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Michael S. Bernstein Memorial Panel

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HOLOCAUST AND HUMAN RIGHTS LAW: THE FOURTH INTERNATIONAL CONFERENCE

PROSECUTORS' SYMPOSIUM: NEW JURISDICTIONS

Michael S. Bernstein Memorial Panel

United States *Eli M. Rosenbaum*¹

Canada *William J.A. Hobson, Q.C.*²

Australia..... *Graham T. Blewitt*³

Great Britain *William G. Chalmers, C.B., M.C.*⁴

Moderator: *Allan A. Ryan, Jr.*⁵

Owen Kupferschmid: The first panel that you will be hearing today is a panel of prosecutors and government officials from the United

¹ Principal Deputy Director, United States Justice Department's Office of Special Investigations, 1988–present; General Counsel, World Jewish Congress, 1985–87; Associate, Simpson, Thatcher & Bartlett, New York, 1984–85; prosecuting attorney, United States Justice Department's Office of Special Investigations, 1980–83; J.D., Harvard Law School, 1980; M.B.A., 1977, B.A., 1976, Wharton School, University of Pennsylvania.

² Senior General Counsel, 1989–present, Assistant Deputy Attorney General of Criminal Law, 1987–89, General Counsel, 1978–87, Counsel, 1972–78, Canadian Department of Justice; Q.C., 1979; L.L.B., Osgoode Hall Law School, 1965; B.A., University of Toronto, 1962.

³ Director, 1991–present, Deputy Director, 1988–91, Special Investigations Unit for War Crimes; Senior Legal Advisor, National Crimes Authority, 1985–88; Director, Public Prosecutions, New South Wales, 1974–88; Diploma in Law, University of Sydney, 1974; Leaving Certificate, De La Salle College, King's Grove, 1964.

⁴ War Crimes Inquiry, 1988–89; Chairman, Industrial Tribunals, 1984–88; Crown Agent for Scotland, Procurator Fiscal Society, 1948–84; B.L., Aberdeen University, 1948; Roberts Gardens College, 1933–39.

⁵ Office of General Counsel, Harvard University, 1985–present; Special Assistant, Attorney General of the United States, 1983; Director, United States Justice Department's Office of Special Investigations, 1980–83; Assistant, United States Solicitor General, 1977–80; law clerk, Associate Justice Byron R. White, United States Supreme Court, 1970–71; J.D., University of Minnesota, 1970; A.B., Dartmouth College, 1966.

States, Canada, Australia, and Great Britain. We have named this panel the Michael Bernstein Prosecutor's Symposium. I would like now to call on the moderator for that panel, Allan A. Ryan, Jr., to say a few words.

Allan Ryan: Thank you. Michael Bernstein was the Assistant Deputy Director of the Office of Special Investigations (OSI) at the Department of Justice. He graduated from the University of Michigan and the University of Chicago Law School and held a masters degree from Johns Hopkins University. He came to OSI in 1985 from the Washington, D.C. law firm of Covington & Burling. Michael Bernstein supervised scores of major war crimes investigations at OSI, and he bore the principal responsibility for over one-fifth of all deportations secured by that office. He was a pioneer in the investigation and the prosecution of SS personnel from the Mathausen concentration camp, and was lead counsel in OSI's prosecution of a number of SS guards from Auschwitz as well. Michael was the point man for the Justice Department on the passage of legislation designed to strip Nazi war criminals of their social security benefits. And on top of all that, he also successfully defended a major Freedom of Information Act lawsuit.

In December of last year, Michael went to Austria to put the final touches on an agreement with the Austrian government to take back the Austrian Nazis deported from the United States. To put this event in perspective, it was in 1980, nine years ago when I was with OSI, that I first raised this issue with the Austrians, and at that time they firmly declined to entertain any such suggestion. It is a tribute to Michael's abilities that he was able to get the Austrian government finally to agree to take back Austrian Nazi war criminals.

