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## Panel Discussion: Holocaust and Human Rights Law: The Fifth International Conference

Michael S. Bernstein Memorial Panel

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# HOLOCAUST AND HUMAN RIGHTS LAW: THE FIFTH INTERNATIONAL CONFERENCE

## TIME AND DISTANCE: THE CHALLENGE OF PROSECUTING HOLOCAUST-RELATED CRIMES

### Michael S. Bernstein Memorial Panel

United States: .....*Bruce J. Einhorn*<sup>1</sup>

Canada: .....*Arnold Fradkin*<sup>2</sup>

Australia: .....*Michael Wolf*<sup>3</sup>

Great Britain: .....*Philip Rubenstein*<sup>4</sup>

Moderator: .....*William M. Mandell*<sup>5</sup>

*William Mandell:* It is the unfortunate legacy of the post-World War II period that significant numbers of former Nazi persecutors have found safe haven in countries around the world. This panel of prosecutors has convened every year of the Conference to discuss what is being and has been done to bring Nazi persecutors to justice

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when they are found in countries in which they did not commit their acts of terror. In the first two years of the Conference, it was only feasible for us to have representatives from two countries on this panel: the United States, which was and is actually engaging in legal actions, and Canada, which was at that time only considering the initiation of actions. In 1990, we are able to have representatives on this panel from four countries, so perhaps we are moving in the right direction. I will call on the panelists in chronological order according to the time at which each country first began bringing legal actions of this type. This order seems the most natural for drawing out the development of this body of law in these countries and for highlighting both the interplay and the distinctions between what these countries have done within their own domestic legal systems.

I would like therefore to start with the United States. Bruce Einhorn has been with us many times over the years to discuss what is happening at the Justice Department's Office of Special Investigations (OSI). Bruce is presently the Deputy Director of OSI and has been with the Office since 1979—almost since its inception. He was very much involved with two prominent cases, the Arthur Rudolph case<sup>6</sup> and the John Demjanjuk case.<sup>7</sup> He has received many awards and citations for his excellent work at OSI, including the Attorney General's Commendation Award and the Justice Department's Special Achievement Award.

*Bruce Einhorn:* First let me say it is a particular pleasure to be back here. This is the best-run and most informative conference on the Holocaust—from a legal perspective at least—that I know of. It is a privilege to be part of it again.

As most of you know, the United States government treats cases involving alleged Nazi persecutors as matters of civil litigation.<sup>8</sup> Under United States law, individuals who—between the years of

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<sup>6</sup> Arthur Rudolph voluntarily relinquished his United States citizenship in 1984. The West German government in 1987 concluded there was insufficient evidence to justify trying Rudolph. A former rocket scientist, Rudolph is currently reapplying for United States citizenship. *Ex-Nazi Scientist Tries to Regain Citizenship*, N.Y. TIMES, July 21, 1991, at A1.

<sup>7</sup> See *Demjanjuk v. Petrovsky*, 475 U.S. 1016 (1986); see also ALLAN A. RYAN, JR., QUIET NEIGHBORS: PROSECUTING NAZI WAR CRIMINALS IN AMERICA 101-41 (1984); Francine R. Strauss, Note, *Demjanjuk v. Petrovsky: An Analysis of Extradition*, 12 MD. J. INT'L L. & TRADE 65 (1987). Demjanjuk is appealing a death sentence in Israel. DAILY TELEGRAPH (London), Aug. 15, 1991, at 7.

<sup>8</sup> See John Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1445-47, 1475-80 (1988).

1933 and 1945—assisted the Nazis, their affiliates, or allies in carrying out persecution based on race, religion, national origin, or political opinion are subject to investigation, denaturalization, and deportation from the United States.<sup>9</sup> The United States government does not presently exercise criminal jurisdiction over these individuals.<sup>10</sup> Rather, such jurisdiction is reserved for other countries, particularly those to which OSI often seeks to deport these individuals once they are located. The only kinds of quasi-criminal cases OSI actively associates with are extradition procedures.

Extradition is different from deportation. Deportation is an act undertaken by the state in which the subject resides.<sup>11</sup> It is the effort of that state to expel from its borders a person illegally present—an alleged Nazi persecutor in the case of OSI. Extradition, on the other hand, is an act initiated by another state, a foreign government, pursuant to a treaty with the United States, claiming that an individual living in the United States committed an act for which the treaty specifies he may be removed.<sup>12</sup> When that person is indicted and an arrest warrant is issued by the requesting state, the United States, under the treaty, may act to extradite the person to the requesting country for trial—a serious action for which there are due process safeguards, including the right to a hearing.<sup>13</sup> The Office does get involved in extradition cases, but only in a few instances. For the most part, OSI's activities are civil in nature, although the underlying activities that OSI investigates and prosecutes are often criminal.

It is with this legal backdrop, which already distinguishes OSI quite dramatically from some of its sister organizations on this panel, that I speak to you today. OSI believes the system the United States government uses has been very successful. In the eleven or so years that OSI has been in existence, it has investigated approximately 1300 individuals who allegedly assisted in Nazi persecution. There are currently about 600 open investigations at OSI. OSI has

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<sup>9</sup> 8 U.S.C.A. § 1251(a)(19) (West Supp. 1991). On denaturalization and deportation, see generally Elliot M. Abramson, *Reflections on the Unthinkable: Standards Relating to the Denaturalization and Deportation of Nazis and Those Who Collaborated with the Nazis During World War II*, 57 U. CHI. L. REV. 1311 (1989); Stephen J. Massey, *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 MINN. L. REV. 97 (1986); Jeffrey A. Evans, Comment, *Denaturalization/Deportation: What Standards for Withdrawing the Welcome Mat?*, 23 U.S.F. L. REV. 415 (1989).

<sup>10</sup> See Kester, *supra* note 8, at 1443–45.

<sup>11</sup> *Id.*

<sup>12</sup> See 18 U.S.C. § 3184 (West Supp. 1991).

<sup>13</sup> See *id.*

filed approximately eighty cases in court and has won almost all of the cases that have been decided. Approximately twenty-seven or twenty-eight individuals have been deported or otherwise removed from the United States as a result of OSI's activities.

It is very important to note that OSI's mandate includes all individuals who assisted the Nazi regime and its allies in carrying out persecution. OSI quite properly does not limit itself to investigating any one nationality or campaign of persecution that occurred in any particular geographic area or against any one ethnic or religious group. OSI's mandate includes the whole of the European Continent for the purposes of gauging the culpability or innocence of alleged war criminals.<sup>14</sup>

OSI has been prosecuting a number of different kinds of cases in the last year, some of which I would like to touch on now. The most common kind of case—but by no means the only kind—has involved the prosecution of Nazi concentration camp guards.<sup>15</sup> OSI has found a large number of former Nazi concentration camp guards who served in SS or SD Units in various Nazi slave labor facilities, concentration camps, and death camps.<sup>16</sup> Many, but not all of these individuals were proven to be ethnic German expatriates; individuals who collaborated with German forces occupying their countries of citizenship, and who were ultimately inducted into the SS and made guards at concentration camps. Some of the individuals were not of German ancestry, but made their way as camp guards by first functioning as auxiliaries to these camps. Because OSI's jurisdiction is civil in nature, it does not confine itself to prosecuting only those individuals who served as executioners or officers in the concentration camps. The Supreme Court of the United States, in a very famous decision, *Fedorenko v. United States*,<sup>17</sup> held that the term "persecution" encompasses the acts of those who served at a minimum as perimeter guards around the Nazi concentration camps, preventing the escape of prisoners being tortured, worked to death, and killed inside.<sup>18</sup> Our jurisdiction has therefore extended to concentration camp guards of almost every description.

