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Canadian Responses to World War Two War Criminals and Human Rights Violators: National and Comparative Perspectives

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Mr. Einhorn: If OSI is unable to prove actual complicity in Nazi war crimes, what the court will then do is say that the misrepresentations that have been proved by the government were not "material." And that is how you lose.

CANADIAN RESPONSES

*Professor Howard Stanislawski:*¹ Our third panel today is concerned with the Canadian Responses to World War Two war criminals and human rights violators. Our speakers will be David Matas,² and Professor Irwin Cotler.³ David, would you care to begin?

Mr. David Matas: Thank you. I wish to address the recent decision of the Commission of Inquiry on War Criminals not to go to the Soviet Union to seek evidence there. I disagree with that decision. I want to tell you why I disagree, and what I think the Commission should be doing.

First, let me present to you a chronology of the relevant events. The Commission, on September 13, 1985, asked counsel for parties with standing before the Commission to present their views as to the legality and advisability of collecting evidence abroad from the U.S.S.R. and four other countries. Counsel for the Commission was heard on September 23, October 3, and October 10. The Commission, on November 14, 1985, decided that seeking the evidence abroad was both legal and advisable, provided six basic conditions were met.

The six basic conditions were confidentiality, independent interpreters, access to original documents, access to witnesses' previous statements, freedom of examination of witnesses in agreement with Canadian rules of evidence, and videotaping. The Commissioner also decided that he, himself, would not go abroad. Instead, he would appoint a deputy.

The Commission wrote to the Soviets on November 26, 1985, asking the Soviets to locate some 70 witnesses and provide information about any other witnesses, concerning 15 persons. At the time of the November 14 decision and the November 26 letter, the deadline of the Commission was December 30, 1985. On December 12, 1985, the Commission deadline was extended to June 30, 1986.

The Soviets replied, by letter received at the Commission May 1, 1986, that the Soviets could receive Commission representatives, after June 10, to examine 34 witnesses

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² Mr. Matas is an attorney in Winnipeg, Canada. He has served as a law clerk to the Chief Justice of the Supreme Court of Canada. Mr. Matas's activities include acting as a legal coordinator for Amnesty International, Canadian Section. He has served as Chairman of the Canadian Jewish Congress's Legal Committee on War Crimes, and as Chairman of the League for Human Rights of B'nai Brith Canada.

³ Professor Cotler is an associate professor of law at McGill University Law School and has taught international human rights at Harvard Law School. His activities include helping to defend Anatoly Scharansky. He is also active in anti-apartheid work. Professor Cotler has testified before the Deschenes Commission, the Canadian commission assigned the task of shaping Canada's policy regarding World War Two persecutors. From 1977-1980, Professor Cotler was President of the Canadian Jewish Congress. He is one of the original members of the Holocaust/Human Rights Research Project's Advisory Board.

in connection with the crimes of two war criminals. The Soviets said they were continuing to look for witnesses and documents implicating other war criminals.

The Commission had its last public hearings four days after receipt of this letter, on May 5 and May 6 in Hull. Neither the Commissioner nor the Commission counsel mentioned receipt of this correspondence at the time of the hearing.

Commission counsel, Michael Meighen and Yves Fortier, replied by letter dated May 7, 1986, asking for the names of the witnesses, the language in which they would give evidence, and the location in which they would give evidence. Counsel also asked for assurances that the safeguards set out in the Commission's decision would be met.

A. Makarov, the Soviet chargé d'affaires in Canada replied by letter dated May 26, 1986, that, within the framework of the legislation of criminal procedure of the Ukrainian S.S.R., Canadian lawyers would be given the opportunity to clarify all questions of interest to them. Videotaping and independent interpreters would be permitted.

Commission counsel then wrote back, on May 29, 1986, noting that no reference had been made to two Commission safeguards; access to original documents, and witnesses' previous statements. The letter of Commission counsel complained that confidentiality had been breached, because the Soviets had revealed to certain Canadian journalists the names of the two people concerned. Finally, it was the view of Commission counsel that the Soviets rejected freedom of examination of witnesses as provided for by the Canadian rules of evidence, because the Soviets referred to their own criminal procedure framework. In response, counsel maintained that the Commission would not go to the Soviet Union to examine witnesses, but that it would reconsider its decision, should the Soviet position change. The Commission then extended its deadline from June 30 to September 30.

