar, may have been involved in the commission of war crimes and crimes against humanity such as the rape, forced marriage and slavery of captured Yazidi women.⁷⁵ Sharrouf is also suspected of having committed several additional war crimes while involved in these conflicts.⁷⁶

The cases of Sharrouf and Elomar are certainly the most notorious examples of atrocities committed by Australian fighters. They are, however, unlikely to be an aberration, as the majority of Australian fighters are thought to have joined the Islamic State ('IS') and Jabhat al-Nusra ('JAN')⁷⁷ — organisations

ABC News (online), 9 February 2016 <<http://www.abc.net.au/news/2016-02-09/at-least-45-australians-killed-fighting-in-syria-iraq-asio-says/7153406>>.

⁷⁰ Department of the Prime Minister and Cabinet (Cth), *Review of Australia's Counter-Terrorism Machinery* (2015) 35.

⁷¹ Sarah Brown, 'On the Front Foot? Preserving Australia's Security against the Threat Posed by Returning Foreign Fighters' (Indo-Pacific Strategic Paper, Centre for Defence and Strategic Studies, Australian Defence College, August 2015) 1.

⁷² Department of the Prime Minister and Cabinet (Cth), above n 70, 35. See *ibid* 1, 4.

⁷³ 'Australian Islamic State Fighters Sharrouf, Elomar Dead: Reports', *The Australian* (online), 22 June 2015 <<http://www.theaustralian.com.au/in-depth/terror/australian-islamic-state-fighters-sharrouf-elomar-dead-reports/news-story/5dfa5143bf1f486d5dfa71a38171d432>>; Rachel Olding, 'AFP Issues Warrants for Australian ISIL Fighters Khaled Sharrouf and Mohamed Elomar', *The Sydney Morning Herald* (online), 29 July 2014 <<http://www.smh.com.au/national/afp-issues-warrants-for-australian-isil-fighters-khaled-sharrouf-and-mohamed-elomar-20140729-zy8lg.html>>.

⁷⁴ At the time of writing, reports were made that Khaled Sharrouf might in fact not be dead: see, eg, Paul Bibby, 'Australian Terrorist Khaled Sharrouf May Be Alive, His Family's Barrister Says', *The Sydney Morning Herald* (Sydney), 15 February 2016, 10; David Wroe, 'Khaled Sharrouf Likely to Have Escaped Drone Attack', *The Sydney Morning Herald* (Sydney), 29 June 2015, 2.

⁷⁵ See Matt Brown and Suzanne Dredge, 'Australian Jihadists Khaled Sharrouf and Mohamed Elomar Accused of Enslaving Yazidi Women in Islamic State Stronghold', *ABC News* (online), 23 January 2015 <<http://www.abc.net.au/news/2015-01-22/australian-jihadists-accused-of-enslaving-yazidi-women/6032938>>.

⁷⁶ Olding, above n 73.

⁷⁷ Anthony Bergin et al, *Gen Y Jihadists: Preventing Radicalisation in Australia* (Australian Strategic Policy Institute, 2015) 14.

that have committed widely documented atrocities and war crimes.⁷⁸ Further, while some of these crimes may have been committed by individuals, it is thought that some Australian fighters have, or had previously, as in the case of the deceased Elomar, taken up leadership roles within IS and JAN.⁷⁹ This raises the possibility that Australian nationals have been, are and may continue to be complicit in the planning and commission of war crimes on a larger scale. It should also be noted that several Australians have left the country to fight *against* terrorist organisations, with groups such as the Kurdish Peshmerga.⁸⁰ This group has also been accused of committing war crimes such as the execution of prisoners of war⁸¹ and ‘ethnic cleansing’.⁸²

⁷⁸ Office of the United Nations High Commissioner for Human Rights, *Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated Groups*, 28th sess, Agenda Item 2, UN Doc A/HRC/28/18 (13 March 2015), 5–11 [16]–[49]; ‘ISIL May Have Committed Genocide, War Crimes in Iraq, Says Human Rights Report’, *United Nations News Centre* (online), 19 March 2015 <<http://www.un.org/apps/news/story.asp?NewsID=50369#.VvKqgU3VyUL>>; Human Rights Watch, ‘He Didn’t Have to Die’: Indiscriminate Attacks by Opposition Groups in Syria (2015) 3, 11–13, 16; Paulo Sérgio Pinheiro et al, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, 27th sess, Agenda Item 4, UN Doc A/HRC/27/60 (13 August 2014), 5–21 [20]–[135]; ‘Iraq: ISIS Escapees Describe Systematic Rape — Yezidi Survivors in Need of Urgent Care’, *Human Rights Watch* (online), 14 April 2015 <<https://www.hrw.org/news/2015/04/14/iraq-isis-escapees-describe-systematic-rape>>.

⁷⁹ Bergin et al, above n 77, 14–15.

⁸⁰ Ian Walker, ‘Ashley Johnston Killed Fighting Death Cult in Syria Farewelled by Australia’s Kurdish Community’, *The Daily Telegraph* (online), 2 April 2015 <<http://www.dailytelegraph.com.au/news/nsw/ashley-johnston-killed-fighting-death-cult-in-syria-farewelled-by-australias-kurdish-community/story-fni0cx12-1227288992194?sv=13532e7b328bafa9f478c24bf8e9a54e>>; Paul Toohey, ‘Union Leader Matthew Gardiner in Legal Limbo after Returning from Fighting ISIS in Syria’, *news.com.au* (online), 13 June 2015 <<http://www.news.com.au/national/union-leader-matthew-gardiner-in-legal-limbo-after-returning-from-fighting-isis-in-syria/story-fncynjr2-1227396361183>>; Stephanie Huang, ‘Not All Foreign Fighters Are Jihadists’, *The Drum* (online), 5 June 2015 <<http://www.abc.net.au/news/2015-06-05/huang-not-all-foreign-fighters-are-jihadists/6523562>>; Michael Safi, ‘Melbourne Man Charged with Allegedly Trying to Join Kurdish Fight against Isis’, *The Guardian* (online), 28 July 2015 <<http://www.theguardian.com/world/2015/jul/28/melbourne-man-charged-after-allegedly-trying-to-join-fight-against-islamic-state>>.

⁸¹ Wladimir van Wilgenburg, ‘Kurds Worried War Crime Accusations Could Ruin Kurdish Image’, *Middle East Eye* (online), 1 November 2014 <<http://www.middleeasteye.net/news/kurds-worried-war-crime-accusations-could-ruin-kurdish-image-1725171872>>; ‘Iraq’s Kurdish Fighters Accused of War Crime’, *Al Jazeera* (online), 4 December 2014 <<http://www.aljazeera.com/video/middleeast/2014/12/iraq-kurdish-fighters-accused-war-crime-2014124164830810959.html>>.

While some of these events are the subject of investigation in the context of terrorism offences,⁸³ no war crimes investigation has yet been reported. It is also regrettable that the potential commission of war crimes in this context is entirely absent from public discourse.

B Immigration

Immigration is another pivotal, albeit less publicly visible, area in the examination of the presence of suspected war criminals in Australia. Given the importance of immigration to Australia's demographic make-up, the apparent lack of interest in post-conflict justice is of serious concern. In the 2015–16 financial year, Australia plans to grant more than 25 000 humanitarian visas to persons seeking asylum, with almost half of these to be given to people fleeing the armed conflicts in Syria and Iraq.⁸⁴ While levels of humanitarian immigration have fluctuated over time, Australia has consistently accepted asylum applicants from all major armed conflicts since the Second World War, including the former Yugoslavia, East Timor, Sri Lanka, Sudan and Afghanistan.⁸⁵ That Australia accepts asylum seekers from conflict-affected areas does not itself indicate that there are war criminals in Australia, nor does it necessarily indicate that immigration screening is inadequate. While media coverage, from time to time, refers to suspected war criminals from contemporary conflicts residing in Australia, without sufficient investment of

⁸² See Sara Elizabeth Williams, 'Destroying Homes for Kurdistan', *Foreign Policy* (online), 23 July 2015 <<http://foreignpolicy.com/2015/07/23/peshmerga-war-crimes-ethnic-cleansing-islamic-state-iraq>>.

⁸³ See, eg, Donna Field, 'Anti-Islamic State Fighter Ashley Dyball Arrives Back in Australia, Family Asks for Amnesty', *ABC News* (online), 7 December 2015 <<http://www.abc.net.au/news/2015-12-06/anti-islamic-state-fighter-ashley-dyball-family-ask-for-amnesty/7005562>>.

⁸⁴ Tony Abbott et al, 'The Syrian and Iraqi Humanitarian Crisis' (Joint Media Release, 9 September 2015) <http://foreignminister.gov.au/releases/Pages/2015/jb_mr_150909a.aspx>; Anna Henderson and Chris Uhlmann, 'Asylum Seeker Intake Explained: Who Will Come to Australia under the Government's Plan?', *ABC News* (online), 9 September 2015 <<http://www.abc.net.au/news/2015-09-09/refugee-intake-plan-who-will-come-to-australia/6762278>>.