I will give two examples. First, OSI recently secured summary judgment in the denaturalization case of an individual named Mi-

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<sup>14</sup> See RYAN, *supra* note 7, at 246-72.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 499 U.S. 490 (1981).

<sup>18</sup> *Id.* at 514.

chael Schmidt, an ethnic German from Romania residing in the Chicago area.<sup>19</sup> Schmidt had served as a camp guard at Sachsenhausen, in what is now East Germany. What is notable about the Schmidt case is that much of the documentation proving Schmidt was a guard—before he admitted it under oath at a deposition—came from the German Democratic Republic before October 1989. We were very impressed and pleased that East Germany, following in the steps of West Germany, was assisting us by providing relevant and credible documentation of Nazi persecution. A case of a similar nature, which is still pending, is the case of Albert Ensin. The case is pending before the United States Immigration Court here in Boston. It involves an ethnic German from, I believe, Lithuania, who is accused of serving as a camp guard at Auschwitz. We expect that we will have a trial in that case some time in June of this year. For those of you who will be in the Boston area and who read the papers and take account of these things, you may see a trial date being posted in the Ensin cases around June. Thus, you may see something that is becoming rarer and rarer—namely, an OSI trial.

OSI has also been involved in several “police cases”: cases involving individuals, generally non-Germans, who served in auxiliary police units under German control in the occupied Eastern territories. These auxiliary police committed atrocities or assisted in committing atrocities against the local population under their control—primarily Jews, Gypsies, and various Slavic nationals. One of the people involved in this kind of activity was an individual named Konrads Callies, who was tried and ordered deported fairly recently. Callies was a member of a death squad that operated in Latvia known as the Arajs Kommando. The chief of that death squad, Major Victor Zaride of the SS, was convicted of war crimes by the West Germans and died serving a life sentence in or near Dusseldorf. Callies was a Latvian who served as one of the unit’s senior officers. Evidence at the trial indicated that he commanded the unit at a time when it was solely engaged in the business of rounding up and executing civilians—principally Jews and the few Gypsies that were in the area at that time. Callies has been ordered deported to Austria, a country of which he is a naturalized citizen. His appeal of this order is pending.

OSI has also done work on a group of “propaganda cases,” which you may find to be somewhat more unusual and interesting

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<sup>19</sup> See Greg Henderson, *Court Won't Review Standards on Deportation of Former Nazis*, UPI, Oct. 15, 1991, available in LEXIS, Nexis Library, UPI File.

from a legal perspective than the guard cases I have discussed. Although these cases are relatively rare, OSI has prosecuted individuals who are accused of assisting in the Nazi reign of terror by advocating—through propaganda—the persecution of civilians, Jews, and certain political minorities. Two of these cases in particular are worth noting. The first was against an individual named Vladimir Sokolov. Sokolov was a Russian Nazi propagandist who retreated behind German lines when his country was invaded by the Nazis in 1941. After that, he served as the editor and chief writer of a German Army-controlled propaganda paper called *Rech*, which was distributed to hundreds of thousands of persons inside Nazi-occupied Russia. Sokolov advocated the extermination of Jews and the persecution of pro-Allied sympathizers. Indeed, at trial we were able to compare his writings to those of Jules Streicher, the editor of *Die Sturmer*, who was hanged at Nuremberg. These writings matched up in places almost word for word. Sokolov was denaturalized by OSI and was ordered deported to the Soviet Union. He has fled the United States.

Another case is against an individual named Forenze Koreh. The case is pending in Newark, New Jersey before a federal district judge. Koreh, a Transylvanian Hungarian who in the 1940s served as a propagandist and editor of a fascist newspaper, advocated the persecution of Romanians, Gypsies, and Jews, as well as those who sympathized with more liberal or allied war aims. After the war, Koreh allegedly lied his way into the United States and took up residence in New Jersey.<sup>20</sup> As I said, the denaturalization proceedings against him are pending. These are the kinds of cases that OSI is dealing with on a regular basis.

Let me close by saying that in discussing the topic of prosecuting war criminals forty-five years after the fact, I was concerned that some people might think I would invariably say that after forty-five years it has become increasingly more difficult to prosecute the kind of people OSI deals with every day. In my judgment, however, it has actually become easier in the United States to prosecute these cases successfully. After eleven years of activity, OSI has an established method of operation that has been found constitutionally proper<sup>21</sup> and that has resulted in the highest litigation success rate in the history of the criminal division of the Department of Justice.

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<sup>20</sup> See *Government Seeks to Denaturalize Suspected Nazi*, UPI, June 21, 1989, available in LEXIS, Nexis Library, UPI File.

<sup>21</sup> See *Fedorenko*, 499 U.S. at 506.

While it was very difficult in the early days to figure out how to approach cases, it is now much easier, simply because we have a standard pattern to follow. One of the things we do regularly as part of our Research and Development Project under the leadership of Deputy Director Eli Rosenbaum is to cross-reference the records of various Nazi units against the records of persons who immigrated to the United States after World War II. After eleven years, OSI has identified most of the major archives of the Nazi regime in the world, and it has regular borrowing power with these institutions to acquire the identities and names of those who participated in the Holocaust from captured documents. Thus, OSI has an established method for comparing names and identities obtained through world archives to information from immigration records of the last forty-five years. With the dawn of the computer age, it has become easier for OSI to identify individuals and to gather the necessary evidence from witnesses and documents that will be used in court. I believe that the OSI method of using civil litigation in the United States, the agency's development of a close working relationship with many governments, and the agency's track record of performance has made the job of bringing these people to justice much easier in the United States. This ease and efficiency of prosecution is essential to OSI's mission, as we have very few years left and are therefore quite literally in a race against time. The good news is that we will probably be more active in the near future than we ever have been in these last few years, having virtually automated the regimen that we use to identify, investigate, and prosecute these individuals.

*William Mandell:* Thank you, Bruce. I am pleased to introduce Arnold Fradkin, who is here from the Canadian government. It is interesting to look at the history of Canadian participation on this panel over the past five years. The first couple of years we had non-governmental representatives from Canada speculate about what Canada might do to follow the example of the United States. Subsequently, we had the Honorable Justice Jules Deschênes come and speak. Justice Deschênes was appointed to head the commission that the Canadian government created to come up with recommendations for future prosecutions.<sup>22</sup> I am happy to report that this

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<sup>22</sup> The Commission of Inquiry on War Criminals was established by Order of the Privy Council For Canada and approved by the Governor General on February 7, 1985. Chaired by the Honorable Mr. Justice Jules Deschênes, the Commission published two reports. The



year we actually have a prosecutor who is engaged in legal actions currently commenced in Canada. Mr. Fradkin is Deputy Director of the Crimes Against Humanity and War Crimes section of the Canadian Department of Justice in Ottawa. He served as counsel in Canada's first denaturalization action of this type and is currently involved in one of a few criminal prosecutions that have been initiated in Canada. Before holding his current position, Mr. Fradkin was special prosecutor in a variety of complex cases representing the Canadian government, and he has represented Canada in a number of human rights cases.<sup>23</sup> Mr. Fradkin is therefore uniquely qualified to talk about many of the issues with which we are concerned today.