The Soviets replied on June 9, 1986, that all conditions would be accepted. They wrote that they would provide documents and witnesses in accordance with procedural regulations laid down in the decision of the Commission. In the Soviet letter, the phrase "in accordance with the procedural regulations laid down in the decision of the Commission" was underlined.

Commission counsel replied on June 11, 1986, that all conditions had been met, but stated that the Commission could not go in any case because of the passage of time between the initial request and the eventual reply of June 9, 1986. The letter pointed out that the Commission already examined a good deal of evidence in Canada. The Commission asserted its willingness to spend one month collecting evidence about two persons.

That is basically the chronology of events. Let me now say why I disagree with what was done. First of all there is the timing. The Commission was prepared to go to the Soviet Union on November 26, to examine 70 witnesses, when its own deadline was December 30, five weeks later. It was prepared to go on May 29, to examine the 34 witnesses, when its deadline was June 30, a month later. Yet, it was not prepared to go on June 11, when its deadline was three and one half months away. I say if the Commission had time to examine 70 witnesses between November 26 and December 30, if it had time to examine 34 witnesses between May 29 and June 30, it also has time to examine these 34 witnesses between June 11 and September 30.

There is also the question of who is doing the examining. The Commissioner decided that he would not go himself but that he would deputize another or others. In fact, Commission counsel Yves Fortier and Michael Meighen have been deputized for the purpose. So, Mr. Justice Deschenes does not have to be concerned about his own time

being taken up in the examination overseas. If Messrs. Fortier and Meighen are themselves too busy to go, the Commissioner can deputize someone else. There is surely someone in Canada, in whom the Commission has confidence, who can spend the time to go to the Soviet Union between now and September 30.

Then there is the untimeliness of the objection. The Commission raised its objection about going, because of the time involved in examining 34 witnesses, not in its letter of May 7, or in its letter of May 29, but in its letter of June 11. The Commission should have taken the objection at the first possible opportunity. Obviously, if the Commission, on June 11, felt that it did not have time to examine the witnesses, it must also have felt it did not have time to examine those witnesses when its deadline was one month away. Yet, on May 29, the Commissioner made no objection based on time. The exchange of correspondence with the Soviets was, in retrospect, a charade.

Next, there was the illogical inversion of numbers. When the Commission says it does not have time to examine 34 witnesses over the period of a month, it leaves the impression that, if the witnesses were fewer, the Commission might have had time to examine them. Yet, it makes little sense to suggest that the less the evidence, the more likely it would be that the Commission would look at it. To my mind, the reverse should be true. The Commission should be more inclined to go to the Soviet Union the greater the evidence, rather than the lesser the evidence.

There is also the inflexibility of the Commission. Because the Commission did not have time to examine 34 witnesses, it would examine none. In fact, the Commission, if it wished, could examine some of the 34, instead of all of them. This option was simply not pursued.

There was the eagerness to seek a disagreement. I do not read, as Commission counsel did, the Soviet letter of May 26, 1986, as rejecting the Commission conditions. At worst, it was ambiguous. A clarification was certainly in order. To say, as Commission counsel did, "You have not agreed," was to find a disagreement that was not there, as subsequent events showed.

There was insufficient weight given to the value of credibility. While I do not question that the Commission has reviewed considerable evidence here in Canada about the individuals concerned, by hearing the witnesses abroad the Commission could assess their credibility, something that cannot be done here. Even where the Commission has prior depositions of the very witnesses offered by the Soviets for examination, talking to those witnesses, judging their demeanor, as well as asking probing questions would add a dimension to the evidence that is not available simply by reading documents in Canada.

There is the limited focus the Commission has put on the issue. What is at issue is not just the evidence against two individuals. It is the reliability of evidence, generally, obtained from the Soviet Union. The suggestion has been raised that the Soviets will agree to any and all conditions, but then violate the conditions once the taking of evidence begins. The Commission could and should test that assertion. I believe it would be of value to the Government to have the Commission go over to the Soviet Union and report on its experience, and on whether the safeguards were, indeed, correct.

