NEW YORK LAW SCHOOL

NYLS Journal of International and Comparative Law

Volume 11
Number 3 *SYMPOSIA: 1990*

Article 5

1990

PROSECUTION IN CANADA FOR CRIMES AGAINST HUMANITY

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I have been asked to address five questions. Why did I push for prosecution of Nazi war crimes and crimes against humanity? Why did Canada decide in favor of prosecuting of Nazi war criminals and criminals against humanity found in Canada? Why is it important to prosecute these crimes in the way we have in Canada? What are the justifications of punishment? How has it worked out? I will attempt to answer, briefly, each of the questions in turn. But first I will discuss what Canada has done to date.

I. CANADIAN ACTION TO DATE

There is a whole body of international criminal offenses that is punishable by the Canadian legal system, no matter where the crime was committed, no matter what the nationality of the accused, no matter what the nationality of the victim, provided only that the criminal is found in Canada.[1] The current list of offenses includes piracy, hijacking, hostage taking, attacks on diplomats, threats to use nuclear material, torture, war crimes and crimes against humanity.[2]

The offenses are punishable even if committed before the enactment

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1. D. MATAS & S. CHARENDOFF, JUSTICE DELAYED: NAZI WAR CRIMINALS IN CANADA 112 (1987) ("[T]he Criminal Code endows the government with extraterritorial jurisdiction for certain offenses regarded as threatening to the world community."); Green, *Canadian Law and the Punishment of War Crimes*, 28 CHITTY'S L.J. 249, 253 (1980); Matas, *Prosecuting Crimes Against Humanity: The Lessons of World War I*, 13 FORDHAM INT'L L.J. 86, 101 (1989-90).

2. D. MATAS & S. CHARENDOFF, *supra* note 1, at 112.

> [T]he Criminal Code already extends universal jurisdiction to Canadian courts over offenses relating to aircraft hijacking, piracy and offenses against diplomats. The recent Criminal Law Amendment Act, Bill C-18, added two more crimes to this list of international offenses, or 'universal crimes': theft of nuclear materials and hostage taking. The Bill C-18 was tabled before the House of Commons in 1984, war crimes justice advocates requested that war crimes and crimes against humanity be included, but were turned down on the basis that the proposal was not germane to the subject of the bill. Despite this technical issue, the merit of this approach remains.

Id.

of Canadian law rendering such offenses punishable, as long as the acts were punishable at international law at the time they were committed.[3] The Canadian law of war crimes and crimes against humanity is unique in its breadth. While there are several jurisdictions that have legislated against Nazi war crimes, the Canadian legislation was enacted with the Nazi war crimes in mind, but was not restricted to them.[4]

Canada has launched three cases under the new law—the cases of Imre Finta, Michael Pawlawsky and Stephen Reistetter.

Imre Finta, a former Hungarian national, was charged on December 9, 1987 with war crimes and crimes against humanity.[5] The Crown unsealed a preferred indictment against Finta on August 18, 1988.[6] Pretrial motions began June 5, 1989.[7] Jury selections began on Novem-

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3. *Id.* at 107-08.

> [T]he Supreme Court of Canada has ruled that customary international law, unless it conflicts with a Canadian legal principle, forms part of domestic law. The Canadian Charter of Rights and Freedoms also incorporates customary international law as a primary source of Canadian criminal law. It provides that anyone charged with an offence has right to be found not guilty, unless at the time the act was committed, it was an offence under Canadian or international law, or was criminal according to the general principles of law recognized by the community of nations. This Charter is an implied recognition that customary international law offenses are domestic offenses, giving Canada jurisdiction to prosecute these crimes, even in the absence of specific criminal legislative provisions.

Id.

4. *Id.* at 108.

> [T]he War Crimes Act, passed by Parliament in 1946, directly incorporates the principles of customary international law. Enacted for the very purpose of prosecuting war criminals, it was specifically drafted to apply retroactively to crimes committed from 1939 onward [unlike the Geneva Conventions Acts which do not expressly state that its application is retroactive to 1939, *id.* at 110-11] and to govern no matter where the crimes took place. Its significance lies in a clear acceptance of the principle that retroactive procedural law, together with extra-territorial jurisdiction and customary international law can be used to determine the nature of a 'war crime' and to govern no matter where the crimes took place. Its significance lies in a clear acceptance of the principle that retroactive procedural law, together with extraterritorial jurisdiction and customary international law can be used to determine the nature of a 'war crime' and to punish guilty parties.