*Arnold Fradkin:* Before I begin, I would like to say that it is a great honor for me to represent the Canadian Department of Justice on this panel. The Boston College Law School's International Conference on the Holocaust and Human Rights is well known in Canada and, indeed, internationally.

I was asked to talk about the successes and the difficulties of our cases. Since all four of our cases in Canada are presently before the courts,<sup>24</sup> we have no decisions. There is therefore very little I can say to you about what our successes and difficulties are. What I can do is describe what we are trying to do in Canada and what we have done so far. We recognize, as I'm sure all the nations represented here do, that human rights, like all rights of law, must have a coexisting system of enforcement to be effective. If those who committed crimes during the Holocaust were not brought to justice, this situation would, of course, serve as an example that human rights can be trampled upon. At the same time, however, Canada also recognizes that there are human rights inherent in the due process system itself, such that trials of persons accused of monstrous crimes, which may engender strong feelings and emo-

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first report was released to the public on December 30, 1986. See CANADA, COMMISSION OF INQUIRY ON WAR CRIMINALS REPORT, PART I: PUBLIC (Ottawa: Minister of Supply and Services, Canada, 30 December 1986) (Commissioner: J. Deschênes) [hereinafter COMMISSION REPORT]. The second report, however, remains confidential. See generally L.C. Green, *Canadian Law War Crimes Against Humanity*, 59 BRIT. Y.B. INT'L L. 217, 221 (1989).

<sup>23</sup> Arnold Fradkin has served as lead counsel in two of the four cases brought before the Canadian Courts to date, namely *Secretary of State v. Luitjens*, [1989] 2 F.C. 125 and *Regina v. Reistetter*, (1990) No. 321 (S.C.O.).

<sup>24</sup> *Regina v. Finta*, [1990] 69 O.R. (2d) 557 (H.C.J.); *Regina v. Pawlawski; Reistetter*, (1990) No. 321 (S.C.O.); *Luitjens*, [1989] 2 F.C. 125.

tions, are nevertheless carried out objectively, dispassionately, and according to the rule of law.

The question has been asked, "how do the cases and prosecutions regarding the Holocaust affect today's human rights violations?" In my view, the different prosecutorial formulae arrived at by the various governments here today, tempered by the realities of the judicial process in each of these countries, constitute the significance of the legal responses to the Holocaust and to the advancement of human rights. The different legal responses that are adopted, and the decisions that come out of these legal responses, will become precedents in Canada and elsewhere. When other crimes—such as crimes in South America or Cambodia—have to be dealt with by prosecutors in North America and elsewhere, the cases on the Holocaust will serve as precedent with regard both to the legal issues that will arise and to the procedures by which these prosecutions are most effectively conducted.

I would first like to talk to you briefly about the Deschênes Commission. As you may know, the Deschênes Commission was started in Canada to determine, in light of information that was continuously coming forward, whether there were war criminals alive and well and living in Canada.<sup>25</sup> The Canadian government instituted a Commission of Inquiry headed by Mr. Justice Jules Deschênes, who sat on this panel two years ago. At that time, his mandate was to inquire into what had been done, to report on the situation of war criminals in Canada, and to come up with legal recourses and suggestions.<sup>26</sup> Justice Deschênes delivered his report on December 31, 1986, about twenty-three months later. It consisted of a public part, which is about 900 pages long, and a confidential part, which is shorter.

I would ask everyone to bear in mind that the Deschênes Commission did not travel overseas to obtain evidence either from witnesses or from documents that are stored in the archives of Germany or of many Eastern European countries. Rather, the Deschênes Commission relied on depositions obtained from witnesses who had testified in trials in the 1940s and the 1950s—an interesting method that was within the Commission's mandate, as it was looking only to see whether the allegations of war criminals within Canadian territory were at all substantial.<sup>27</sup>

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<sup>25</sup> COMMISSION REPORT, *supra* note 22, at 17.

<sup>26</sup> *Id.* at 17–18.

<sup>27</sup> *Id.*

Instead of forming an office similar to the OSI, Mr. Justice Deschênes recommended that significant results could be achieved within the existing framework of the Department of Justice and the Royal Canadian Mounted Police.<sup>28</sup> As a result, a special prosecution unit of the Department of Justice was set up about three years ago and a similar unit of investigation was set up in the Royal Canadian Mounted Police. The Deschênes Commission made it clear that success in war crime endeavors in Canada depended upon foreign governments and their cooperation.<sup>29</sup> If we could not see all the witnesses in these mostly Eastern-Bloc countries, and the documents that were in their archives, then it would be extremely difficult, if not impossible, to obtain the necessary evidence. The Commission also made one final recommendation that six criteria be implemented before the government of Canada pursue this kind of evidence-gathering. Justice Deschênes insisted upon the following: (i) the protection of the witnesses' and the subjects' reputations through confidentiality; (ii) the use of independent interpreters; (iii) access to original documents; (iv) access to witnesses' previous statements; (v) examination of witnesses in accord with Canadian rules of evidence; and (vi) the videotaping of evidence taken in foreign countries that would then be filed in court.<sup>30</sup>

The government responded to the Deschênes Commission by adopting many of its recommendations, taking what we call a "Made in Canada" approach. This means that all persons residing in Canada who have committed crimes in foreign countries will be brought to account in Canada in a manner consistent with Canadian standards of law and evidence, and in accordance with the Canadian Charter of Human Rights.<sup>31</sup> This approach takes into account the existing Canadian laws that deal with denaturalization,<sup>32</sup> deportation,<sup>33</sup> and extradition.<sup>34</sup> In other words, building upon the American experience, the Canadian approach went one step further: it amended the Canadian Criminal Code to allow for prosecution of

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<sup>28</sup> *Id.* at 828-30.

<sup>29</sup> *Id.* at 891-92 (App. I-M).

<sup>30</sup> *Id.* at 890-91 (App. I-M).

<sup>31</sup> CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) [hereinafter Canadian Charter].

<sup>32</sup> Citizenship Act, R.S.C., ch. C-29 (1976), amended by ch. 37, 1987 S.C. 1105, 1114-15; see also COMMISSION REPORT, *supra* note 22, at 155, 168-239.

<sup>33</sup> Immigration Act, R.S.C., ch. I-2 (1977), amended by ch. 37, 1987 S.C. 1105, 1110-14; see also COMMISSION REPORT, *supra* note 22, at 156, 168-239.