Then there is the hypocrisy of focusing on Soviet delay. When I say hypocrisy, I do not mean that the Commission has been slow. The Commission itself has been expeditious in its work. However, I think Canada, as a country, is being hypocritical. Canada waited forty years even to begin to act systematically about alleged Nazi war criminals in Canada. After this forty year delay by the Government, it is hypocritical for a government

Commission to complain of Soviet delay of five months, from November 26, 1985 to May 1, 1986.

Next there is the need for immediate action. We are talking about witnesses who saw events over forty years ago, and were old enough to understand and remember them. The witnesses are, at best, in late middle age. Most of them will be elderly. Even if government lawyers end up going to the Soviet Union after the Commission reports, witnesses alive now may be dead then. Not examining witnesses now may mean missing an opportunity that will never recur.

There is also the reversal of the previous decision of the Commission, made without a hearing. The Commission may not have been obligated to hold a hearing originally. It may not have been required to give parties with standing before the Commission an opportunity to argue whether seeking evidence abroad was legal or advisable. However, once the Commission did hold a hearing and decided, after the hearing, that it was both legal and advisable to go abroad to collect evidence provided certain conditions were met, the Commission makes a mockery of its own proceedings when it reverses its decision, without a hearing. The hearing the Commission held turns out to have been a feigned hearing. Reversal of the decision without a hearing is unfair to everyone who took part in the original proceeding.

There was the negating of expectations. Once the Commission decided it was legal and advisable to go to the Soviet Union to collect evidence, provided certain conditions were met, the reasonable and legitimate expectation was that the Commission would go. The Commission decision was tantamount to a conditional undertaking that it would go. By not going, the Commission breached the undertaking. It is in the interests of good administration that any administrative body which reaches a decision should implement its decision. It is in the interests of justice that any representative of a justice system should honor its undertaking.

There was the appearance of political interference. Controversy has surrounded the Commission's decision as to whether it should go to the Soviet Union. I have heard the opinion expressed, within the Ukrainian and Baltic communities in Canada, that the Commission should not go to the Soviet Union under any circumstances. A lobbying campaign has been focussed on members of Parliament on this very issue.

I do not believe that the Government told the Commission not to go to the Soviet Union. Nor do I believe that the Commission decided not to go to the Soviet Union for political reasons. I believe that the reasons the Commission gave for not going were the real reasons. However, they were not good reasons.

There is a commonplace maxim that justice must not only be done, it must also appear to be done. In this context, what that maxim means is that justice must not only be free from political interference, it must also appear to be free from interference. The Commission has reversed a politically controversial decision in an unfair manner. That reversal cannot help but give the appearance of political interference. There is a widespread belief that the Commission acted for political reasons. I do not, as I said, share that belief. I do feel, however, that the Commission must take full responsibility for the prevalence of that belief.

This whole experience leads me to a number of recommendations. There are, I think, lessons for the government of Canada. These events show that the evidentiary work needed in order to bring Nazi war criminals in Canada to justice cannot end with the Commission. If the evidence now available in the Soviet Union is not collected by the Commission, then the Government must collect it. Even if the Commission reverts

to its original decision and does decide to collect the available evidence on the two named individuals, there remain the witnesses and the other 13 individuals named by the Commission in its original letter to the Soviets. It is going to take a continuing effort, beyond the mandate of the Commission, to obtain all the evidence available.

I have four suggestions for the Commission, which I shall communicate to the Commission directly, and which I now pass on to you.

First, the Commission should revert to its earlier decision. It should examine the witnesses available to it in the Soviet Union. Before the Commission, I have represented the League for Human Rights of B'nai Brith Canada. Harry Bick, the President of B'nai Brith Canada, today released a statement deeply regretting the decision of the Commission not to go to the Soviet Union to collect available evidence, expressing concern that the Commission has reneged on its earlier decision, and urging the Commission to reconsider.

Second, I suggest that the Commission, if it does not have time to interview all 34 witnesses, choose the witnesses that it would be most useful to interview. The Commission should, at least, interview these witnesses.

Third, if neither Yves Fortier nor Michael Meighen have the time to go over to the Soviet Union to collect evidence, the Commission should deputize someone else to conduct the examinations.

Fourth, before the Commission comes to a final conclusion as to whether it should reverse its earlier decision, it should hold a hearing on the issue. Counsel for all the parties who originally argued the issue should be invited to make representations.