⁸⁵ Department of Immigration and Border Protection (Cth), *Fact Sheet — More than 65 Years of Post-War Migration* <<https://www.border.gov.au/about/corporate/information/fact-sheets/04fifty>>; Victoria Mence, Simone Gangell and Ryan Tebb, *A History of the Department of Immigration: Managing Migration to Australia* (June 2015) 62 <<https://www.border.gov.au/CorporateInformation/Documents/immigration-history.pdf>>.

investigative resources it is impossible to conclusively determine the numbers of suspected war criminals in Australia at present.⁸⁶

1 *Post-Second World War Immigration*

In the post-Second World War period, significant volumes of migrants arrived in Australia from Europe.⁸⁷ Australian immigration policy has, since its inception after the Second World War, likely sought to balance the national interest in population growth against the obvious need to screen migration applicants for involvement in crimes of mass atrocity. After the war, Australia's first Immigration Minister Arthur Calwell prioritised the need to increase the Australian population through migration.⁸⁸ Labour shortage was the primary driver in this respect, but security considerations also suggested that a larger population would enable the country to better defend itself.⁸⁹ Calwell suggested that in order to capably defend against 'those hungry, covetous eyes ... still looking our way',⁹⁰ self-sufficiency and development were essential. These goals could only be achieved by dramatic population growth.⁹¹ Together these imperatives were marketed with the 'populate or perish' slogan.⁹² In 1947, Calwell sought approval from Prime Minister Chifley to sign an agreement with the International Refugee Organisation ('IRO') which would see Austral-

⁸⁶ See comments of Mark Aarons on *The 7.30 Report*:

The anecdotal evidence of war criminals living in Australia from contemporary wars, from say Pinochet's Chile, from the Khmer Rouge atrocities of the mid-1970s onwards, from Afghanistan and indeed from even more contemporary wars such as the Balkans wars of the 1990s, is absolutely overwhelming.

ABC Television, 'Labour Considers Fresh War Criminal Investigation', *The 7.30 Report*, 29 April 2004 (Mark Aarons) <<http://www.abc.net.au/7.30/content/2004/s1098027.htm>>. See also 'Burmese War Criminal Claims There Are Others in Australia', *Herald Sun* (online), 19 July 2011 <<http://www.heraldsun.com.au/news/australian-citizen-htoo-htoo-han-admits-war-crimes-in-burma/story-e6frf7jo-1226097047030>>.

⁸⁷ Department of Immigration and Multicultural Affairs (Cth), *Immigration: Federation to Century's End 1901-2000* (2001) 4-7.

⁸⁸ Mence, Gangell and Tebb, above n 85, 26; Aarons, *War Criminals Welcome*, above n 18, 244-5.

⁸⁹ Mence, Gangell and Tebb, above n 85, 26; Aarons, *War Criminals Welcome*, above n 18, 244-5.

⁹⁰ ABC, 'Broadcast by Minister for Immigration' *ABC News Review*, 7 January 1949 (Arthur Calwell), 4.

⁹¹ Aarons, *War Criminals Welcome*, above n 18, 245.

⁹² *Ibid*; Mence, Gangell and Tebb, above n 85, 26.

ia select an annual intake of 12 000 Baltic refugees.⁹³ In its entirety, Australia's migrant intake after the war to 1959 was approximately 1.2 million.⁹⁴

The great competition for desirable refugees, Australia's apparently urgent need for a larger workforce and international pressure from British administration, combined to concentrate the Australian demand for displaced persons. It became such that the very limited war crimes screening procedures relied upon by Australian, Allied and IRO officials appear to have done little to prevent Nazi collaborators, involved in the commission of crimes of mass atrocity, from entering Australia via Calwell's Displaced Persons program.⁹⁵ The political pressures, both domestic and international, under which Calwell was working, arguably contributed to his zeal for ensuring the success of his post-war migration program.⁹⁶ Neither he nor his Liberal successor Harold Holt, were interested in accepting the delay or reduced migration intake necessary to allow adequate war crimes screening mechanisms to be put in place.⁹⁷ International pressure to prosecute war criminals waned quickly and was replaced by the perceived utility of fascist intelligence assets in the Cold War.⁹⁸ Together, these political constellations encouraged Australian governments to turn a blind eye to the presence of European war crimes suspects from the late 1940s until the late 1980s.⁹⁹

Given the numbers of displaced persons accepted from states which had at different times been occupied by Nazi Germany, careful screening of intakes was important if war crimes suspects were to be denied safe haven and anonymity in Australia. The accounts of the effectiveness of Australian screening processes vary markedly. The Department of Immigration¹⁰⁰ maintains that detailed scrutiny of applicants prevented war criminals

⁹³ Mence, Gangell and Tebb, above n 85, 28 citing James Jupp (ed), *The Australian People: An Encyclopedia of the Nation, Its People and Their Origins* (Cambridge University Press, 2nd ed, 2001) 39.

⁹⁴ Menzies, above n 19, 33.

⁹⁵ See generally Mence, Gangell and Tebb, above n 85, 28.

⁹⁶ Aarons, *War Criminals Welcome*, above n 18, 258.

⁹⁷ *Ibid* 252, 259–60.

⁹⁸ See Mark Aarons, 'The Search for Nazi War Criminals in Australia' (2012) 26 *Australian Journal of Jewish Studies* 164, 164.

⁹⁹ See generally Aarons, *War Criminals Welcome*, above n 18; *ibid*.

¹⁰⁰ In this article, 'Department of Immigration' refers generally to Australia's department overseeing immigration. This body is currently called the Department of Immigration and Border Protection (Cth), but has had many previous official names.

entering Australia,¹⁰¹ yet other commentators including Mark Aarons allege that Nazi war criminals were assisted in seeking refuge in Australia in the belief that their experience operating against communist intelligence would provide valuable assistance.¹⁰² The middle ground appears to be occupied by the Menzies Review, wherein Menzies examined government archival material and concluded that at least 70 suspects had been accepted as refugees in Australia.¹⁰³

2 *Immigration Screening in Contemporary Contexts*

Since the Menzies Review, there has been no large-scale or commissioned investigation into the entry of suspected war criminals into Australia. The Department of Immigration screens applicants in its assessment of applications, and refuses visas to persons suspected of involvement in war crimes, crimes against humanity and genocide.¹⁰⁴ In 2002, the War Crimes Screening Unit ('WCSU') was established in the Department of Immigration.¹⁰⁵ The WCSU focuses on screening applicants arriving from countries afflicted by conflict, where there have been human rights violations. A Movement Alert List ('MAL') includes names of individuals suspected of involvement in war crimes and other serious crimes.¹⁰⁶ In 2003–4, 726 cases were referred to the WCSU;¹⁰⁷ in 2004–5, there were 881 referrals;¹⁰⁸ 2006–7 saw 933 referrals;¹⁰⁹ during 2009–10 there were 369 referrals;¹¹⁰ in 2010–11, 495 referrals were made,¹¹¹ and 2011–12 saw 890 referrals.¹¹² The number of referrals to the

¹⁰¹ See, eg, Mence, Gangell and Tebb, above n 85, 28 which states that 'all [potential migrants] were carefully selected'.

¹⁰² Aarons, *War Criminals Welcome*, above n 18, 260.

¹⁰³ Menzies, above n 19, 120.

¹⁰⁴ Department of Immigration and Citizenship (Cth), *Annual Report 2009–10* (2010). The Department of Immigration has stated that 'war crimes screening is an essential element in maintaining the integrity of Australia's borders through identifying and preventing the entry of people suspected of war crimes, crimes against humanity and genocide': at 147.

¹⁰⁵ Department of Immigration and Multicultural and Indigenous Affairs (Cth), *2003–04 Annual Report* (2004) 82.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ Department of Immigration and Multicultural and Indigenous Affairs (Cth), *2004–05 Annual Report* (2005) 112.

¹⁰⁹ Department of Immigration and Citizenship (Cth), *Annual Report 2006–07* (2007) 115.

¹¹⁰ Department of Immigration and Citizenship (Cth), *Annual Report 2009–10* (2010) 147.

¹¹¹ Department of Immigration and Citizenship (Cth), *Annual Report 2010–11* (2011) 145.

WCSU in 2012–13 and 2013–14 is not readily available, and unknown at the time of writing. During 2005–6, a War Crimes Task Force operated for a short amount of time and with a limited scope within the Department of Immigration to investigate ‘a discrete set of cases’, which amounted to 82 cases in total.¹¹³ Seven of these cases were referred to the AFP for evaluation,¹¹⁴ although a lack of additional information on these investigations and a dearth of locally initiated cases relating to war crimes, indicate that none of these cases reached the trial stage. After the winding up of the War Crimes Task Force, the Department continued to review a further 15 cases, but acknowledged that these reviews ‘did not necessarily relate to war crimes.’¹¹⁵ Whether the current Government plans to enact a similar task force with regard to the influx of refugees expected from the current Middle Eastern conflicts, remains to be seen.