<sup>34</sup> Extradition Act, R.S.C., ch. E-21 (1970), amended by R.S.C., ch. E-23 (1985); see also COMMISSION REPORT, *supra* note 22, at 155.

persons living in Canada who had committed offenses forty to fifty years earlier in countries other than Canada.<sup>35</sup>

I would like to take a few moments to share these observations with you, because the "Made in Canada" approach, in my humble opinion, represents a great step forward. At the same time, we have maintained other legal alternatives, such as denaturalization, deportation, and extradition. First of all, the Canadian Charter of Rights and Freedoms provides that the government cannot pass a law that makes a crime retroactive.<sup>36</sup> If an act were not an offense at the time it took place, the government cannot pass a law today that says it is an offense. That principle is consistent with universal standards of justice. If we were to find someone in Canada today who had committed a crime in Canada forty or fifty years earlier, however, there is no reason why such a person should not be brought to justice, as there is no statute of limitations in the criminal law of Canada. What we would have to do is to prosecute under the Criminal Code as it existed at the time the offense was committed. That was the first step in our concept. The second step was to ask where Canada gets the right to prosecute offenses that have taken place in another country. The third step was to determine whether the offenses to be charged were war crimes or crimes against humanity.

Under Canadian law, if an act is an offense under the Criminal Code, is a war crime or a crime against humanity, and is committed by a person who is a Canadian citizen or employed by Canada in a civilian or military capacity, then Canada would have jurisdiction.<sup>37</sup> This concept basically reflects the international law principle of "nationality"—a state may pass laws that affect its citizens extraterritorially.<sup>38</sup> Additionally, if the offense were committed by a person who is a citizen employed in a civilian or military capacity by a state that is engaged in an armed conflict against Canada, then Canada could claim jurisdiction.<sup>39</sup> This demonstrates the "protective" or "perpetrator principle," which states that a country may pass laws extending extraterritorial jurisdiction to the nationals of a state with which it is engaged in armed conflict and which threatens its na-

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<sup>35</sup> Criminal Code, R.S.C., ch. C-46, § 6(1.91)-(1.97) (1985), amended by ch. 37, 1987 S.C. 1105.

<sup>36</sup> Canadian Charter, *supra* note 31, § 11g.

<sup>37</sup> Criminal Code, R.S.C., ch. C-46, § 6(1.91) (1985), amended by ch. 37, 1987 S.C. 1105.

<sup>38</sup> See Law Reform Commission, *Extraterritorial Jurisdiction* (working paper) (Ottawa: Ministry of Supply and Services, Canada, 1984) at 37 [hereinafter Law Reform Commission].

<sup>39</sup> *Id.*

tional security.<sup>40</sup> Finally, the Canadian Criminal Code extends jurisdiction to cases where the crime charged was committed against a Canadian citizen or a citizen of a state in an armed conflict.<sup>41</sup> This is known as the "passive personality principle."<sup>42</sup>

The Canadian legislation, however, went further. A second subsection provides extraterritorial jurisdiction on the basis of the person's presence in Canada where, at the time of the crime, Canada could have, in conformity with international law, exercised jurisdiction over the person with respect to the crime committed.<sup>43</sup> This expresses what is known in international law as the "universal jurisdiction" concept.<sup>44</sup> Certain crimes are committed not against a particular state but against the international community, and therefore any state in which the offender is located has the right to try the offender.<sup>45</sup> The best example of this principle in international law has always been piracy.<sup>46</sup> Under international law, any state that captured a pirate could try him regardless of where the acts of piracy took place. War crimes are crimes against humanity and should be subsumed under that same principle of universal jurisdiction, since such crimes were committed, by definition, against the international community.<sup>47</sup>

<sup>40</sup> *Id.*

<sup>41</sup> Criminal Code, R.S.C., ch. C-46, § 6(1.91)(a)(iii) (1985), amended by ch. 37, 1987 S.C. 1105.

<sup>42</sup> See generally Law Reform Commission, *supra* note 38.

<sup>43</sup> Criminal Code, R.S.C., ch. C-46, § 6(1.91)(b) (1985), amended by ch. 37, 1987 S.C. 1105.

<sup>44</sup> See, e.g., Christopher L. Blakesley, *A Concept Framework for Extradition and Jurisdiction Over Extraterritorial Crime*, 1984 UTAH L. REV. 685, 688-717 (1984); A.R. Carnegie, *Jurisdiction Over Violations of Laws and Customs of War*, 39 BRIT. Y.B. INT'L L. 402, 405 (1963); William B. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. REV. 177, 216-18 (1945); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788 (1988); Rena Hozore Reis, *The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine*, 20 CORNELL INT'L L.J. 281, 301-07 (1987).

<sup>45</sup> See Blakesley, *supra* note 44, at 688-717.

<sup>46</sup> See Theodore Meron, *Common Rights of Mankind in Gentili, Grotious and Suarez*, 85 AM. J. INT'L L. 110, 111-14 (1991).

<sup>47</sup> The 1987 Amendment to the Criminal Code adopts the following definitions: "crime against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations; "war crime" means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in

Canada has tried to adopt this principle of universal jurisdiction as an evolving concept. For a crime to warrant universal jurisdiction, it had to be recognized under international law at the time as being applicable and proper.<sup>48</sup> Over the years, different treaties and the advancement of international law have expanded the concept of universal jurisdiction such that it now covers a lot of offenses to which it had not extended in the past.

That is what the logic of the Canadian experience has been in its attempt to prosecute war crimes and crimes against humanity. The government of Canada feels that this is the way to bring those offenses forward, by dealing with them in Canada according to our own standards and principles. Indeed, if a person does get convicted in Canada, he will go to a Canadian jail and serve his time there.

Now I would like to turn briefly to what we have done since the Deschênes Commission Report and the passage of the foregoing legislation. Often we are asked why the twenty cases specifically identified by the Commission of Inquiry have not yet proceeded in our courts. The short answer is that the Commission of Inquiry did not, as I said earlier, gather the actual evidence or documentation that exists outside of Canada in a manner that is required to meet Canadian rules of evidence. We cannot bring a case to court unless we have the evidence available and admissible under our law. We cannot take a deposition that was filed in some trial in 1948 and file it in a Canadian court. We have to locate the witnesses and find out whether they are willing and able to testify. Then we must determine whether they will come to Canada, and if not, whether to take commission evidence in the countries where they are located. The same applies to documents that are found in foreign archives. We have to determine whether these documents are admissible under our standards of evidence either as business records or in some other manner consistent with the provisions of the rules of the Canada Evidence Act dealing with the admissibility of documents.<sup>49</sup> All of this evidence takes time to gather of course, particularly when you start off fresh and have to develop an entire system.

When Canada began this endeavor, there were no negotiations or agreements with any foreign countries. We had to undertake

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the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.

Criminal Code, R.S.C., ch. C-46, § 6(1.96) (1985), amended by ch. 37, 1987 S.C. 1105.

<sup>48</sup> See Blakesley, *supra* note 44, at 688-717.

<sup>49</sup> Canada Evidence Act, R.S.C., ch. C-5 (1985).

negotiations with foreign governments and work out memoranda of understanding in which they agreed to assist Canada by permitting Canadian investigators and historians to go into their archives and hold rogatory commissions to gather evidence. We are increasingly finding that a lot of witnesses we have located do not want to come to Canada or are unable to come for reasons of health or age. Therefore, we have to form commissions to go to them and take their evidence. We then run into the problem that European countries generally, and Eastern European countries in particular, use systems for gathering and giving evidence that are quite different from the Anglo-American system.<sup>50</sup> For example, they do not have the same full rights of cross-examination. Thus, during negotiations, they felt it might compromise their sovereignty if they allowed us to cross-examine witnesses and take their evidence on commission in a manner consistent with Canadian standards. So, a lot of negotiation and hard bargaining had to be done before these matters finally could be resolved. Notwithstanding the changing conditions in Europe, it is our position that these memoranda of understanding continue to guarantee our ability to go and take evidence as previously agreed.