By way of conclusion, let me say that I have been and remain a supporter of the Commission. I welcomed its appointment. I believe it has been doing good work and will come out with a useful report. Because I believe in the importance of the work of the Commission, I make these remarks tonight. The misstep the Commission has just made taints its credibility and undermines the impact of the report it will make. The Commission has cast disrepute on its own work.

We must remember that when the Commission reports, it does so privately to the Government. I expect the Government will release the historical and legal portions of the report. I do not expect the Government to release the part of the report naming individuals. We may never know if the two individuals against whom there are now witnesses available in the Soviet Union were named in the Commission report. All we will know is whether the Commission did its work properly and thoroughly. If it proceeds on its present course, we will have to say it did not. I urge that the Commission revert to its original decision, so that we can say that it did.

Professor Irwin Cotler: As David put it, the first inquiry ever into the question of bringing suspected Nazi war criminals to justice in Canada began with the creation of what has come to be known as the Deschenes Commission, also known as the Commission of Inquiry on War Criminals, specifically those relating to Nazi war crimes. It was set up in February of 1985. Its mandate was to terminate at the end of December 1985, though it has been given a six-month extension. It will now conclude its mandate, if no other extension is provided, by the end of June 1986. The mandate orders the Commission to take all necessary steps to bring suspected Nazi war criminals in Canada to justice.

The terms of reference are threefold. First, are there any suspected Nazi war criminals in Canada and if there are, is there any evidence to bring them to justice? Second, if there are Nazi war criminals in Canada, how did they enter Canada and did

the Canadian government or any of its officials facilitate their entry? Third, are there any existing legal remedies to bring the criminals to justice and, if not, are there any remedies that can now be enacted as a matter of law? However, as David has pointed out, and I think this is a crucial issue, the general mandate, as well as the specific terms of reference that I have just described, have been trivialized if not distorted.

The result is that a human rights issue has been converted, as it were, into an ethnic quarrel of Jews versus Ukrainians. Thus, one of the more profound justice issues of our times has been characterized as a Jewish revenge issue. Accordingly, in all the submissions that David and I have made, respectively, as counsels and on behalf of parties having standing before this Commission, the organizing or underlying theme of our remarks has been to remind the Commission, the government, and the public, that the presence of suspected Nazi war criminals in Canada is a moral outrage, an affront to conscience, and a repudiation of everything that Canada and the United States represent. The issue is not one of revenge, but one of justice. It is not an ethnic quarrel, but indeed, one of the most profound human rights issues of our time.

Yet having said that, one still finds that an underlying response might be, even if not publicly articulated, why now? Why forty years later? Why, for example, are we bringing quiet neighbors to justice? The answer is, of course, that we are bringing people to justice not for what they have done or not done these past forty years as "quiet neighbors," but for the atrocities that they committed during the Second World War, for which there is no statute of limitations. Yet, these are questions which many Canadians, and I suspect people in other jurisdictions continue to ask. We therefore must offer a compelling moral and judicial basis as to why we are bringing these suspected Nazi war criminals to justice.

Because time does not permit any elaboration of these reasons, I will only identify them. The first is what we call fidelity to the rule of law. Simply put, that means that the murderers of the innocent shall not go unpunished. Indeed as we have stated, even the notion of war criminals is itself a misnomer, because we are prosecuting people not because they have been involved in the killing of combatants in the course of a war, but rather because they have murdered innocents and persecuted a race.

The second reason is fidelity to Canadian or American citizenship. Namely, that those who secured citizenship under false pretenses should not be permitted to enjoy that Canadian or American citizenship, when they certainly would not have been admitted to our country, let alone granted citizenship, had we known of their crimes.

The third reason is fidelity to international obligations. Canada and the United States year after year have affirmed within the United Nations General Assembly, and otherwise, our respected domestic obligations under international law to apprehend, arrest, and bring to justice all suspected Nazi war criminals. And a failure to bring suspected Nazi war criminals to justice would, in effect, be a breach of our responsibilities under international law.