3 *Article 1F Exclusion Clause and the Character Test*

Suspected war criminals are described by the Department of Immigration as ‘controversial visa applicants’ and ‘people of concern’,¹¹⁶ given the need for national security and public interest to be considered and weighed in immigration processing. The Department of Immigration has the option pursuant to the *Migration Act 1958* (Cth) (*‘Migration Act’*)¹¹⁷ and *Convention Relating to the Status of Refugees* (*‘Refugee Convention’*)¹¹⁸ to refuse entry to protection

¹¹² Department of Immigration and Citizenship (Cth), *Annual Report 2011–12* (2012) 296. During some reporting years, 2005–6, 2007–8 and 2008–9, the number of referrals made to the WCSU was not noted in Annual Reports despite the Department having the relevant information (in 2005–6, 798 referrals were made, during 2007–8 there were 674 referrals and in 2008–9 there were 813): Scott Ludlam, *Australian Immigration and War Crimes Screening Unit*, *The Australian Greens* (25 March 2011) <<http://scott-ludlam.greensmps.org.au/content/questions-notice/australian-immigration-and-war-crimes-screening-unit>>.

¹¹³ Sandi Logan, National Communications Manager, Department of Immigration and Multicultural Affairs (Cth), ‘War Crimes Unit Open’, *The Sun-Herald* (online), 28 January 2007 <<https://web.archive.org/web/20131008042009/http://www.immi.gov.au/media/letters/letters07/le07005.htm>>.

¹¹⁴ Tom Hyland, ‘Australia Kills Off War Crimes Unit’, *The Sunday Age* (Melbourne), 21 January 2007, 1, 4.

¹¹⁵ *Ibid* 1.

¹¹⁶ Department of Immigration and Border Protection (Cth), *Fact Sheet — Controversial Visa Applicants* <<https://www.border.gov.au/about/corporate/information/fact-sheets/78controversial>>.

¹¹⁷ See *Migration Act 1958* (Cth) s 36(2C).

¹¹⁸ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954). Australia acceded to the *Refugee Convention* in 1954:

visa applicants suspected of war crimes, crimes against humanity and other serious international crimes. Article 1F of the *Refugee Convention* provides:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.¹¹⁹

In practice, the Department of Immigration has refused a number of protection visa applications on the basis of the art 1F(a) exclusion clause. For example, from 1999 to 2010, 38 protection visa applications were refused on the basis of this clause.¹²⁰ Cases involving such refusals are subject to review in the Administrative Appeals Tribunal,¹²¹ and can be appealed to the Federal Court of Australia.¹²²

United Nations, *Convention Relating to the Status of Refugees* (8 April 1966) United Nations Treaty Collection <https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en>.

¹¹⁹ See also Alison Duxbury, 'Excluding the Undesirable: Interpreting Article 1F(a) of the *Refugee Convention* in Australia' in David A Blumenthal and Timothy L H McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (Koninklijke Brill, 2008) 259.

¹²⁰ Ludlam, above n 112.

¹²¹ See, eg, *SAL v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] AATA 1164 (12 November 2002); *SAH v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] AATA 263 (18 April 2002); *AXOIB v Minister for Immigration and Multicultural Affairs* [2002] AATA 365 (17 May 2002); *Re W97/164 and Minister for Immigration and Multicultural Affairs* (1998) 51 ALD 432.

¹²² See, eg, *SHCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 229 (24 March 2003); *Tchoylak v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 302; *SZITR v Minister for Immigration and Multicultural Affairs* (2006) 221 FCR 583; *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1588 (19 December 2003), revd (2005) 147 FCR 1; *Al Tekriti v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 138 FCR 60; *WAKN v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 138 FCR 579. See also Joseph Rikhof, *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (Republic of Letters, 2012) 158–62, 210–14.

In addition to the exclusion clause in refugee applications, a person's character is an important consideration in immigration processes.¹²³ Where an applicant is seeking entry to Australia through any immigration channel, past involvement in war crimes and crimes against humanity is directly relevant to an applicant's character and can be considered in general immigration contexts (for example, in non-protection visa applications).¹²⁴ The *Migration Act* also enables the Minister to cancel visas on the basis of past criminal conduct and failure of the character test.¹²⁵

4 *Deportation of Non-Citizens or Revocation of Citizenship*

Menzies considered in his review what measures could be taken to bring war criminals to justice under existing domestic laws;¹²⁶ deportation and revocation of citizenship were two options examined in the broader immigration context as it applied at the time.¹²⁷

Menzies had considered but discounted the possibility of deportation, as given the lapse in time since the alleged commission of offences and his investigations, suspected war criminals had since become Australian citizens.¹²⁸ The *Migration Act* enables non-citizens to be deported, and where suspected war criminals reside in Australia and have not attained citizenship, deportation is an option, although an uncertain one.¹²⁹

The *Convention Relating to the Status of Stateless Persons* ('*Stateless Persons Convention*')¹³⁰ and the *Convention on the Reduction of Statelessness* ('*Reduc-*

¹²³ *Migration Act* s 501.

¹²⁴ Joseph Rikhof, 'War Criminals Not Welcome; How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context' (2009) 21 *International Journal of Refugee Law* 453, 468.

¹²⁵ *Migrations Act* ss 501(2), (6).

¹²⁶ Menzies, above n 19, 149–74.

¹²⁷ *Ibid* 161–2.

¹²⁸ *Ibid* 161.

¹²⁹ See *Migration Act* ss 200–6; *ibid*. The Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (Cth) sch 1 item 16 also proposes changes to the *Migration Act* whereby a non-citizen would be considered to be ineligible for a protection visa if the minister has serious reasons to consider that the person has '(a) ... committed a crime against peace, a war crime or a crime against humanity ... or (b) the non-citizen committed a serious non-political crime before entering Australia; or (c) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations'.

¹³⁰ *Convention Relating to the Status of Stateless Persons*, opened for signature on 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960). Australia acceded to the *Stateless Persons Convention* on 13 December 1973; United Nations, *Convention Relating to the Status of Stateless Persons* (8 April 2016) United Nations Treaty Collection

tion of Statelessness Convention')¹³¹ are key international treaties ratified by Australia, and relevant considerations in the revocation of citizenship.¹³² Article 1 of the *Stateless Persons Convention* provides that it shall have no application to suspected war criminals (with wording mirroring art 1F of the *Refugee Convention*).¹³³ In any event, art 31 of the *Stateless Persons Convention* provides that a contracting state 'shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.'¹³⁴ These grounds may well be viewed as encompassing war crimes. For instance, it is well-established in international criminal law that acts of terror perpetrated on civilian populations may constitute mass atrocity crimes in certain instances.¹³⁵

The *Reduction of Statelessness Convention* provides that, notwithstanding the provisions of the Convention, a person may be deprived of nationality in cases 'where the nationality has been obtained by misrepresentation or fraud.'¹³⁶ Menzies in his review made the distinction between obtaining entry into Australia by fraudulent means on the one hand, and obtaining nationality by fraud on the other, and as the citizenship forms did not ask questions about war crimes in the past, the option of denaturalisation was limited.¹³⁷ At present, an application for Australian citizenship requires an applicant to answer questions about their good character and whether they have 'committed, or been involved in the commission of war crimes or crimes against humanity or human rights overseas or in Australia.'¹³⁸

<https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&lang=en>.

¹³¹ *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 6 June 1960). Australia acceded to the *Reduction of Statelessness Convention*, on 13 December 1973; United Nations, *Convention on the Reduction of Statelessness* (8 April 2016) United Nations Treaty Collection <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en>.

¹³² See also Menzies, above n 19, 156–9; Gillian Triggs, 'Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?' (1987) 16 *Melbourne University Law Review* 382, 399.

¹³³ *Stateless Persons Convention* art 1(2)(iii).

¹³⁴ *Ibid* art 31.

¹³⁵ William A Schabas, *War Crimes and Human Rights: Essays on the Death Penalty, Justice and Accountability* (Cameron May, 2008) 855–62.

¹³⁶ *Reduction of Statelessness Convention* art 8(2).

¹³⁷ Menzies, above n 19, 158–9.

¹³⁸ See, eg, Department of Immigration and Border Protection (Cth), *Application for Australian Citizenship: General Eligibility (Form 1300t)* (2015) 19 <<https://www.border.gov.au/Forms/Documents/1300t.pdf>>; Department of Immigration and

Revoking the citizenship of suspected war criminals is theoretically possible. However, this option is untested and has inherent difficulties, as no Australian citizen has had his or her citizenship revoked for alleged involvement in war crimes or crimes of mass atrocity.¹³⁹ At the time of the Menzies Review, the *Australian Citizenship Act 1948* (Cth) only enabled the prosecution of a person within 10 years from the alleged commission of an offence, including where a person had procured citizenship through the provision of false or misleading information.¹⁴⁰ Suspected Nazi war criminals could not have their citizenship revoked at the time of the Menzies Review as the 10-year limitation period had passed. The *Australian Citizenship Act 2007* (Cth) (*'Australian Citizenship Act'*) no longer contains this 10-year limitation period for offences involving false statements and representations,¹⁴¹ and the Minister exercises the discretion to revoke citizenship for fraudulent offences.¹⁴²

In June 2015, the Abbott Government introduced the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth).¹⁴³ The Bill was passed on 3 December 2015 as the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (*'the Citizenship Amendment Act'*) and given Royal Assent on 11 December 2015. The *Citizenship Amendment Act* provides for automatic loss of citizenship for dual nationals where a person engages in certain forms of terrorist conduct,¹⁴⁴ or fights in the armed forces of a country at war with Australia.¹⁴⁵

Whilst the *Citizenship Amendment Act* is unlikely to apply to Australian war criminals directly, it may apply indirectly, as returning foreign fighters may be both guilty of war crimes and offences under the *Australian Citizenship Act*.¹⁴⁶ This legislation may well have some merit from a national security

Border Protection (Cth), *Application for Australian Citizenship: Other Situations (Form 1290)* (2015) 19 <<https://www.border.gov.au/Forms/Documents/1290.pdf>>.