The next thing I want to turn to is what Canada actually has done. At the moment, there are four cases before the courts. The three criminal cases are *Regina v. Finta*,<sup>51</sup> *Regina v. Pawlawski*,<sup>52</sup> and *Regina v. Reistetter*.<sup>53</sup> The fourth case, *Secretary of State v. Jacob Luitjens*,<sup>54</sup> is a denaturalization case. I of course will only be able to tell you what is public knowledge about these cases.

Mr. Finta was arrested in December 1987. His preliminary inquiry was set for September 1988, but instead, a direct indictment was preferred by the Attorney General of Canada himself.<sup>55</sup> On August 18, 1988, foreign evidence was obtained in Hungary and Israel. Preliminary motions were heard in June 1989. The trial is presently proceeding in Toronto. Mr. Finta is charged with unlawful confinement, robbery, kidnapping, and manslaughter under the Criminal Code as it existed in 1944—the date these offenses al-

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<sup>50</sup> See COMMISSION REPORT, *supra* note 22, at 869–92 (App. I–M).

<sup>51</sup> [1990] 69 O.R. (2d) 557 (H.C.J.).

<sup>52</sup> [1990] No. 293 (S.C.O.); (1990) No. 22566 (S.C.C.).

<sup>53</sup> [1990] No. 321 (S.C.O.).

<sup>54</sup> [1989] 2 F.C. 125 (Vanc.).

<sup>55</sup> *Finta*, 69 O.R. (2d) at 563.

legedly occurred.<sup>56</sup> These offenses also are alleged in the indictment to constitute war crimes or crimes against humanity.<sup>57</sup>

Michael Pawlawski was charged by direct indictment in December 1989. Motions are presently being argued before the court. He is charged with several counts of murder in 1942 under the Criminal Code as it existed at that time. His crimes are also alleged to constitute war crimes or crimes against humanity.

Stephen Reistetter was charged by direct indictment in January 1990. Within a month, an order was obtained from the Ontario Supreme Court to take commission evidence in Czechoslovakia. He is charged with two counts of kidnapping in 1942 under the Criminal Code as it then existed, such offenses also constituting war crimes or crimes against humanity.

Revocation of citizenship proceedings were brought against Jacob Luitjens in January 1988.<sup>58</sup> The trial started in September 1988 and lasted until May 1989. Two rogatory commissions were formed and went to the Netherlands. The government alleges Mr. Luitjens fraudulently gained entry into Canada and obtained Canadian citizenship by failing to declare his past Nazi activities.<sup>59</sup> We are presently awaiting judgment with regard to Mr. Luitjens. Thus, no decisions have been rendered; one trial has been completed and one trial is close to being completed. Again, I apologize for not being able to say more, but perhaps next year on this panel we will be able to talk a little further about these cases.

I would like to close simply by reading a quotation by Elie Wiesel, taken from his Nobel Peace Prize address in 1986. I think Mr. Wiesel's words are very appropriate in light of the actions that have been taken by our government and by other governments in bringing Nazi war criminals to justice. Mr. Wiesel stated:

When human lives are endangered, when human dignity is in jeopardy, national borders and sensitivities become irrelevant. Wherever men or women are persecuted because of their race, religion, or political views, that place must—at that moment—become the center of the universe.

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What all these victims need above all is to know that they are not alone; that we are not forgetting them, that when their

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<sup>56</sup> See *id.* at 563–64.

<sup>57</sup> *Id.*

<sup>58</sup> *Luitjens*, 2 F.C. at 128.

<sup>59</sup> *Id.*



voices are stifled we shall lend them ours, and that while their freedom depends on ours, the quality of our freedom depends on theirs.<sup>60</sup>

*William Mandell:* We now move to Australia. In the past two years we actually have had representatives from the Australian government on this panel. We have had the Director of the branch of their Justice Department that deals with these cases, Mr. Robert Greenwood, and the Deputy Director, Graham Blewitt. Australia has initiated actions and currently is engaged in many different types of legal proceedings based on changes in their law. Because of the busy schedule of these gentlemen and their fellow colleagues, we unfortunately could not bring anyone from the Australian government to the Conference this year. However, we are very privileged to be able to have Michael Wolf on the panel today. As Bruce Einhorn has told you, Michael Wolf served at OSI and the United States Justice Department for four years as Deputy Director. He is currently a sole practitioner in litigation and labor law in Washington, D.C., and serves as special consultant to the government of Australia.

*Michael Wolf:* When we think about World War II, we generally think of Europe, the United States, and Canada. For Australia, the Pacific theatre really was the war;<sup>61</sup> that was the focus of its attention. When the Australians had war crimes trials after the war, they were against Japanese officers.<sup>62</sup> If you look in Australia today you do not find legions of Holocaust experts or experts in the World War II Eastern European theatre teaching at the universities. Their outlook is very different. On top of that, Australia does not have a large Jewish community. Certainly, there are lots of European emigres there, but it is not like Canada or the United States. So naturally the question is raised: why are the Australians prosecuting Nazis? What brought them to this? It always struck me as an interesting question and I will not answer it yet. First let me explain what it is that the Australians have done legally, and then I will come back to that question.

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<sup>60</sup> Acceptance speech before Nobel Committee at Oslo, Norway, *reprinted in* N.Y. TIMES, Dec. 11, 1986, at 1.

<sup>61</sup> See generally LIONEL WIGMORE, *THE JAPANESE THREAT* (1957).

<sup>62</sup> See generally PHILLIP R. PICCAGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIME OPERATIONS IN THE EAST 1945-51* (1971).

There is a War Crimes Amendment Act of 1988<sup>63</sup>—which actually did not become effective until January 1989—that provides for the prosecution of “serious crimes”: manslaughter, murder, mayhem, etc. The Amendment Act also added to the definition of “serious crimes” certain things specific to the war in Europe, such as the internment of people in concentration camps and death camps, or the deportation of people to camps.<sup>64</sup> In addition, a serious crime becomes a “war crime” within the meaning of the law if it were committed in the course of hostilities of war, or in the course of occupation, and if it were part of a campaign of political, racial, or religious persecution.<sup>65</sup> “War,” as defined in this Amendment, means the war in Europe, which began on September 1, 1939 and ended May 8, 1945.<sup>66</sup> The Amendment Act makes all persons who engaged in serious war crimes subject to life imprisonment if the crime involved an intent to kill, and subject to a maximum twenty-five year sentence for lesser crimes.<sup>67</sup> The Act extends criminal liability also to those who conspired in a serious crime, aided it, abetted it, attempted it, or—another cause of action that will undoubtedly become an issue in the courts—were “knowingly concerned” in it.<sup>68</sup> This “knowingly concerned” language is involved in the first prosecution, where, as I said, the courts will undoubtedly address what it means.