Another question to address is did the Canadian government facilitate the entry of suspected Nazi war criminals into Canada? How, in fact, did they get in? Again, without elaboration both David and I can tell you that the hearings before the Deschenes Commission and the disclosure of previously secret documents have revealed some disconcerting, and even shocking, revelations about the presence of suspected Nazi war criminals in Canada, and the manner in which the Canadian government facilitated their entry. Let me identify a number of these rather disturbing revelations. These revelations are of such a nature that they not only expose a pattern of Canadian government inaction

over the last forty years, but, if taken together, raise a reasonable apprehension of obstruction of justice on the part of the Canadian government. I realize that these are tough words, but there are no other words to describe not only governmental inaction, but also its conscious refusal to bring suspected Nazi war criminals to justice.

First, one previously secret communiqué from the United Kingdom in 1948 to Commonwealth countries, including Canada, called upon them to terminate prosecutions of suspected Nazi war criminals on the grounds that the time had come "to bury the past." Canada, along with the other Commonwealth countries, not only acquiesced to this request, which is a scandalous indictment of United Kingdom policy and practice at the time, but also kept this acquiescence secret until it was disclosed before the Deschenes Commission.

A second startling and disturbing revelation was that the Canadian government knowingly provided sanctuary for Vichy collaborators with the French government of the Second World War including Count Jacques D'Bonnenville, the right-hand man to Klaus Barbie. The Canadian government then moved to passing orders and quashing prospective judicial deportation orders against the collaborators. At the same time the Canadian government was deporting Jewish refugees that had allegedly entered Canada on false passports. The asymmetry of keeping Jewish refugees out, while letting suspected Nazi war criminals in, is disturbing. During the aftermath of the Second World War it was easier to get into Canada if you were a Nazi, than if you were a Jew.

The third thing is what might be called the disturbing innuendo in the Canadian government's policy and practice over time of blaming the victim. For example, a secret Cabinet communiqué from 1956 disclosed that when *prima facie* evidence of suspected Nazi war criminals in Canada was presented to the Canadian government, the senior officials in the Canadian bureaucracy advised against the government doing anything on the grounds that "this would be pandering to Jewish revenge." And so, we had here what might be called a classic Orwellian inversion. Rather than bringing Nazi war criminals to justice as a matter of domestic and Canadian responsibility, those who were asking the government to bring them to justice were, in fact, blamed. Thus, a human rights issue was converted into a Jewish revenge issue.

A fourth disturbing revelation has been destruction of immigration files which the Commissioner of the RCMP and the Deputy Solicitor General both characterized as crucial with respect to the use of the remedy of revocation of citizenship and deportation. What is disturbing about this destruction, even though evidence suggests that files were routinely destroyed, is that it took place immediately after the only trial we have had in Canada, namely the *Ralta* case — the extradition of a suspected Nazi war criminal, Herman Ralta in May 1983 to West Germany after a year of legal entanglements.

A fifth disturbing revelation disclosed by records was that the Canadian government had a clear and unequivocal policy of no investigation, regardless of how serious the allegations were, or of how incriminating the evidence was. I find this somewhat ironic because, while I was acting as counsel in another inquiry, the Commission of Inquiry into the activities of the RCMP, the RCMP continuously engaged in what might be called the "unauthorized investigation" of people in Canada. Yet the Deschenes Commission revealed that the RCMP followed a policy of not investigating people that *prima facie* evidence indicated had committed the most serious murders in our times. You can see the disturbing asymmetry here.

This brings me to the final issue, and that is: "Are there any legal remedies available?" As David and I have tried to point out before the Commission and in our writings,

the problem in our view is not the absence of legal remedy, but the absence of political will. Thus, the question is not whether there exist any legal remedies to bring Nazi war criminals to justice, but which of the existing legal remedies will in fact be exercised to undertake both our domestic and, as I indicated earlier, international responsibilities. We have identified four main remedies that are available.

The first, and indeed the preferred remedy, is extradition. However, as we have pointed out, the remedy of extradition, while a valid remedy, is ultimately limited. Most suspected Nazi war criminals in Canada will remain immune from any legal process, because either no one will request their extradition or their extradition may be requested from countries with whom Canada does not have an extradition treaty.

The second remedy which we have suggested is the revocation of citizenship and deportation. Here we are treated once again to a kind of Orwellian feast by the Canadian government. First we were told that we could not exercise this legal remedy because there was no evidence. Then we were told that if there was evidence, then the remedy has no legal foundation, and on and on.