¹³⁹ Hanson, above n 25, 10.

¹⁴⁰ Menzies, above n 19, 157 citing *Australian Citizenship Act 1948* (Cth) ss 21, 50, as repealed by *Australian Citizenship (Transitional and Consequential) Act 2007* (Cth).

¹⁴¹ *Australian Citizenship Act* s 50.

¹⁴² *Ibid* s 34(1).

¹⁴³ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2015, 7369 (Peter Dutton).

¹⁴⁴ *Citizenship Amendment Act* s 33AA.

¹⁴⁵ *Ibid* s 35.

¹⁴⁶ Ben Saul, Submission No 2 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill*, 30 June 2015, 4. The same may also be said more generally of the expansion of the counter-terrorism

perspective; it may, however, also have an undesirable effect with regard to prosecuting individuals for war crimes. Submissions on the proposed legislation highlighted that foreign fighters who wish to return to Australia may no longer be subject to Australian law enforcement measures such as arrest, prosecution and imprisonment.¹⁴⁷ Such individuals would also no longer be subject to efforts by Australian law enforcement agencies to secure their return to face justice in Australia via methods such as extradition, mutual legal assistance, the removal/deportation from Australia and the extradition and surrender of individuals to the International Criminal Court.¹⁴⁸

Of further concern is that Australian war criminals may also be dual citizens of states that are failed or failing and thus do not have the capacity, will and legal frameworks to bring such people to justice.¹⁴⁹ By stripping foreign fighters of Australian citizenship, the government may in effect be placing them in a position of impunity for any war crimes they have committed.

C Extradition

The avenue of extradition for suspected war criminals has not been specifically developed in policy terms, in contrast to domestic prosecutions. Historically, the *Extradition Act 1988* (Cth) (*'Extradition Act'*) was preceded by previous statutes governing the terms of extradition in Australia.¹⁵⁰ The *Extradition Act* enables the request of a person suspected of having committed an 'extradition offence', which is defined as an offence against a law of another country carrying the death penalty or a minimum 12 months' imprisonment, or an offence under a relevant extradition treaty.¹⁵¹ Relevantly, offences constituting war crimes, including murder or rape, fall under the general scope of the *Extradition Act*. An 'extradition country' is defined in the *Extradition Act* as including any country 'that is declared by the regulations to be an extradition country'.¹⁵² Whether Australia has entered into bilateral or multilateral agreements with other countries is critical in considering extradi-

regime under the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

¹⁴⁷ See, eg, Saul, above n 146, 1–2.

¹⁴⁸ Ibid. See also *International Criminal Court Act 2002* (Cth) pt 3.

¹⁴⁹ Saul, above n 146, 2.

¹⁵⁰ See *Extradition (Commonwealth Countries) Act 1966* (Cth); *Extradition (Foreign States) Act 1966* (Cth).

¹⁵¹ *Extradition Act* s 5 (definition of 'extradition offence').

¹⁵² Ibid s 5 (definition of 'extradition country').

tion as a potential option in dealing with war crimes suspects,¹⁵³ and accordingly, extradition is a process that is inherently subject to overarching political factors.

1 *Post-Second World War and Post-1980 Periods*

Particularly in the post-Second World War and post-1980 periods, extradition requests were subject to political and jurisdictional considerations. In the early 1960s, Australia received an extradition request from the Soviet Union regarding an alleged war criminal, Ervin Viks.¹⁵⁴ In his address to Parliament on 22 March 1961, Sir Garfield Barwick (the then Acting Minister for External Affairs and Attorney-General) noted that Australia was not obliged to answer a request for extradition of Viks to the Soviet Union.¹⁵⁵ Sir Garfield Barwick referred to the absence of an extradition treaty with the Soviet Union, and then made an oft-cited comment about two opposing considerations:

Two deep-seated human interests, however, may well here come into conflict. On the one hand, there is the utter abhorrence felt by Australians for those offences against humanity to which we give the generic name of war crimes. On the other hand, there is the right of this nation, by receiving people into this country, to enable men to turn their backs on past bitternesses and to make a new life for themselves and for their families in a happier community. This has formed a precious part of the heritage of the West, in which Australia has an honourable share.¹⁵⁶

Sir Garfield Barwick concluded his address stating that it was time to ‘close the chapter’ on war crimes prosecutions for Australia.¹⁵⁷ Irene Nemes argues that politicians should not hinder the application of the ‘full force of the law’ to prosecute suspected war criminals through rhetoric of ‘gratuitous benevolence’ in ‘preaching mercy and forgiveness’.¹⁵⁸ Graham Blewitt’s view is that

¹⁵³ See *Extradition Regulations 1988* (Cth); Attorney-General’s Department (Cth), *Fact Sheet 2 — Overview of the Extradition Process* <<https://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/Extradition/Pages/default.aspx>>.

¹⁵⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 22 March 1961, 449 (Sir Garfield Barwick).

¹⁵⁵ *Ibid* 450.

¹⁵⁶ *Ibid* 451.

¹⁵⁷ *Ibid* 452.

¹⁵⁸ Irene Nemes, ‘Punishing Nazi War Criminals in Australia: Issues of Law and Morality’ (1992) 4 *Current Issues in Criminal Justice* 141, 153.

the ‘political climate during those years was one of “let bygones be bygones,” and “let us bury our grudges along with the dead”.’¹⁵⁹

After the Menzies Review, Attorney-General Bowen addressed the Parliament on 24 February 1987 and stated that ‘[w]here serious war crimes are concerned this Government does not regard the chapter as closed.’¹⁶⁰ Regarding extradition, he noted that:

Mr Menzies, in his recommendations, placed emphasis on the possibility of extradition where investigations showed that serious charges of war crimes should be brought against particular individuals. The approach preferred by the Government is to conduct war crimes prosecutions in Australia. I would be concerned at the prospect of making special arrangements to extradite persons to countries with markedly different judicial systems.¹⁶¹

Gillian Triggs refers to this period as involving a ‘renewed political determination’ to investigate allegations of war criminals.¹⁶² The Hawke Government took on the initiatives of setting up and funding the SIU. Aarons believes that the decision of the Hawke Government to implement the recommendations of the Menzies Review, and implement the amended war crimes legislation ‘probably resulted from a combination of legal and political factors.’¹⁶³ For example, the Government was not keen on extradition because that would have pressured the Government to enter into negotiations and extradition treaties with Eastern European, Central European and mainly communist localities.¹⁶⁴ Aarons states that in light of the ‘historical and political sensitivities involved, this was never a viable option for Bob Hawke.’¹⁶⁵

2 *Extradition in Contemporary Contexts*

To date, Australia has only successfully extradited one suspected war criminal who has contested extradition — Dragan Vasiljkovic, who was transferred in July 2015 after fighting his extradition to Croatia for almost a decade.¹⁶⁶ It has

¹⁵⁹ Edelman et al, above n 22, 210.

¹⁶⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 1987, 594.

¹⁶¹ *Ibid* 595.

¹⁶² Triggs, ‘All Pity Choked’, above n 22, 123.

¹⁶³ Mark Aarons, *Sanctuary: Nazi Fugitives in Australia* (William Heinemann, 1989) 289.

¹⁶⁴ *Ibid* 289–90.

¹⁶⁵ *Ibid* 290.

¹⁶⁶ Natasha Robinson, ‘Dragan Put on Plane to Croatia’, *The Australian* (Sydney), 9 July 2015, 2. See also Nicola Berkovic, ‘High Court Clears Dragan for Extradition’, *The Australian* (Sydney), 31 March 2010, 1.

been reported that in 2007, Australia extradited suspected war criminal Anton Gudelj to Croatia, who had consented to his extradition.¹⁶⁷ In practical terms, extradition matters concerning suspected war criminals are lengthy, costly and involve protracted court proceedings. As discussed below, the extradition cases of Charles Zentai and Dragan Vasiljkovic have been highly litigated and protracted proceedings. Another high profile case involving Nazi war criminal suspect, Konrad Kalejs, was prematurely concluded when Kalejs died in November 2001.¹⁶⁸ Kalejs, a former Latvian soldier, migrated to Australia after the Second World War. In 2000, Latvia requested his extradition in relation to war crimes, and the matter was in the preliminary stages in the courts when he died.¹⁶⁹

Former Hungarian Royal Army soldier, Charles Zentai, was alleged to have committed a war crime in 1944 while stationed in Budapest. Zentai had migrated to Australia in 1950, and then gained citizenship in 1958. In 2005, Hungary requested Zentai's extradition.¹⁷⁰ The Minister for Home Affairs granted this request in 2009.¹⁷¹ On appeal, the Federal Court quashed the Minister's determination, ruling that the bilateral treaty did not permit extradition for retrospective offences.¹⁷² This was upheld by the Full Court,¹⁷³ and on 15 August 2012 the High Court of Australia upheld the decision to refuse Hungary's request to extradite Zentai.¹⁷⁴ Importantly, it was held that Zentai could not be extradited unless the Minister was satisfied of the existence of the specific offence of 'war crime' in Hungary in 1944.¹⁷⁵ Such offence was, however, only enacted in Hungary's domestic legislation in

¹⁶⁷ Natasha Robinson, 'Aussie Extradited for Croatia Trial', *The Australian* (Sydney), 12 January 2007, 3. See also 'Suspected War Criminal in Australia Sought', *The Age* (online), 13 September 2005 <<http://www.theage.com.au/news/national/suspected-war-criminal-in-australia-sought/2005/09/13/1126377279915.html>>.