Id.; *see* Watson, *Canada Hunts for Nazi War Criminals, but Critics Question Commitment*, L.A. Times, June 19, 1988, § 1, at 18, col. 1.

5. *See* Babad, *Canada Charges Hungarian Immigrant with War Crimes*, U.P.I., Dec. 10, 1987; Long, *Former Hungarian Charged with War Crimes in Canada*, Reuters, Dec. 10, 1987.

6. *No Preliminary Hearing for Man Going to Trial on War Crimes Charge*, Globe & Mail (Toronto), Aug. 23, 1988, at A1, col. 1.

7. Platiel, *Rescind War Crimes Law, Finta Lawyer Urges Court*, Globe & Mail

ber 15, 1989.[8] Opening statements were made to the jury on November 22, 1989.[9] The case was heard in a Toronto court. Finta was acquitted on May 25, 1990.[10] The Crown is appealing the acquittal.[11]

Michael Pawlowski, of Renfrew, Ontario, was charged on December 19, 1989, with war crimes and crimes against humanity committed in Byelorussia during World War II.[12] Stephen Reistetter, of St. Catherines, Ontario, was charged on January 18, 1990, with crimes committed in Czechoslovakia during World War II.[13] Neither the trial of Pawlowski nor the trial of Reistetter has begun.

There are also two alleged Nazi war criminals against whom proceedings were launched in Canada under domestic law. Albert Helmut Rauca was arrested in 1982 and extradited in 1983 for trial in West Germany for war crimes.[14] He died in a West German prison before his case came to trial.[15] Jacob Liutjens has been subject to denaturalization proceedings in Vancouver because it is claimed that he failed to disclose on his arrival in Canada his involvement in war crimes in the Netherlands during World War II.[16] The evidence in the Liutjens case is complete

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(Toronto), June 6, 1989, at A19, col. 1.

8. *Jury Chosen in Canada's First War Crimes Trial*, Reuters, Nov. 21, 1989.

9. Platiel, *First War Crimes Trial Cleared to Start Today*, Globe & Mail (Toronto), Nov. 22, 1989, at 1, col. 1.

10. Claiborne, *Hungarian Accused in Canada is Acquitted of War Crimes*, Wash. Post, May 26, 1990, § 1, at A25, col. 1.

11. *See* Kezwer, *Crown Set to Appeal Finta Not Guilty Verdict*, Canadian Jewish News (Toronto), June 21, 1990, at 5, col. 1.

12. Vienneau, *War Crimes Suspect Charged in 490 Deaths*, Toronto Star, Dec. 19, 1989, at 1, col. 1.

13. *Canadian Charged with 1942 Kidnapping of 3,000 Jews*, Reuters, Jan. 18, 1990.

14. *Former Nazi on Way to West Germany to Stand Trial for War Crimes*, U.P.I., May 21, 1983; Martin, *Canada Orders Extradition of Accused Nazi*, N.Y. Times, Nov. 5, 1982, at A3, col. 1. *See generally* D. MATAS & S. CHARENDOFF, *supra* note 1, at 24, 31, 33, 55, 82-85, 95-97, 100-02, 115; Comment, *Her Majesty the Queen and the Federal Republic of Germany v. Albert Helmut Rauca: International Law—Nationality—Jurisdiction—Extradition*, 33 U. NEW BRUNSWICK L.J. 333 (1984).

15. *See* Long, *Former Hungarian Charged with War Crimes in Canada*, Reuters, Dec. 10, 1987.