The third remedy, generally speaking, is domestic prosecution or prosecution under available criminal law remedies in Canada, to which reference was made this morning. Here too we have suggested three approaches: first, prosecution under a statute, which we have in Canada, the War Crimes Act, enacted in 1946; second, prosecution under the Geneva Convention; third, prosecution under what might be called universal criminal or common law.

A final remedy that we suggested was a worst case scenario. If these existing remedies, for whatever reason, are shown not to have a sufficient persuasive legal basis, then we suggested and provided a framework for the enactment of new legislation. Let me conclude on this point on the issue of retroactivity, which has been raised time and again as being the main obstacle, not only with respect to existing remedies in Canadian statutory law, but also with regard to existing law and to the enactment of new law. Our response with regard to retroactivity is to suggest once again, as we did concerning the term "war criminal," that it is misleading. There is nothing retroactive about war crimes or crimes against humanity whose prosecution, in effect, is an invocation of international law rather than a breach of either domestic or international law. The consideration we put forward was (1) that war crimes and crimes against humanity were always criminal under international law, whether it be treaty law or customary international law or United Nations law and the like; (2) that murder was always criminal according to the law of nations, and it wasn't simply a post-World War II offense; (3) that the International Military Tribunal at Nuremburg codified these principles; (4) that the War Crimes Act and the Geneva Convention are domestic criminal law statutes in Canada, and were in effect domestic codifications of existing law, not the creation of new law. They provided a forum for the prosecution of existing offenses rather than the enactment of new legislation with regard to hitherto nonexistent offenses; (5) and of particular relevance to Canada, the Canadian Charter of Rights and Freedoms, which was proclaimed in Canada in 1982 — our Canadian equivalent to the American Bill of Rights. It provides in § 11G of the Charter, I'm paraphrasing, that "retroactivity shall not avail as a defense when the crimes are criminal according to international law or according to the principles of the law of nations." In a word, § 11G of the Canadian Charter of Rights and Freedoms is a domestic constitutional codification of these international law principles; (6) the Canadian law as well as the Charter must be interpreted in such a way as to not violate international law.

In conclusion, we end where we began: the presence of Nazi war criminals in Canada and the United States or elsewhere, is a moral outrage. Bringing them to justice is a matter not only of domestic, but also of international responsibility. It fulfills our responsibility to law, to Holocaust remembrance, to Canadian citizenship, to international obligations, and the like. The legacy of Nuremberg — “never again” — is not only, I would say, an exhortation to justice, but a warning against injustice.

Professor Stanislawski: We only have time for a few questions. I'll hold off my own until a later time. Yes?

Question: I just wanted to ask about the question of universal jurisdiction. What you're saying is, that given universal jurisdiction, Canada should be the one to try these people?

Professor Cotler: Well, we're saying that we were trying to provide either international or Canadian remedies, because what happens with the “either or” philosophy is that if you lose on one and that's the only one, then you're done. We're saying that these remedies are mutually reinforcing rather than mutually exclusive, and that the issue therefore is which amongst the remedies is the most preferred, rather than which of the remedies is the only one to be exercised. Then you have a situation of revocation of citizenship and deportation or domestic prosecution.

Revocation of citizenship for deportation may be a protracted legal process, but may have certain benefits with respect to the evidentiary character of the process and standards of proof. The adversarial proceeding of a criminal process may be more problematic. We're saying okay, if you can't use that remedy then move with regard to domestic prosecution, as well as prosecution from a “political point of view.” I'm using that term in a larger public policy sense. It does have, in that sense, the support of the oppressed nationalities that David has mentioned, because it does not presumably and ultimately involve a deportation to a country they object to with regard to the whole issue, i.e., the Soviet Union, or Eastern Block nations.

Finally, three things distinguish the Canadian situation from the American situation: (1) the Canadian Geneva Conventions Acts and the War Crimes Act, which provide a statutory basis for prosecution; (2) we are ready, having the criminal code, and the incorporation by reference of the universality theory of jurisdiction. Canadian law covers such diverse potentially international issues as the theft of nuclear materials and the kidnapping of diplomats. Thus, it would be consistent for Canada to include in the genre of those universal offenses war criminals, or those who committed crimes against humanity, because presumably the jurisdictional basis is already there in the criminal code. Why not also include, along with other universal offenses, the elite of this genre of offenses — war crimes and crimes against humanity; (3) most importantly, as I indicated earlier — we have a constitutional basis for recovery. The Canadian Charter of Rights and Freedoms § 11G has effectively codified on a constitutional basis the use of the criminal law process to bring suspected Nazi war criminals to justice. I said clearly and unequivocally that retroactivity shall not avail as a defense against prosecution in that regard.