¹⁶⁸ Barclay Crawford, 'Death the Last Word on Kalejs', *The Australian* (Sydney), 12 December 2001, 4.

¹⁶⁹ *Kalejs v Minister for Justice and Customs* (2001) 111 FCR 442; *Kalejs v Republic of Latvia* [2001] FCA 676 (6 June 2001).

¹⁷⁰ See generally *Zentai v O'Connor* [No 3] (2010) 187 FCR 495, 502 [6]–[7], 545 [218], 587 [350] (McKerracher J).

¹⁷¹ *Ibid* 505 [48].

¹⁷² *Ibid* 540–5 [184]–[214].

¹⁷³ *O'Connor v Zentai* (2011) 195 FCR 515.

¹⁷⁴ *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213.

¹⁷⁵ *Ibid* 241–3 [70]–[72] (Gummow, Crennan, Kiefel and Bell JJ).

1945.¹⁷⁶ Zentai's matter involved many court cases held over the course of seven years before its finalisation.¹⁷⁷

In February 2006, Croatia requested the extradition of former Red Berets paramilitary unit leader Dragan Vasiljkovic for alleged war crimes.¹⁷⁸ In 2006 the High Court upheld the constitutional validity of Australia's extradition laws in this case.¹⁷⁹ Numerous court cases led to the High Court decision in 2010 that no extradition objection was established.¹⁸⁰ In 2012, Minister for Home Affairs Jason Clare approved the extradition.¹⁸¹ In September 2013, Vasiljkovic's lawyers mounted a legal challenge in the Federal Court of Australia against his extradition on the grounds of delay.¹⁸² Counsel for the Government countered that the appellant's 'highly litigious' nature effectively delayed the Minister's approval.¹⁸³ On 8 July 2015 Vasiljkovic was finally deported back to Croatia.¹⁸⁴ By that date, his extradition had been contested in Australian courts over a nine-year period.¹⁸⁵

Recently, Bosnia withdrew its extradition request concerning Canberra resident Krunoslav Bonić. Bonić, a former Bosnian Croat soldier, was accused

¹⁷⁶ Ibid 231 [41]. Critically for the High Court judges, murder was not a war crime in Hungary during the Second World War. Had the Hungarian authorities requested extradition for the crime of murder, the decision may, presumably, have been different.

¹⁷⁷ The first Federal Court decision was handed down on 12 September 2006: *Zentai v Hungary* (2006) 153 FCR 104. The final High Court decision was handed down on 15 August 2012: *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213.

¹⁷⁸ *Snedden v Minister for Justice (Cth)* (2014) 230 FCR 82, 89 [28] (Middleton and Wigney JJ).

¹⁷⁹ *Vasiljkovic v Commonwealth* (2006) 227 CLR 614.

¹⁸⁰ *Croatia v Snedden* (2010) 241 CLR 461, 464–5 [3]–[5] (French CJ).

¹⁸¹ *Snedden (aka Vasiljkovic) v Minister for Justice (Cth)* (2013) 306 ALR 452, 460–2 [27].

¹⁸² Ibid. See also *Snedden v Minister for Justice (Cth)* (2014) 230 FCR 82; Pia Akerman, 'Delays "Fatal" to Dragan Extradition Bid', *The Australian* (Sydney), 25 September 2013, 6.

¹⁸³ Pia Akerman, 'Litigious Dragan Caused Legal Delay', *The Australian* (Sydney), 25 September 2013, 7.

¹⁸⁴ 'Captain Dragan: Serbian War Crimes Suspect Dragan Vasiljkovic Extradited from Australia', *ABC News* (online), 8 July 2015 <<http://www.abc.net.au/news/2015-07-08/war-crimes-suspect-captain-dragan-extradited-from-australia/6605248>>.

¹⁸⁵ *Vasiljkovic v Commonwealth* (2006) 227 CLR 614; *Vasiljkovic v Minister for Justice and Customs (Cth)* (2006) 234 ALR 643; *Snedden v Croatia* [2009] FCA 30 (3 February 2009); *Snedden v Croatia* (2009) 178 FCR 546; *Croatia v Snedden* (2010) 241 CLR 461; *Vasiljkovic v O'Connor* (2010) 276 ALR 326; *Vasiljkovic v O'Connor [No 2]* [2011] FCAFC 125 (30 September 2011); *Snedden (aka Vasiljkovic) v Minister for Justice (Cth)* (2013) 306 ALR 452; *Snedden v Minister for Justice (Cth)* (2014) 230 FCR 82.

of war crimes allegedly committed in 1993 in central Bosnia and migrated to Australia in the mid-1990s.¹⁸⁶

The extradition option presents potential obstacles in both political and legal terms. Issues arise regarding the requesting country's ability to provide a fair trial to an accused, and the protracted length and costs of extradition proceedings (and the potential for suspects to argue that delay is a relevant consideration in extradition refusals). While Australia's record of domestic prosecutions of suspected war criminals in the post-1980 period has been criticised on numerous fronts (for instance, the lack of successful convictions, the expense of domestic investigations and prosecutions and the delay in commencing prosecutions after the alleged commission of offences), the option of domestic prosecutions needs to be seriously considered in terms of future mechanisms for dealing with this issue. Where extradition is impracticable or refused, there should be the potential for Australia to prosecute suspects in its own courts. Arguably, one of the most critical lessons to take from the post-1980 prosecutions is that war crimes proceedings should be commenced as soon as practicable. Therefore, the legislative framework enabling domestic prosecutions of suspected war criminals should be entrenched as an ongoing option, rather than established via ad hoc responses to political and policy influences.

III CONCEPTUALISING AUSTRALIAN WAR CRIMES POLICY

Since the post-1980 domestic prosecutions, Australia's engagement with war crimes policy internationally has largely been limited to ratification and domestic incorporation of relevant international treaties and agreements. It has also provided political, financial and other assistance (for example, the referral of suspect names) to the International Criminal Tribunals for the Former Yugoslavia and Rwanda, Extraordinary Chambers in the Courts of Cambodia and the International Criminal Court.¹⁸⁷ Foreign policy and Australia's standing in the international community are relevant factors in the

¹⁸⁶ See Christopher Knaus, 'Former War Crimes Suspect Freed from Canberra Prison, Extradition Collapses', *The Canberra Times* (online), 22 January 2015 <<http://www.canberratimes.com.au/act-news/former-war-crimes-suspect-freed-from-canberra-prison-extradition-collapses-20150122-12vuxx.html>>.

¹⁸⁷ See Hanson, above n 25, 5.

implementation of such treaties and the provision of financial and other assistance.¹⁸⁸

A Domestic Incorporation of International Treaties

Australia has a history of conservatism regarding compliance with its international obligations regarding war crimes prosecutions.¹⁸⁹ In 1949, the *Genocide Convention Act 1949* (Cth) commenced operation pursuant to Australia's ratification of the *Genocide Convention*.¹⁹⁰ However, in 1999, in the case of *Nulyarimma v Thompson*,¹⁹¹ the majority held that in the absence of a domestic instrument specifically criminalising genocide, there was no law that facilitated the prosecution of genocide in Australian courts.¹⁹² This lacuna was filled by the passing of the *International Criminal Court (Consequential Amendments) Act 2002* (Cth), which created offences for genocide, war crimes and crimes against humanity under div 268 of the *Criminal Code*.¹⁹³ This necessary and welcome enactment means that Australia now has a comprehensive legislative apparatus for the prosecution of recent war crimes; however, given that the Act entered into effect in June 2002, there remain considerable gaps regarding the commission of war crimes in conflicts before that date.¹⁹⁴

Australia's ratification of the *Geneva Conventions* in 1949 was encapsulated in the *Geneva Conventions Act 1957* (Cth) ('*Geneva Conventions Act*'). Previously, the *Geneva Conventions Act* contained ss 7 and 10 which enabled prosecutions to be commenced against accuseds suspected of grave breaches of the *Geneva Conventions*, and gave certain Australian courts the jurisdiction

¹⁸⁸ See, eg, House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Advisory Report on International War Crimes Tribunal Bill 1994 and International War Crimes Tribunal (Consequential Amendments) Bill 1994* (1994) 16.