16. D. MATAS & S. CHARENDOFF, *supra* note 1, at 98.

> [In 1981, Ottawa] refused a[n] . . . extradition request from the Dutch government for the surrender of Jacob Luitjens, a Vancouver resident convicted *in absentia* in 1948 in Holland as a Nazi party member responsible for two deaths and sentenced to twenty years in prison. The Dutch asked that Luitjens be extradited for 'aiding and abetting the enemy in a time of war.' Canada's extradition treaty with the Netherlands signed in 1899, refers only to the crime of murder, and not complicity with foreign occupation in general. Despite the

and the trial judge has reserved his judgement, which is pending.

II. ADVOCATING THE PROSECUTION OF NAZI WAR CRIMINALS

The position I took then and take now is that pushing for the prosecution of any criminal should not be necessary. Prior to the enactment of the Canadian law, I was either head of a legal committee on war crimes of the Canadian Jewish Congress or senior legal counsel to B'nai B'rith Canada. The organizations I acted for spoke on behalf of survivors, relatives and victims of the Holocaust. The position I took then and take now is that justice should not depend upon the victims.

The bringing to justice of murderers is a state responsibility. It is not the sole responsibility of the surviving relatives of the victims. Any state that leaves it to the surviving relatives to push for prosecution, before prosecution will occur, is a state without a functioning justice system.

Murder is not just an attack on the victims. It is an attack on the whole society of which the victim forms a part. Crimes against humanity are not just crimes against a group. They are an attack on all humanity. All humanity suffers when one of its parts is systematically killed. The loss is a universal loss; the tragedy is a planetary tragedy. Unless all humanity reacts, we deny the fundamental humanity of all of us, our own common bonds as human beings.

I saw my efforts not as pushing for prosecution of Nazi war criminals, or even for justice for the surviving victims of the Holocaust, but as advocating a functioning justice system in Canada for the prosecution of mass murder. I saw myself not so much as a Nazi hunter but rather as a justice hunter.

The law as it stood in Canada, in effect, condemned murder as wrong, except when the murder was of the Jews during the Holocaust.[17] That law made murder punishable, except when the murderers took part in the Holocaust.[18] That was an untenable position not simply in the Jewish community's view, but also from the perspective of the ideal of abstract justice. It was this ideal that I was trying to pursue.

III. MOTIVES UNDERLYING CANADIAN PROSECUTION OF WAR CRIMINALS

The arguments of principle, I and others raised, influenced to some degree Canada's decision to prosecute war criminals. They were not,

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fact that Luitjens' alleged crimes were considered by the Dutch court that convicted him to be complicity in murder, the Canadian government was not prepared to accede to the extradition request.

Id.

17. *Id.* at 78.

18. *Id.*

however, the only considerations; political considerations played a role as well.

Although the Canadian scheme has much to recommend from the point of view of principle, its creation was very much the product of the political realities in Canada. Many of the alleged war criminals in Canada came from Eastern Europe.[19] Canada does not have operative extradition treaties with several of these countries, including, most notably, Poland and the Soviet Union.[20] In Canada, once an extradition treaty is signed, an accused cannot question the fairness of the legal system in the country to which the person would be extradited.[21] The extradition treaty creates a legal presumption of fairness.[22]

During the Cold War, Canada was not prepared to accept the legal systems of Eastern Europe as fair. Even for those countries in Eastern Europe for which there were operative extradition treaties, such as Czechoslovakia, Hungary, Romania and Yugoslavia, extradition for trial of accused Nazi war criminals was an unacceptable political option.

A commonly held view in emigre communities in Canada is that efforts instituted in Eastern Europe to prosecute Nazi war criminals were aimed not at Nazis alone but at anti-communists as well. Whatever the validity of that view, its existence was a political reality. Extradition to Eastern Europe, or even denaturalization and deportation to Eastern Europe, met with widespread opposition among Eastern European emigres in Canada.[23]

Prosecution in Canada became the easiest to adopt. It achieved the widest consensus of support.[24] Even evidence obtained from Eastern Europe, either from eye witnesses living there or in the form of Nazi

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19. *Id.* at 96; Green, *supra* note 1, at 251.

20. *See Czechoslovakia and Canada Reach Accord on Nazi War Criminal*, Reuters, Dec. 8, 1987.