Thus, I think there are distinguishable features in terms of the Canadian and American law. But I think as well that there are certain parallel aspects which would make, in my view, a theory of universal jurisdiction and prosecution, under what is sometimes called universal criminal law, also applicable here in the States.

Question: I wanted to address something that Mr. Matas said in his talk. A perception by the Canadian press that this is not only delegitimization of their national liberation struggle, but also a matter of an ethnic slur or a form of group libel against the Lithuanian or the Ukrainian people. I wanted to address that point because earlier when Mr. Ryan was speaking he implied, for instance in portraying and characterizing the displaced persons that settled in Austria and Germany after World War II, that there is a presumption of guilt and of complicity on the part of Ukrainian or Lithuanian people in these kinds of war crimes. In my opinion, that sort of a statement makes many Ukrainian and Lithuanian people upset, and breeds a tremendous amount of resentment within those communities. This seems to be a form of character assassination against a whole people. I was hoping that Mr. Matas could address this point and also that Mr. Ryan could address that point because that is something that has been glossed over.

Mr. Matas: Well, actually what you say is true. I mean, it was glossed over, because he was passing me little notes — I have three minutes; I had two minutes — and so I did skip part of my text as I was going along. I don't know if it's fair to ask Mr. Ryan to answer that question because I don't know if he was here for all of what I said. I think that what I was concerned about is not that these are slurs, on that point you're right. It's not normally proper to identify a criminal by his ethnic origin. We don't consider it proper here, and I think that in general it shouldn't be done. What I said in the text, and maybe I shouldn't have skipped it, is that the problem is not a legal one, it's a journalistic one. It's the way these cases are reported sometimes, and that's very often what these communities are reacting against. What I'm commenting on here is not the fact that they are reacting to them so much as the differential reaction to them.

I think if any community in North America is concerned about the Nazi war criminal efforts from the point of views of ethnic slurs, it would be the German community. But their reaction is nowhere near the reaction of the Ukrainians and Balts. If you listen to the list that Allan Ryan gave of the people who came over to this country, he mentioned the Ukrainians, he mentioned the Balts, but he also mentioned the Russians as part of that group. The Russians within North America are generating nowhere near the same reactions as the Ukrainians and the Balts. So I say, "Sure slurs are wrong," but when you look at the differential reaction to the slurs, the concern that these people have is not that they are being slurred in a North American context, rather the concern is that they feel that their nationalistic aspirations are being discredited by the slurs.

Question: You would agree that they are being slurred on some level?

Professor Cotler: Yes, but what I am trying to do is explain the opposition to the efforts to bring Nazi war criminals to justice, and the opposition doesn't come from these ethnic designations. If that was true the opposition would come from the Germans, from the Russians, from every other nationality. I mean Trief has been identified as a Romanian and the Romanian community hasn't protested the way the Ukrainian community protested about Demjanjuk or the Croatian community contested about Artukovic, so if you're looking for explanations to opposition, the designations are not the problem. The problem lies elsewhere.

Mr. Ryan: I have said this many times before and I'm having to say it again. I have neither abused nor would I ever classify any nationality, nation or people to be a nation

of collaborators. Every country that was occupied by the Nazis from 1939 to 1945 was populated by collaborators. In every country there were resistance fighters and heroes. I think that as a matter of history, you can say that the level of collaboration was higher in some countries. But that is not an attempt on my part to say that nationality is a presumption of guilt.