¹⁸⁹ See Gideon Boas, 'An Overview of Implementation by Australia of the Statute of the International Criminal Court' (2004) 2 *Journal of International Criminal Justice* 179, 180.

¹⁹⁰ *Genocide Convention Act 1949* (Cth) ss 1–5.

¹⁹¹ (1999) 96 FCR 153.

¹⁹² *Ibid* 166 [32]–[34] (Wilcox J), 173 [58]–[59] (Whitlam J); cf at 205 [186] (Merkel J). See also Andrew D Mitchell, 'Genocide, Human Rights Implementation and the Relationship between International and Domestic Law: *Nulyarimma v Thompson*' (2000) 24 *Melbourne University Law Review* 15, 32.

¹⁹³ *International Criminal Court (Consequential Amendments) Act 2002* (Cth) sch 1.

¹⁹⁴ See, eg, Hanson, above n 25, 8; Boas, 'War Crimes Prosecutions', above n 51, 323.

to hear such proceedings,¹⁹⁵ although no domestic prosecutions under the *Geneva Conventions Act* were ever initiated.¹⁹⁶ These provisions were repealed in 2002 by the *International Criminal Court (Consequential Amendments) Act 2002 (Cth)*.¹⁹⁷

In situations where an Australian citizen or resident goes overseas to assist incursions into foreign states, the *Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth)* ('*Crimes (Foreign Incursions and Recruitment) Act*') provided a mechanism for prosecution of such individuals.¹⁹⁸ In parliamentary discussions during the passage of the relevant Bill, examples cited in the Senate included 'terrorist forces' receiving training in Australia and then assisting in acts against the former Yugoslav Government, or Australians participating in the Middle East conflict at the time.¹⁹⁹ Under the *Crimes (Foreign Incursions and Recruitment) Act*, assisting incursions into foreign states with the requisite intent brought with it a maximum penalty of 20 years' imprisonment.²⁰⁰ The Act has since been repealed by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth)* with analogous provisions having been inserted into the *Criminal Code*. Hostage taking is also prohibited under the *Crimes (Hostages) Act 1989 (Cth)*, and is theoretically capable of being prosecuted in Australia.²⁰¹

Most significantly, Australia's enactment of the *International Criminal Court Act 2002 (Cth)* ('*ICC Act*'), which concerns broad matters of cooperation with the International Criminal Court,²⁰² raises pertinent domestic and

¹⁹⁵ *Geneva Conventions Act 1957 (Cth)* ss 7(1), 10(1), as repealed by *International Criminal Court (Consequential Amendments) Act 2002 (Cth)* sch 3 item 1.

¹⁹⁶ Katherine L Doherty and Timothy L H McCormack, "Complementarity" as a Catalyst for Comprehensive Domestic Penal Legislation' (1999) 5 *University of California Davis Journal of International Law and Policy* 147, 171.

¹⁹⁷ *International Criminal Court (Consequential Amendments) Act 2002 (Cth)* sch 3 item 1.

¹⁹⁸ *Crimes (Foreign Incursions and Recruitment) Act* ss 9A, 10, as repealed by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth)* sch 1 pt 2. The mechanism for prosecution is now contained in the *Criminal Code* ss 119.10–119.11.

¹⁹⁹ Commonwealth, *Parliamentary Debates*, Senate, 8 March 1987, 430 (John Button).

²⁰⁰ *Crimes (Foreign Incursions and Recruitment) Act* s 6, as repealed by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth)* sch 1 pt 2. The maximum penalty for the same offence now contained in *Criminal Code* s 119.1 is imprisonment for life.

²⁰¹ *Crimes (Hostages) Act 1989 (Cth)* s 10. The Act was created pursuant to Australia's ratification of the *International Convention against the Taking of Hostages*, opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983).

²⁰² It should be noted that the implementation of the *Rome Statute* crimes into Australian domestic criminal law was facilitated by the accompanying *International Criminal Court (Consequential Amendments) Act 2002 (Cth)* sch 1.

international policy issues. While Australia's incorporation of its domestic obligations under the *ICC Act* indicates a commitment to the principles of international criminal justice embodied in the *Rome Statute*, it also emphasises Australia's sovereignty, jurisdictional powers and scope over the enumerated crimes in the *Rome Statute*, including war crimes, crimes against humanity and genocide.²⁰³ Of particular importance is the principle of complementarity underpinning the International Criminal Court and its constituent instruments; in particular, this principle affirms Australia's primary responsibility for domestic prosecutions of crimes of mass atrocity.²⁰⁴ Despite this undertaking to prosecute war criminals domestically as a matter of primacy, there has not been a single prosecution in Australia since the enactment of the *ICC Act* in 2002, arguably reflecting both disinterest and a lack of clear policy.

B *Factors Impacting on Australian Government Policy*

Timothy McCormack and Gerry Simpson state that domestic prosecutions of war criminals 'have tended to be highly controversial, and occasionally embarrassing, attempts by national governments to respond to the prevailing public mood.'²⁰⁵ The reactive nature and the specific targeting of public concerns in the development of war crimes policy and legislation, is noted by Glenn O'Neil:

response to take action against alleged war crimes is not necessarily based on motivation to enforce humanitarian law or a sense of moral obligation. In my opinion, the response of governments to allegations of war crimes is based on a pragmatic approach to countering specific allegations raised by local and global communities and not on a uniform or systematic approach. The limited scope of the *War Crimes Amendment Act* (in its confinement to Europe) is evidence of this sort of approach.²⁰⁶

The public outrage around war crimes that precipitated the Menzies Review and pushed the Hawke Government to establish the SIU has been absent from Australian public debate for some time. Three main factors appear to have

²⁰³ See above nn 56–7 and accompanying text.

²⁰⁴ Boas, 'War Crimes Prosecutions', above n 51, 321–2.

²⁰⁵ Timothy L H McCormack and Gerry J Simpson, 'The International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions' (1994) 5 *Criminal Law Forum* 1, 9.

²⁰⁶ O'Neil, above n 22, 22.

kept this issue low on the agendas of all Australian governments since the Hawke Government.

The first is that governments have historically found it difficult to implement war crimes policy without alienating sections of the electorate. In recent times, Serbian community groups have given financial support to challenge the extradition of Vasiljkovic.²⁰⁷ Conversely, the relatively small size of these voter groups means that there is little political capital to be won from taking up the cause of one group, especially when it would mean alienating another. The challenge facing government is one of designing and implementing a policy framework which addresses the interests of justice without being derailed by skewed partisan views of the conflict in question. Given the controversial nature of the subject matter, and the marginal electoral incentive to government to engage with the topic in a relevant manner, it is not surprising that only two systematic attempts have been made in Australia's history.

The second factor is the absence of any real discourse around international criminal law in the popular media. For most, 'war crimes' is something that happens far away, in the Balkans and perhaps Africa, and is dealt with overseas in places such as the Hague. From time to time, an ageing Nazi or runaway Serb appears in the headlines of the popular press. However, these are aberrations, absent from the experience of most Australians. Popular discourse surrounding Australian participation in armed conflict very rarely considers the laws of war or war crimes. The consequence is that there is no electoral capital to be made on the issue from the broad majority of voters. These sentiments may be changing, however. The current conflict in the Middle East — and the war crimes that have been committed by groups such as IS as a result of it — have been visible on a world stage and have been disseminated on an unprecedented scale. The increased documentation and visibility of such atrocities may well increase a public (and thus political) desire to prosecute individuals within Australia who have participated in these crimes.

The impact on policy development of these two factors is largely to deny impetus to pragmatic, risk-averse governments. War crimes policy is outside the experience and expectation of most voters and those to whom it is a crucial issue are few. In the past, Australia's war crimes policy has been shaped by the need for governments to avoid scandalous injustice. The maintenance of a minimal immigration screening program, a token federal police unit with

²⁰⁷ Australian Broadcasting Corporation, 'Man Faces Extradition Over Alleged War Crimes', *The 7.30 Report*, 11 July 2006 (Rebecca Baillie) <<http://www.abc.net.au/7.30/content/2006/s1684144.htm>>.

limited capacity to investigate occasional public allegations, and extradition requests suffices to prevent such scandal.

The third factor is Australia's regional diplomatic interests. The international character of any war crimes investigation and prosecution means that the opprobrium attached to any finding of guilt may cast the actions and policies of another state in a very poor light even without a formal finding in regard to the policy itself. The issue of a writ against the president of Sri Lanka by a Tamil refugee, alleging responsibility for atrocities committed during the civil war there,²⁰⁸ is an example of the potential for international diplomatic embarrassment. The writ was issued on the eve of the Commonwealth Heads of Government Meeting in Perth, Australia, just as the President, Mahinda Rajapaksa, was about to depart for Australia.²⁰⁹ Prosecutions for war crimes under the *Criminal Code* require the approval of the Commonwealth Attorney-General.²¹⁰ In this case, the Attorney-General refused to approve the prosecution, but in some ways the damage had already been done.²¹¹ The story was front-page news and the allegations of abuse by Sri Lankan officials were given significant media attention during a regionally significant diplomatic event hosted by Australia.²¹²

The Australian Labor Party's 2007 election platform acknowledged that there 'are major gaps in Australia's domestic laws that allow such accused [war] criminals to enter and live here without fear of prosecution' and it committed itself to 'closing these loopholes'.²¹³ This commitment was dropped from subsequent platform statements and was not pursued when Labor was in government. This is in contrast to questions put to the Howard Government in 2004 by Tanya Plibersek MP, and comments in early 2007 by Joe Ludwig MP, highlighting the fact that while the machinery for the investiga-

²⁰⁸ See Gideon Boas, 'War Crimes in Australia's Too-Hard Basket?', *The Drum* (online), 27 October 2011 <<http://www.abc.net.au/unleashed/3604294.html>>.