21. D. MATAS & S. CHARENDOFF, *supra* note 1, at 95-99.

22. *Id.*

23. *Id.*; Green, *supra* note 1, at 251; Mendes, *Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights*, 20 ALBERTA L. REV. 430 (1982). *See generally* H.M. TROPER, OLD WOUNDS: JEWS, UKRAINIANISM AND THE HUNT FOR NAZI WAR CRIMINALS IN CANADA (1988).

24. D. MATAS & S. CHARENDOFF, *supra* note 1, at 106-07.

> [T]he advantages of bringing a Nazi war criminal to trial in Canada are many. Rather than exporting suspected individuals to another country, they are guaranteed to be brought to justice and receive punishment for their crimes. Moreover, accused persons would be sure to receive all the protections of the Canadian legal system, including indisputably fair trials. For these reasons, many advocates prefer this remedy.

Id.

documents stored there, met with suspicion from these same emigre groups.[25] That suspicion, however, was diminished by the safeguards the government implemented to examine and admit the evidence in court.

While prosecution was more palatable than any other remedy, prosecution of all war criminals and criminals against humanity was more palatable than prosecution of Nazi war criminals alone. The Ukrainian Canadian Committee, in particular, was active in reminding the Canadian political community of Stalinist crimes of which the Ukrainians had been the victims.[26] The committee lobbied actively for any legislative remedy that would encompass the possibility of prosecution for Stalinist crimes.[27]

IV. THE IMPORTANCE OF CANADA'S PROSECUTORIAL APPROACH

The legislation that resulted, through the fruit of political tactics, withstands the scrutiny of principle. Legally, it is an easier law to defend than a more narrowly constructed statute aimed only at Nazi war criminals.

The Canadian Charter of Rights and Freedoms guarantees equality to all, before and under the law, and the equal benefit and protection of the law without discrimination.[28] Imre Finta's counsel, Doug Christie, who has already presented constitutional challenges to the Ontario court, was quick to rely on the equality guarantee to argue that the Canadian war crimes provisions in the Criminal Code were unconstitutional.[29] But the inequalities he relied on were farfetched and fanciful.

Christie argued that Finta was being treated unequally because what Finta did in deporting Jews to Auschwitz was similar to what Canada did to its Japanese citizens during World War II in dispossessing, relocating and deporting them.[30] The trial judge did not condone the Canadian treatment of its Japanese citizens; however, he found that the situation was drastically different from the Nazi treatment of Hungarian Jews. Nevertheless, if the Canadian law was not to have covered all war crimes, but only Nazi war crimes, Christie would have had a more plausible argument to make. While the horrors, the dimension and the techniques of the Holocaust were a unique tragedy, there have been all too many

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25. *Id.* at 15.

26. *Id.*

27. *Id.*

28. *See supra* note 3 and accompanying text.

29. Kozak, *Cowboy-Booted War Crimes Defense Lawyer Doubts Holocaust*, Reuters, Jan. 16, 1990.

30. Amiel, *When Obeying Orders Makes the Law an Ass*, The Times (London), May 18, 1990, at 1, col. 1.

crimes of mass murder committed both before and since that bear a good deal more resemblance to the Holocaust than the Canadian mistreatment of its Japanese citizens. The legislation, because of its general terms, precludes arguments of unequal treatment based on the inability to prosecute other mass murderers not involved in the Holocaust.

V. JUSTIFICATIONS FOR PUNISHMENT

Once again, the issue is not so much punishment as it is justice. Punishment is the consequence of conviction. Any criminal justice system that is punishment-free will end up being deterrent-free. But as important as punishment are detention, arrest, trial and conviction.

One question I am asked with regard to Nazi war criminals is, do you believe in forgiveness and mercy? In the abstract, forgiveness and mercy are important values, as is justice. While forgiveness and mercy are not inconsistent, mercy depends on repentance, on asking for forgiveness. Mercy is never appropriate when the accused says, "I did not do it"; "it did not happen"; "I would not do it again"; "the documents are forged"; "the witnesses are lying"; "you made a mistake." Granting forgiveness in these circumstances makes a mockery of the concept of forgiveness. Yet invariably in Nazi war crime cases, that is what the accused say. The actions of the accused in these cases leave no room for forgiveness. I am prepared to forgive quite a lot that is done to me; it is up to you to forgive what is done to you. It would be presumptuous and supererogatory of me to forgive what someone has done to you. I cannot forgive what has been done in the Holocaust, not because I am unmerciful but because it is not for me to forgive. One of the many aspects of the tragedy of the Holocaust was that those who could forgive were killed along with those for whom forgiveness might be sought.