In contrast to the United States and Canada, Australia provides only for criminal prosecution of war criminals.<sup>69</sup> There is no deportation or denaturalization mechanism in Australia under this law. Thus, to that extent, the Australian experience is likely to be very different from that of the United States. The trials will be jury trials and the whole dynamic of the trial will also be very different.

One last aspect of the statute that is very interesting: there is no special provision to make it easier for the prosecutor to try these cases after forty-five years. There is, however, a provision that helps the *defendant* a little bit by allowing him to move for a stay of

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<sup>63</sup> AUSTL. C. ACTS, No. 3 (1989) (amending War Crimes Act, AUSTL. C. ACTS, XLIII, No. 48 (1945)) (copy on file at the Boston College Third World Law Journal office).

<sup>64</sup> *Id.* § 6.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* § 5.

<sup>67</sup> *Id.* § 10.

<sup>68</sup> *Id.* § 6.

<sup>69</sup> Compare Citizenship Act, R.S.C., ch. C-29 (1976), amended by ch. 37, 1987 S.C. 1105, 1114-15 and Immigration Act, R.S.C., ch. I-2 (1977), amended by ch. 37, 1987 S.C. 1105, 1110 and *Fedorenko v. United States*, 449 U.S. 490 (1981) with War Crimes Act, AUSTL. C. ACTS, XLIII, No. 48 (1945) amended by AUSTL. C. ACTS, No. 3 (1989).

proceedings if, due to the passage of time, he is unable to gather evidence necessary to the presentation of a defense.<sup>70</sup> Now that there is a prosecution in Australia we will see what comes of this provision and how it is handled by the court and the defendant. As to the political history of the law's passage, the Amendment Act went through Parliament and, as I stated earlier, became effective in January 1989. It was actually quite a close vote. As I understand it, the vote basically was divided along party lines. One of the main points the opposition raised was that Australians could themselves be prosecuted under this statute. What if it emerged that an Australian had committed a serious crime in the European theater? The government insisted that it would not carve out an exception for any person who committed war crimes. The government's position was that anyone who committed a war crime should be prosecuted regardless of whether he was or was not an Australian citizen. This created quite a controversy. Ultimately, the statute was passed and Australia's Special Investigations Unit is now operating under that statute.<sup>71</sup>

Back to the question of why the Australian government passed this law. I think the easy answer—to use the parlance of the day—was that the government wanted to “do the right thing.” To quote Bob Greenwood in a speech he gave when addressing this question, “What could possibly be the grounds for forgetting the murder of a child of an age less than the age of consciousness simply because the child was Jewish?” How can you say forget it and just walk away from it? This was the motivating factor and I applaud it.

Now on to the first case that the government brought only a few months ago.<sup>72</sup> Unfortunately, there is not too much that I can say about the case except what is public.

The Australians arrested someone who aided the Germans in a small village, a *shtetl*, located on the Byelorussian-Ukranian border. One of things he is charged with is killing small infants not yet at the age of consciousness—exactly the sort of case Bob Greenwood had put forth in his speech as a paradigm. The defendant is accused of helping the Germans round up all the Jews from the ghetto and murder them in a classic mass execution. Ditches were dug, Jews

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<sup>70</sup> War Crimes Amendment Act, § 13(5)(a)–(b).

<sup>71</sup> See Special Investigations Unit Annual Report (1989) (on file at the Boston College Third World Law Journal office).

<sup>72</sup> Polyukmovich v. Commonwealth of Australia and Anor, 171 C.L.R. —(1991) (slip opinion on file at the Boston College Third World Law Journal office).

were brought out and forced to undress. They had already gone through a period in the ghetto when they were starved and reduced to less than human status, where their will to think and act had been taken away from them. Finally, the men, women, and children of that village were brought to the ditches and killed. The defendant was also accused of going out into the forest to find the Jews who escaped. Allegedly, his job was to go out into the woods—into the Pripet Marsh area, which is a rather God-forsaken place—and find the escaped Jews that were hiding there and kill them. There will be witnesses who will testify that this is exactly what he did. It will be a classic murder case.

From a legal perspective, this case will present many of the same challenges that the United States and Canada have experienced. Witnesses and evidence from all over the world will be tested and challenged for a whole host of reasons. The War Crimes Amendment Act will be challenged on constitutional grounds, and the question will be raised: can Australia prosecute people for crimes committed overseas? I cannot predict what the other defenses will be, but the defense lawyer has already said that he will raise a constitutional challenge. If there is any press coverage here in the United States on either the legal or evidentiary issues, it will be a fascinating and exceptionally educational case to see unfold.

*William Mandell:* Thank you Michael. From Great Britain, we are honored to have Philip Rubenstein. Since 1986, Philip has been Secretary to the All Party Parliamentary War Crimes Group in London. This group played a key role—and Philip has been highly instrumental—in coordinating efforts in Great Britain to address the issue of the possible presence in Britain of former Nazi persecutors. This War Crimes Group has managed, among other things, to have an independent Inquiry on War Crimes established and concluded by the British government. It is interesting to note that on this very podium one year ago Sir William Chalmers, Q.C., who was one of the jurists appointed to the War Crimes Inquiry, spoke on this panel to discuss the situation in Britain. As he sat here and gave his presentation and listened to the other panelists, we all knew very well that he was about to head back to Great Britain to make recommendations as to whether the country should change its laws to address this issue. It is gratifying to know that after his participation in last year's Conference, Sir William did in fact recommend that Great Britain address this issue and make some changes in its

laws. Without further delay, allow me to introduce Philip Rubenstein.

*Philip Rubenstein:* Three years ago, when I was last in Boston, everyone was interested in what was going on in Great Britain with respect to war crimes. At that time, I was able to report that the U.K. government was considering what to do—but no more than that. By way of history, in October 1986, the Simon Wiesenthal Center in Los Angeles presented the British government with a list of seventeen people.<sup>73</sup> The list was acknowledged by the Prime Minister, although she took no action herself. Members of Parliament were closely watching these events unfold, and a number of them became sufficiently concerned to set up a Parliamentary War Crimes Group. Following on from there, Scottish Television provided the Home Office with another list of thirty-four names. Our Group was comprised of Members of Parliament only. There were one hundred Members from all sides of the Houses of Commons and Lords who came together under the leadership of former Home Secretary Merlyn Rees.<sup>74</sup> Immediately, the Group drew up terms of reference, wrote to ministers, and began to apply considerable pressure on the government through Parliament and the press. As soon as it became clear that the issue of war crimes had been passed on to the Home Secretary, we decided to meet with him. The then Home Secretary informed us that, although he would take all allegations seriously, we would have to come up with more concrete evidence. Six months later, we had worked with Scottish television and the Simon Wiesenthal Center to put together a lengthy and comprehensive dossier of case details. After reviewing the materials for three months, the Home Secretary finally decided that it was time to do something. That was pretty much the state of things when I was last in Boston.

Since that time, a number of things have happened that have brought us close to the introduction of a War Crimes Bill in Parliament. Three years ago, when the government was deciding what to do, there was a good deal of speculation that it would opt for prosecutorial action, but no conclusive decisions were made. At that

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<sup>73</sup> Catherine Gerwetz, *Wiesenthal Center Says 17 Nazis Hiding in England*, UPI, Oct. 22, 1986, available in LEXIS, Nexis Library, UPI File.