²⁰⁹ 'War Crimes Case Decision Upsets Tamils', *ABC News* (online), 26 October 2011 <<http://www.abc.net.au/news/2011-10-26/tamil-community-upset-at-sri-lanka-decision/3600588>>.

²¹⁰ *Criminal Code* s 268.121. See also Boas, 'War Crimes in Australia's Too Hard Basket', above n 208.

²¹¹ Anna Hood and Monique Cormier, 'Prosecuting International Crimes in Australia: The Case of the Sri Lankan President' (2012) 13 *Melbourne Journal of International Law* 235, 237.

²¹² It should be noted that the prosecution would almost certainly have failed in any case, given the immunity of a visiting head of state: *ibid* 251. As such, publicity was likely the primary motivation behind the attempted private prosecution.

²¹³ Australian Labor Party, *National Platform and Constitution 2007* (7 August 2007) Parliament of Australia, 201 [75] <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fparty%2F1024541%22>>.

tion and prosecution of war crimes suspects had the potential to be highly effective, there remained legislative gaps and 'a lack of political will' to utilise this capacity.²¹⁴ The tension between these positions points to a decision-making process predicated on pragmatic risk-averse politics.

In contemporary times, while the focus and context has shifted to conflicts in other regions such as Syria and Iraq, the issue remains the same, with the migration of persons from countries afflicted by conflict and the likelihood of suspected war criminals residing in Australia. At minimum, what the Department of Immigration statistics and art 1F exclusion cases indicate is that suspected war criminals residing within, or attempting to seek entry into, Australia is an ongoing and live issue.²¹⁵ The true number of war criminals likely to be present within the jurisdiction remains unknown, although it may be inferred from comparisons with countries with similar immigration profiles. Canada and Australia, for instance, share similar immigration profiles, especially in terms of humanitarian intake.²¹⁶ Yet far greater resources are allocated to immigration screening, investigation and prosecution of war crimes suspects in Canada than Australia.²¹⁷ It is perhaps not surprising then that far fewer cases are identified in Australia than Canada, in spite of the similarities in source countries as regards the humanitarian migration intake.²¹⁸ One of the practical consequences of this disparity is that refugee communities are afflicted by the continued presence of people who were involved in atrocity crimes in the conflict zones from which they have fled. This represents a terrible and ongoing emotional and psychological burden for people who believe that they have 'escaped' their oppressors.²¹⁹ It will likely continue to be an issue as the refugee intake from the Middle Eastern conflicts increases — bringing both victims and perpetrators into Australia — and as Australian foreign fighters who have committed war crimes return home.

²¹⁴ Martin Wallace, 'Ultimate Atrocity — Special Investigation: Sixty Years after WWII, Is Australia Hiding the Most Evil War Criminals', *The Daily Telegraph* (Sydney), 18 June 2004, 27. See also Tom Hyland, 'War Crimes Controversy as Taskforce Is Wound Up', *The Sun-Herald* (Sydney), 21 January 2007, 36.

²¹⁵ See generally Duxbury, above n 119.

²¹⁶ Hanson, above n 25, 11.

²¹⁷ *Ibid* 10–12.

²¹⁸ It could further be suggested that the smaller resource allocation in Australia is likely to act as an incentive to people involved in war crimes making humanitarian visa applications.

²¹⁹ Mark Aarons' work on the subject includes reports of this kind of experience: see, eg, Aarons, *War Criminals Welcome*, above n 18, 35.

There has been a shift in contextual background from the Second World War, wherein Australia was an active participant and Australian troops were subjected to war crimes, to conflicts overseas that do not involve the participation of Australian military personnel. The amended *War Crimes Act* has no application to persons accused of committing war crimes in contemporary conflicts, unless the legislation is substantially revised with retrospective operation. The *International Criminal Court (Consequential Amendments) Act*, by contrast, does provide a legislative framework for the prosecution of war crimes in this modern context; however, as discussed above, in its current form, it is constrained temporally to crimes committed after 2002. Some associated policy considerations (though arguably not the predominant driving forces) were the recognition that suspected war criminals should not be immune from prosecution, and the pursuit of post-conflict justice in this jurisdiction. It is clear that public interest has predominantly shaped the government's policy decisions to enact specific war crimes legislation for domestic prosecutions.

It is arguable that in addition to the significance of community opinion in formulation of public policy, factors that should hold increasing relevance in contemporary times are the concept of universal jurisdiction, international relations in an interconnected global community, and the impact of rapidly developing norms of international criminal justice since the Second World War.

C *The Way Forward*

This article highlights the intermittent and ad hoc nature of Australia's legal and policy responses to the presence of suspected war criminals. It is apparent that the disadvantages to not having a firm policy position on this issue is the under-utilisation of existing avenues (no prosecutions, a poor extradition record, and immigration screening processes in need of qualitative and quantitative measurement) and a lack of progressive movement towards a set objective.

Andrew Menzies and Graham Blewitt, key figures in the post-1980 investigations, flagged the requirement for a clear war crimes policy.²²⁰ In recent times, Timothy McCormack and Fergus Hanson have reiterated the need for Australia to make a clear policy statement addressing the presence of suspect-

²²⁰ Menzies, above n 19, 180; Graham T Blewitt, 'The Australian Experience' in Bassiouni M Cherif (ed), *International Criminal Law* (Transnational Publishers, 2nd ed, 1999) vol 3, 301, 323.

ed war criminals.²²¹ The creation and enactment of such a statement should be based upon comprehensive and widespread consultation with the whole range of stakeholders that exist with regard to the issue of war crimes.²²² Such consultation should also be conducted independently of media attention. Whilst it may assist in raising public awareness on war crimes atrocities, excessive media attention may also emotionalise and trivialise the discourse surrounding the issue, and may unduly shift focus from the many questions that must be resolved if Australia is to have a strong and clear war crimes policy.

The predominant impetus for such a policy should be justice for victims and the continual pursuit of the ideal that the international community will not allow atrocities such as genocide, war crimes and crimes against humanity to be committed with impunity.²²³ However, there is also a political incentive, as inaction and a continuing lack of a clear policy statement — especially when such visible and monstrous crimes are being committed in the Middle East — may diminish Australia's standing amongst the international community.

Comparatively, the Canadian Government has stated its policy on this issue in unambiguous terms:

The policy of the Canadian Government is unequivocal: Canada is not and will not become a safe haven for persons involved in war crimes, crimes against humanity or other reprehensible acts regardless of when or where they occurred. Under Canada's War Crimes Program, war criminals and those responsible for crimes against humanity are not welcome in Canada, whether the crimes were committed during World War II or more recently.²²⁴

The Canadian Government's policy statement is supported by a comprehensive and coordinated framework, with formal partnerships between key agencies. Canada's War Crimes Program includes the Department of Justice, Canada Border Services Agency, Citizenship and Immigration Canada, and

²²¹ Tim McCormack, 'Investigating and Prosecuting War Crimes and Crimes against Humanity' on *Human Rights Law Centre* (3 June 2010) <<http://www.hrlc.org.au/investigating-and-prosecuting-war-crimes-and-crimes-against-humanity>>; Hanson, above n 25, 13.

²²² Such stakeholders may include: government departments; law enforcement agencies; law reform bodies; community organisations that are comprised of stakeholders from conflict zones (past and present); academics; and other interested parties.

²²³ See *Rome Statute* Preamble.

²²⁴ Canada Border Services Agency, *Canada's War Crimes Program* (16 August 2012) <<http://cbsa-asfc.gc.ca/security-securite/wc-cg/>>.

the Royal Canadian Mounted Police.²²⁵ Canada first established the program in 1998, and provided annual funding of \$15.6 million for the first three years.²²⁶ The Canadian Government has reported on the successes of the War Crimes Program, and has implemented pilot programs and initiatives on a rolling basis. In addition, the War Crimes Program has increased public awareness of the issue in Canada.²²⁷

As for Australia, no such policy has been stated. The Department of Immigration has previously chaired an inter-departmental working group involving representatives from the AFP, Attorney-General's Department, CDP, Department of Foreign Affairs and Trade, Customs, Office of National Assessments, and others.²²⁸ This working group focused on war crimes-related issues arising during visa processes in cooperation with other key departments and agencies. The best practice model of Canada's War Crimes Program involves formal coordination between the government departments, and a focus on addressing the problem of suspected war criminals finding refuge in Canada going beyond migration screening. Australia should follow suit.²²⁹

Any future policy response should also be cognisant of current Australian legislative shortcomings and draw upon advances made in other jurisdictions such as the United Kingdom, which has passed retrospective legislation with regard to genocide, war crimes and crimes against humanity. In 2009, the UK Parliament passed the *Coroners and Justice Act 2009* (UK) c 25, which amended ss 51 and 58 of the *International Criminal Court Act 2001* (UK) c 17.²³⁰ The amendment provides that the sections now apply to acts committed on or after 1 January 1991 and they now cover a larger range of conflicts including the war in the former Yugoslavia and the Rwandan genocide. In comparison, Australia's own *ICC Act* does not operate retrospectively to

²²⁵ Department of Justice (Can), *War Crimes Program* (25 February 2016) <<http://justice.gc.ca/eng/cj-jp/wc-cdg/prog.html>>.