In any case, forgiveness and mercy are relevant to punishment alone. They are not relevant to detention, arrest, trial and conviction. Mercy justifies a lessening of the sentence; it does not justify the failure to establish a functioning justice system. The purpose of the trial is to find out who committed these crimes, to allow us to decide whether we should punish or not and to determine what the punishment should be. Even those least inclined to punishment cannot cogently argue against the need for trials, for establishing who is guilty and not guilty.

VI. RESULTS

Obviously, it is too early to gauge the results. Cases are moving more slowly than I would have liked. The effort of the government is nonetheless substantial.

There are two specific criticisms I would make. One is that the deterrent effect of the laws would be more effective if there were a world

criminal court, rather than a Canadian criminal court system with universal jurisdiction.

The deterrent effect of a crime against humanity trial is very different message from that of an ordinary criminal trial. An ordinary criminal trial of murder, for instance, has a deterrent effect even if the effect is just local to the community where the trial takes place.

But the importance of the message of a trial for crimes against humanity is diminished substantially if the message is confined to the local community where the trial takes place. Indeed, much of the hesitancy about prosecuting crimes against humanity comes from looking at deterrence from a narrow local focus.

There are many places in the world where crimes against humanity have recently been committed and where the commission of future crimes against humanity is eminently possible.[31] Yet Canadian trials are little known in these places. Their impact is diluted by distance and the local nature of the jurisdiction being asserted in Canada. An international criminal court would not suffer from this disadvantage. Its message would be more clearly international and its deterrent impact would be more effective.

Thus, there is reason to work for an international criminal court, even while we prosecute locally. Indeed the very fact of local prosecution, if it spreads widely enough among enough countries, will make the creation of an international criminal court more likely.

The second specific criticism is that the comprehensive nature of the Canadian law is more theoretical than real. Canadian law allows for generalized prosecutions.[32] But no prosecutions outside of the Nazi context have been launched.

The true measure of the law, at the end of the day, will not be its structure or its possibilities. The true test will be whether it will ever be used beyond the boundaries of World War II. We know, regrettably, that there are enough crimes, and enough criminals to allow the law to be invoked outside the Nazi context. It remains to be seen if that will happen.

In advance of any such prosecution, the new Canadian law has changed the language of political discourse in Canada. We heard Professor Cotler at Boston call for a statement by the government of Canada putting those responsible for the atrocities in Burundi on notice that they would be prosecuted for crimes against humanity should they be found in Canada.[33] Anti-apartheid activists in Canada have been urging

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31. Romania, China and Kuwait are examples.

32. *See supra* notes 1-4 and accompanying text.

33. Platiel, *Invasions That Stop Genocide Should Be Held Legal, Conference Told*, Globe & Mail (Toronto), Apr. 3, 1990, at A3, col. 1.

the use of the Canadian law to prosecute those responsible for apartheid as a crime against humanity. At the time of the Tiananmen Square massacre, I myself had endorsed a statement by the Government of Canada that it would use the Canadian law against those implicated in Chinese crimes against humanity found in Canada.[34]

Even for those of us whose first concern is the bringing to justice of Nazi war criminals, the creation of a generic international criminal justice system that goes beyond the Holocaust must also be a primary concern. If the lessons of the Holocaust are to be part and parcel of all human experience, if the Holocaust is not to be sealed off on its own as a special case, then all war criminals and criminals against humanity must be prosecuted. The Canadian law at least holds out the hope that the lessons of the Holocaust will not be forgotten.

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34. *See Lawyer for Accused War Criminal Says Deportation Not Inhumane*, Reuters, May 8, 1990.