The extent of collaboration in the Baltic countries and the extent of collaboration in the Ukraine was, in my opinion, as high as any in Europe. That is not to say that there were not resistance efforts there. It is also a fact that under the Displaced Persons Act, there were overt preferences given to Baltic nationals and there were indirect preferences given to Ukrainians. As a result, if you look at the nationality of people that came to this country, you find those nationalities very heavily represented. It was very difficult for Germans to come to this country and Austrians to come to this country in the 1948 to 1952 period. So from these nations that had substantial levels of immigration to this country, inevitably what you get is a margin of collaborators and war criminals who are Latvian, Lithuanian, Ukrainian, Hungarian, Yugoslavian, and virtually every other European nationality. The collaborators of France, for example, stayed in France. The collaborators in England stayed in England. They did not come to this country. So, it is essential to review not only the historical pattern of collaboration during the war, but the historical pattern of immigration to the United States after the war.

I have met with leaders of the Ukraine, along with Baltic leaders of this country, and I have tried to explain this in great detail. In fact, I once addressed a meeting of the Ukrainian American Bar Association in which I answered questions for three hours on the subject. It does not seem to have had any effect.

I read the *Ukrainian Weekly*, which seems to be fairly responsible in covering these issues and I have been dismayed to find it widely believed that the OSI was out to get Ukrainians. I think it's shameful that some leaders in that community are preying on fears of innocent people, who did nothing more than cut a few years off their age when they applied to come to this country, by implying that the U.S. Justice Department may be knocking down their doors tonight to send them back to the Soviet Union. I think that is an irresponsible and shameful attempt to stir up anti-Justice Department actions.

I want to make it clear that I have never characterized any nation in terms that I would consider libelous or anything like that. Every case brought that I've been involved with has been directed only against the individual who is on trial.

My final point is that I think it's terribly unfortunate that ethnic leaders in this country have rallied around someone like Demjanjuk, who has been proven guilty by a court of law. I think that if the Ukrainian leaders in this country are serious about what they say, namely freeing the Ukrainian name from guilt by association, they would say: "Demjanjuk may be guilty, that has been proven in a court of law, but that does not make all Ukrainian people guilty." I have said that. I say it again today, and hope Ukrainian people would say that. Instead, what they say is that Demjanjuk is not guilty, and because the Justice Department and the Soviet Union and the courts and the press say he is, they are libeling all of us with the tarred brush of Nazism. I think that is absolutely the wrong way to go about it.

Professor Stanislawski: I have one question which will have to be the last question of this session. Professor Cotler, we started the day today with a discussion about German war crime trials. We can see that disparate motives may have been at work in Germany in regard to those trials. American actions could be understood as a function of the U.S.

role as a superpower after World War II, and the anti-Communist motivations that have been preeminent in this country. How do you understand the British motives in the 1948 memorandum that you cited, and the Canadian motives in approving and implementing the contents of that memorandum? What explains the reactions of a country like Canada, other countries in the British Commonwealth, and presumably other countries which were lesser powers after World War II, in their reluctance to proceed on these kinds of matters?

Professor Cotler: Well, one looks over all the documentation, and there have been volumes of evidence, both documentary and before the Deschenes Commission. What emerges from all this is an absence of any moral sensibility about the Holocaust. The Holocaust itself is reduced to a footnote. There is no sense, no appreciation about the horrors of the Holocaust. What you have is a kind of bureaucratic mind set that develops, and then characterizes the matter as a Jewish revenge issue, rather than, as I said, it being a justice and a human rights issue. There may be a number of reasons that may account for it. There may be, and I think the evidence does disclose that there was overt anti-Semitism at senior political and bureaucratic levels in Canada. Those who were responsible for keeping the Jews out, were also the same people who were responsible for letting the Nazis in.

The second thing is that Britain, in its own communiqués, addressed the issue of the emerging Jewish politics of the time. So there were these geopolitical things to be added to the latent anti-Semitism.

The third thing, as I said, is the simple bureaucratic mind set. And so you have the whole question of bureaucratic inertia.

Finally, there is a telling ignorance. That is to say that the government repeats over and over again that there are no legal remedies available to bring suspected Nazi war criminals to justice. And what you have is a kind of, and this is a charitable way of putting it, continuing legacy of errors of fact and law. When you take all these things together, I think the end result is simply inaction, if not worse. I'm prepared to say, and I will continue to say, that in my view, the 40 years of Canadian government inaction reveal a knowing obstruction of justice on the part of the Canadian government and Canadian officials in the past.

Professor Stanislawski: I'd like to thank both of our panelists for their presentations, and the audience for their support.