<sup>74</sup> The Home Secretary is a senior Cabinet Minister of Great Britain whose responsibilities include the administration of justices, criminal law, criminal justice system, immigration and nationality, and community relations. Merlyn Rees was Home Secretary from 1976–1979 under the last Labour Government (footnote provided by panelist).

time, there was a flagship Criminal Justice Bill that was going through Parliament.<sup>75</sup> We urged the government to introduce an additional provision to the Bill that would allow Nazi persecutors to be tried in Britain. We tabled such a provision at the Committee stage of the Bill, but the government refused to support it. Instead, the government decided to set up a Commission of Inquiry.

Douglas Hurd, the Home Secretary, appointed two commissioners—Sir William Chalmers, and Sir Thomas Hetherington.<sup>76</sup> A former Director of Public Prosecutions in Britain, Sir Thomas had for a ten-year period been responsible for deciding whether there was sufficient evidence to bring public prosecutions. Bill Chalmers was his Scottish equivalent, as the former Crown agent in that jurisdiction. Together, they were charged with the task of sifting through all the available evidence and deciding how to proceed.

We endeavored to help the Inquiry with its work by maintaining regular contact, by providing the Inquiry with information about individuals, and by submitting two major documents for the Inquiry's consideration. The first was an historical analysis of the manner by which we believed people now accused of Nazi war crimes had entered Britain.<sup>77</sup> The story is similar to those of the United States, Canada, and Australia, where displaced persons were brought over from Eastern and Central Europe after the war to fill an enormous need for labor. We supplemented this first document with a legal report. Having set out how Nazi war criminals may have entered Britain after the war, we wanted the government to know what our thoughts were as to what should now be done. In so doing, we examined the available information in great detail and reviewed the various prosecutorial options that the government had open to it, also making suggestions for provisions in any future legislation.<sup>78</sup>

The Inquiry tabled its report in July 1989,<sup>79</sup> and its conclusions surpassed everyone's expectations. The Inquiry found enough information to justify a change in the law so that people in Britain

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<sup>75</sup> Criminal Justice Act, 1988, ch. 33.

<sup>76</sup> Craig Whitney, *Britain Moving to Allow Trials of Suspected Nazis*, N.Y. TIMES, May 2, 1991, at A6.

<sup>77</sup> See ALL-PARTY PARLIAMENTARY WAR CRIMES GROUP, REPORT ON THE ENTRY OF NAZI WAR CRIMINALS AND COLLABORATORS INTO THE UNITED KINGDOM (1988).

<sup>78</sup> See LEGAL COMMITTEE, ALL-PARTY PARLIAMENTARY WAR CRIMES GROUP, NAZI WAR CRIMINALS IN THE UNITED KINGDOM: THE LAW (1989).

<sup>79</sup> SIR THOMAS HETHERINGTON & WILLIAM CHALMERS, WAR CRIMES INQUIRY, REPORT OF WAR CRIMES INQUIRY (1989) [hereinafter WAR CRIMES INQUIRY REPORT].

accused of Nazi war crimes could be prosecuted.<sup>80</sup> Enough evidence was found to warrant the indictment of three people, and the Inquiry gave grounds for strong suspicion against three others.<sup>81</sup> Another seventy-five potential cases existed, but because of a lack of time the Inquiry did not have an adequate chance to look at these cases in detail.<sup>82</sup> There was also a category of forty-six people who as yet had been untraced by the Inquiry.<sup>83</sup> In a key section of the report, the Inquiry gave its view as to why something had to be done in Britain. They stated that “the crimes committed are so monstrous that they cannot be condoned.” They added that they hoped prosecution could act as a deterrent in future wars. “To take no action,” they insisted, “would taint the United Kingdom with the slur of being a haven for war criminals.”<sup>84</sup> This was not a partisan pressure group talking, but rather the independent commissioners who had put together the War Crimes Inquiry Report.

The report clearly moved the Home Secretary, but he was still unsure as to how he should proceed. One of his officials had the bright idea of letting someone else make the decision. So the Home Secretary brought the Inquiry’s Report to Parliament in December 1989. After a three hour debate, a vote was taken and Parliament voted three to one in favor of legislation—348 votes in favor and 123 against.<sup>85</sup>

As a result, the government has now introduced a War Crimes Bill, which received its Second Reading two weeks ago. It is very thin, containing only three clauses and an explanatory schedule at the back. To understand the legislation that has been put before Parliament, it is useful to go back and listen to exactly what transpired during the House of Commons’ debate in December.

The first problem discussed was whether Britain should seek to prosecute, extradite, or denaturalize war criminals. There were people who were anxious that the legislation would result in the extradition of war criminals only to the Soviet Union, because that was the only country that had expressed an interest in taking anyone. As in most Anglo-Saxon countries, there is still enormous distrust in Britain for Soviet justice and Soviet judicial methods. So

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<sup>80</sup> *Id.* §§ 10.5–10.6.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* § 10.1.

<sup>85</sup> 163 PARL. DEB., H.C. (6th ser.) 908 (1989). The House of Commons debated the War Crimes Bill on December 12, 1989 (footnote provided by panelist).

no one wanted to pursue that option. There was also the possibility of denaturalization and deportation—the system that exists in the United States. Again, most members of Parliament were opposed to that option. In Great Britain, if someone is denaturalized, it is purely on the prerogative of the Home Secretary.<sup>86</sup> There is no procedure in open court, only a quasi-judicial appeal. Because of the nature of the evidence and the controversy, it was felt that these trials—if they were to be conducted at all—should be conducted in open court. That meant that the only viable option was prosecution in British courts.

There was a second anxiety. There were people who accepted criminal prosecution as a viable solution, but who nevertheless bristled at the idea of retrospective legislation, arguing that it was inherently wrong to create a new category of crime for acts that were not criminal when they were committed. The government listened to this argument and decided to introduce a measure that would create or extend British criminal jurisdiction to include murder and manslaughter committed as violations of the laws and customs of war during World War II in Germany and German-occupied territories. Thus, the statute would not be retrospective because it would apply only to acts that were in fact crimes under both international<sup>87</sup> and domestic<sup>88</sup> law when they were committed. If these crimes had been committed in Germany or German-occupied territories by someone who was a British citizen at the time, they could be tried in Britain even without this law. A Labor Party member of Parliament put it this way: “The kernel of the Bill is to put people who are residents in this country and have rights of a vote here—some British citizens and some not—on the same footing as everyone born here. To that extent, it is a technical adjustment of nationality law.”

Others argued a third strand, that even though the law would not be retrospective, new rules of evidence would need to be introduced in order to secure convictions in war crimes cases. The gov-

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<sup>86</sup> British Nationality Act, 1981, ch. 61, § 40(1).

<sup>87</sup> The Hague Conventions of 1899 and 1907 were accepted by the western world as part of the international law governing the laws and customs of war (footnote provided by panelist).