²²⁶ Canada Border Services Agency et al, *Canada's Program on Crimes against Humanity and War Crimes: Eighth Annual Report 2004–2005* (2005) <<http://cbsa-asfc.gc.ca/security-securite/wc-cg/wc-cg2005-eng.html>>.

²²⁷ *Ibid.*

²²⁸ See Department of Immigration, above nn 109–13.

²²⁹ See Department of Justice (Can), above n 225.

²³⁰ *Coroners and Justice Act 2009* (UK) c 25, s 70. Sections 51 and 58 of the *International Criminal Court Act 2001* (UK) c 17 deal with genocide, war crimes and crimes against humanity.

crimes committed before the commencement of the Act²³¹ and thus an ‘impunity gap’ still exists within the Australian legislation.

Finally, immigration and extradition cannot be effective standalone mechanisms. Any policy framework must be buttressed by a renewed focus on domestic investigations and prosecutions, consistent with our domestic and international obligations.²³² Indeed, there may be no more propitious time than the present. Certain historical impediments — such as unreliable or unavailable eyewitness evidence — which plagued previous investigations and prosecutions,²³³ may now be less significant than ever. This is due to the unprecedented proliferation of the use of audiovisual devices in conflict zones and the dissemination of recorded material via the internet and social media. The extent to which many perpetrators of war crimes, including IS, now use technology to record and disseminate their crimes, may assist modern day prosecutors in much the same manner as the meticulous record keeping of the Nazis assisted the prosecutors at Nuremberg.²³⁴

This emphasis on investigation and prosecution ought to be considered in the context of the significant developments over the past two decades in relation to the conduct of international, and increasingly domestic, war crimes proceedings. While significant difficulties still exist with the conduct of such proceedings, especially in countries like Australia employing universal jurisdiction, much has changed since Australia’s past attempts. A wealth of expertise and knowledge may be drawn from the experience of the various ad hoc and hybrid war crimes tribunals,²³⁵ and now the International Criminal Court. These jurisdictions have not only developed a comprehensive body of jurisprudence on the substantive and procedural law, but also a set of practices to address the recurring difficulties associated with war crimes proceedings involving events that occurred in a distant land, and often a number of years earlier. The use of effective investigative techniques, the

²³¹ The substantive components commenced on 26 September 2002: *ICC Act* s 2(1). See generally Shirley Scott, ‘Why Wasn’t Genocide a Crime in Australia? Accounting for the Half-Century Delay in Australia Implementing the Genocide Convention’ (2004) 10(1) *Australian Journal of Human Rights* 159; Tim McCormack, ‘Crimes of War Get Lost in Law Limbo’, *The Age* (Melbourne), 20 July 2011, 17.

²³² See, eg, *Convention I* art 49; *Convention II* art 50; *Convention III* art 129; *Convention IV* art 146; *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Genocide Convention* arts I, V.

²³³ See above n 51 and accompanying text.

²³⁴ Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Alfred A Knopf, 1992) 57.

²³⁵ In particular, the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and the Special Court for Sierra Leone.

securing of evidence, including evidence of fluid chains of command, the protection of victims and witnesses and the cooperation with international, national and non-governmental agencies, are all examples of areas where much has been learnt over the past 20 years. Perhaps enthused by this, a number of countries such as France,²³⁶ Germany,²³⁷ Canada²³⁸ and the Netherlands,²³⁹ have also initiated their own domestic proceedings against alleged war criminals residing in their respective jurisdictions, and have done so with increasing success. The time has now come for Australia to build on this vast expertise and find a renewed willingness to consider these avenues.

IV CONCLUSION

The development of specific war crimes policy in Australia has been limited to the domestic prosecutions in the aftermath of the Second World War, and in the post-1980 period. Drivers for the formulation of such policy objectives include public outcry and attention on war crimes and criminals related to Australia, foreign policy and geopolitical influences, international and diplomatic standing, and developing norms of post-conflict justice. In the case of the domestic prosecutions of Japanese accused, Australia's contribution formed part of a coordinated effort between Allied nations on both domestic and international levels after the cessation of the Second World War. The post-1980 prosecutions are a telling study into the importance of public interest in war crimes policy formation. Media reports on the presence of suspected war criminals to the public have given rise to a new generation of Australians developing an understanding of war crimes during the Second World War, and knowledge of the presence of suspected war criminals in this country. This, in turn, has led to the inquiry and political support for the war crimes investigations and prosecutions that ensued. Since the Hawke Government's establishment of the SIU, the amended *War Crimes Act* and subsequent

²³⁶ See, eg, Cour d'Assises de Paris [Court of Assizes of Paris], 13/0033, 14 March 2014.

²³⁷ See, eg, Bundesverfassungsgericht [German Constitutional Court], 2 BvR 1290/99, 12 December 2000 ('*Jorgic case*').

²³⁸ See, eg, *R v Munyaneza* [2009] QJ 4913 (Quebec Superior Court). See also Canada Border Services Agency, *Canada's Program on Crimes Against Humanity and War Crimes* (27 March 2012) <<http://www.cbsa.gc.ca/security-securite/wc-cg/wc-cg2011-eng.html#c5x7>>.

²³⁹ See, eg, *Prosecutor v Sébastien N*, Rotterdam District Court, Case No 20-003852-06, 7 April 2004 <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3ARBROT%3A2004%3AAO7287>>; *Prosecutor v Frans van A*, The Hague District Court, Case No 09/751003-04, 23 December 2005 <<http://www.haguejusticeportal.net/index.php?id=6332>>.

prosecutions, there has been no consistent media attention or resurgence of war crimes policy in Australia.

The Menzies Review, and more recently, the Department of Immigration's published statistics on war crimes referrals and cases of refusals based on art 1F of the *Refugee Convention*, all evidence that migration flows from countries afflicted by conflict may include persons suspected of involvement in those wars. War crimes prosecutions are predominantly carried out in domestic courts around the world, and while Australia's history has been chequered and plagued by criticisms including the belated nature of the proceedings and associated economic cost, the potential for future domestic prosecutions is real and arguably necessary in light of the *ICC Act*. Further, extradition processes can be protracted and highly litigious, and raise critical issues about court systems in other countries and whether an accused may be able to receive a fair trial if extradited. It is arguable that Australia's robust and fair criminal justice system has the potential to be effectively utilised to bring suspected war criminals to justice in this jurisdiction.

The presence of suspected war criminals remains an ongoing issue that impacts on Australia's domestic and international interests. War crimes, crimes against humanity and genocide may occur in remote places geographically, and in conflicts not actively involving Australia, but the impact and implications for Australia in providing a safe haven for suspected war criminals is of great significance. Communities in Australia may suffer secondary forms of trauma in being exposed to war crimes suspects, and perpetrators of mass atrocity crimes should not be given immunity from prosecution in the interests of national security²⁴⁰ and the commitment to the rule of law. In order to take decisive steps in this area, what is required is an unambiguous policy position, followed by the formal coordination of relevant government departments and agencies.

Australia's (at times) beleaguered history of dealing with suspected war criminals need not be repeated in future. This article contends that Australia's domestic obligations to investigate and deal with suspected war criminals in its jurisdictional scope can be realised through the development of systemic and ongoing responses. As such, contemporary approaches should be

²⁴⁰ The threat of 'lone wolf' attacks by Australians who have been involved in the Syrian and Iraqi conflicts and the national security issues this raises has been the object of much discussion: see, eg, Andrew Zammit, 'Australian Foreign Fighters: Risks and Responses' (Analysis, Lowy Institute for International Policy, 16 April 2015); Charles Lister, 'Returning Foreign Fighters: Criminalization or Reintegration?' (Policy Briefing No 47, Brookings Doha Center, August 2015); Bergin et al, above n 77; Brown, 'On the Front Foot', above n 71; Department of the Prime Minister and Cabinet (Cth), above n 70.

conceptualised and positioned in the context of specifically-framed war crimes policy and legislative frameworks that re-emphasise the importance of initiating investigations and prosecutions for such offences. One of the most pertinent lessons from the post-1980s war crimes prosecutions is the requirement to act promptly in the face of such allegations. In order to facilitate effective responses from a criminal justice perspective, the appropriate legal and policy mechanisms need to be set in place, as opposed to being sporadically carved out in response to public outrage over Australia providing refuge and safe haven to war crimes suspects.