<sup>88</sup> Offenses Against the Person Act, 1861, 24 & 25 Vict., ch. 100, § 9. Section 9 gives English courts jurisdiction over acts of murder and manslaughter committed overseas by British subjects. *Id.* This provision, however, does not extend jurisdiction to such acts committed overseas by persons who were not British subjects at the time of commission (footnote provided by panelist).



ernment listened to this argument and came up with a proposal that would change only one particular procedure—the “committal proceeding.” In Great Britain, before a criminal case gets to Crown Court, it has to go through a Magistrate’s Court, where it is committed for trial. The magistrate has to be satisfied that there is a *prima facie* case to answer. Because the prosecution and defense could both insist on bringing over witnesses during committal, potentially leading to unnecessary expense and interminable delays, the government proposed that the committal proceeding be forgone in these cases, with war crimes instead going directly to the Crown Court. Effectively, this system provides the same safeguards for the accused as the committal proceeding in a different form.<sup>89</sup> For the past four years, moreover, the same procedure has been used in serious fraud cases, so there is nothing particularly novel in this proposal. The Inquiry Report also proposed that if any documents from the archives were presented as evidence in these cases, the archivist should not be required to testify as to their authenticity. The government, however, rejected this proposal because it would break new legal ground and would leave the legislation open to the charge of retrospectivity.<sup>90</sup>

The government also answered the anxiety on special pleading on evidence.<sup>91</sup> There was an Inquiry proposal that the law of Scotland be amended to enable live television evidence to be presented in Scots’ Courts.<sup>92</sup> For those not familiar with the British system, Scottish and English law are entirely different. Rather than make an exception just for these cases, legislation was introduced so that live television evidence may be taken from overseas and introduced in all criminal cases.

The Bill is now in the Committee Stage and has not yet passed through its Second Reading, where the principles behind the legislation are discussed. It then must pass through the House of Commons and, after that, the House of Lords. Most of the House of Commons is behind this Bill, but this is not the case in the House

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<sup>89</sup> The relevant portion of the War Crimes Bill provides the following: Dismissal of the charge or of all the charges against the applicant shall have the same effect as a refusal by examining magistrates to commit for trial, except that no further proceedings may be brought on a dismissed charge except by means of the preferment of a voluntary bill of indictment.

(footnote provided by panelist).

<sup>90</sup> 524 PARL. DEB., H.L. (5th ser.) WA52 (1990).

<sup>91</sup> WAR CRIMES INQUIRY REPORT, *supra* note 79, § 10.4, para. 9.38.

<sup>92</sup> *Id.* § 10.4, para. 9.34.

of Lords. The House of Lords is an unelected body consisting mainly of people who are rather elderly and who are there by virtue of the fact that their father before them was a Lord; and so it has been since time immemorial. There is a convention that you do not go against the will of the elected House of Commons if you are in the House of Lords. It seems that on this issue, however, most of the House of Lords—with a few brave and honorable exceptions—are against this particular change in the law, as the record of the floor debate makes perfectly clear. There are a number of reasons. First, there is a former Lord Chancellor—a former head of the entire British legal system<sup>93</sup>—who is completely opposed to this legislation. He believes that the proposed legislation would abolish the hearsay rule. This is simply not true. There has been no suggestion of any tampering with the hearsay rule. He told the House of Lords that if this legislation goes through, it would mean that statements from persons now deceased could be introduced as evidence in court. What he neglected to say was that this has been the law in Britain for the past two years.

Second, there are also the policy-makers of yesteryear who are against the legislation, and they hold great sway. One member of the House of Lords formerly served as a Foreign Office Minister, and was responsible for bringing Ukrainians and Poles to Britain after the war.<sup>94</sup> Most of these people were entirely blameless during the war and had every right to enjoy a very happy and rewarding life in Britain. Some of these immigrants, however, had probably been involved in war crimes. This member of the Lords had advised the government in 1947 to stop all prosecutions in the British Zone of Germany and to discourage any legal activity against people who had entered Britain. His opposition to the Bill may be rightly questioned as an attempt to validate his post-war recommendation and thereby defend his reputation.

A third element that we had not bargained for is that a significant number of persons in the House of Lords are themselves of the war generation. Speaker after speaker in the original debate in the House of Lords said that we should look forward to a new Europe of reconciliation and not an old Europe of recrimination.<sup>95</sup>

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<sup>93</sup> Lord Hailsham, Lord Chancellor, 1979–87. Lord Chancellor is a senior Cabinet post with responsibility for administering the English legal system (footnote provided by panelist).

<sup>94</sup> Lord Mayhew, Parliamentary Under Secretary of State at the Foreign Office, 1946–50 (footnote provided by panelist).

<sup>95</sup> 524 PARL. DEB., H.L. (5th ser.) WA52 (1990).

For many of these people the war holds very painful memories. Their opposition to the legislation stems, at least in part, from their desire to leave these awful memories in the past.

The fourth and final category of opposition to the legislation is epitomized by Lord Bellhaven and Stenton, who suggested that if you put someone on trial now for war crimes, you may be subjecting him to as harrowing an experience as that which he allegedly put his victims through.<sup>96</sup> I was sitting in the public gallery when he said this and I was momentarily horrified; it sounded like an obscenity. After reading his speech again the next day, however, I realized that he truly had not meant it in any malicious or insensitive way. I think that because he is about the same age as most of the people who are going to face trial, he felt the pressing need to ask himself how he would feel if he were in their position. I think an empathy factor played a major role in his opposition and quite probably will continue to do so.

These, I believe, are the main reasons for the vociferous opposition to the Bill that we are seeing in the House of Lords. But the Lords will need to take care: if they ultimately vote against this legislation, they are likely to spark a constitutional crisis in Britain. In opposing this legislation, they would be going against a four to one majority in the House of Commons—a body that is elected and that, for better or worse, represents the will of the people.

I want to come back to the House of Commons to talk about our greatest success—the conversion of David Waddington to our side. David Waddington is the current Home Secretary, a job he has held for only six months. It is rumored that when last canvassed three years ago, he believed that war crimes cases could not and should not be undertaken. When he became Home Secretary, however, he had the opportunity to read the Chalmers and Hetherington Report. More importantly, he had the opportunity to do what most of us, myself included, have not: to read the unpublished annex to the Report that details the allegations surrounding the particular crimes of the particular persons we are discussing. He has seen the evidence and has done a complete turn-around. When Secretary Waddington presented the War Crimes Bill to the House of Commons, he said:

Nobody would have chosen to address these issues so long after the event. It is so long since the war, and the instinctive wish of

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<sup>96</sup> *Id.*

most of us is to get on with our lives in peace and not to rake over the past, let alone the pasts of men who have lived peacefully in this country since before many honorable Members were even born. But sometimes one is brought face-to-face with facts that cannot be buried, with deeds so terrible that they cannot be forgotten, and as long as one of those responsible survives, the world will cry out for justice.<sup>97</sup>

As much as successive British governments have tried to rake over the past, the facts have refused internment. The British government did not need this. They did not like it, and they did not want it. But they have got it, and now they have faced up to it. I am very pleased to live in a country that recognizes its own responsibility and that is finally taking steps to ensure that those who are responsible for Nazi atrocities, who crept into Britain after the war, are after all these years made to answer for their crimes.

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<sup>97</sup> 169 PARL. DEB., H.C. (6th ser.) 890 (1990).