On December 22, 1988, Michael was returning to Washington, D.C. on Pan Am flight 103. He was murdered, along with all others on that flight, when a terrorist's bomb exploded in the plane's cargo hold. Michael Bernstein was thirty-six years old. He leaves his wife, Stephanie, and two young children. Michael Bernstein gave his life, not only in the service of his country, but in the pursuit of human rights. He was a man whose breadth of intellect was matched only by the depth of his compassion and by his commitment to the principles with which we concern ourselves at this Conference. He gave his life for those principles. Let us live for those principles.

I have here a letter addressed to the Conference from the Attorney General of the United States:

I was very pleased to learn that the Boston College Holocaust/Human Rights Research Project has named a panel of its annual international conference in memory of the late Michael S. Bernstein, Assistant Deputy Director of the United States Department of Justice Office of Special Investigations.

Mike Bernstein's memory is appropriately, and perhaps uniquely, honored by this tribute at Boston College. Mike died as he lived, acting in the service of his country pursuing a cause in which he deeply believed. He was carrying home the fruits of an important victory he had achieved in Vienna—an agreement he negotiated with the Austrian government, paving the way for the deportation of Nazi war criminals. That achievement will serve as lasting evidence of Mike's patience, determination, and legal and diplomatic skills.

Mike's success in Vienna came as no surprise to those who knew him and worked with him. It was the latest in a long line of remarkable victories he achieved during his tenure at the Department of Justice. Moreover, his contributions will continue as cases he developed are brought to successful conclusions. We will not forget his devoted service in the cause of justice. As President Bush wrote to Mike's family shortly after Mike was murdered, his work "set a noble example of what public service in the pursuit of justice can accomplish."

As Attorney General of the United States, and on behalf of the entire Department of Justice, I commend you for your studies of human rights law and I thank you for commemorating the life and contributions of Michael Bernstein.

Dick Thornburgh
Attorney General⁶

On behalf of the Boston College Law School Holocaust/Human Rights Research Project, we would like to present this plaque to Eli Rosenbaum, who is representing the Office of Special Investigations. We present this plaque to the Bernstein family in memory of Michael Bernstein.

Eli Rosenbaum: Thank you very much. I would like to add a few personal thoughts to amplify what Allan has already said and what the Attorney General has said in his very moving letter.

Mike Bernstein was a brilliant advocate, a first-rate legal scholar, and a trusted advisor and friend. He also was someone on whom

⁶ Letter from Richard Thornburgh, United States Attorney General, to the Boston College Holocaust/Human Rights Research Project (Mar. 17, 1989) (copy on file at the Boston College Third World Law Journal office).

the Department of Justice could, and did, rely for leadership of OSI when Mr. Sher, Mr. Einhorn, and I were unavailable. Professionally, I recall most of all Mike's tenacity as a seeker of justice. To cite but one example: he could often be found in our central file room late in the evening searching for new cases to investigate and new leads to pursue. Mike was indefatigable in his work and unyielding in his commitment to justice.

Because of Mike's reputation as a litigator *par excellence*, the defendants in his cases almost invariably settled, agreeing before trial to give up their ill-gotten U.S. citizenships and leave the country. So, one of Mike's greatest frustrations was that he never actually got to go to trial. We ribbed him frequently about that. Indeed, there was a joke at OSI among our junior attorneys that if you wanted to get trial experience, you should try your best *not* to get assigned to a case with Mike Bernstein. I have no doubt, however, that Mike would have performed as magnificently in court as he did out of court.

Mike was a kind, caring, modest person. I recall seeing him lose his temper only once—when he felt that the West German government was failing to make a good faith effort to bring to justice a defendant whom OSI had deported to Germany. It still seems remarkable to me that such a gentle individual could be so exceptionally effective as a prosecutor. He remains, in my estimation, *the* role model for all of his colleagues at the Department.

Mike earned the respect and affection of everyone with whom he worked at OSI. We remember him professionally as an enormously gifted and dedicated prosecutor, and we remember him personally with deep, abiding affection as a friend. Most importantly, we will think of Michael always as a loving husband and son and a devoted father to his two beautiful children. I thank you on behalf of Mike's family, who cannot be here this morning, and on behalf of the entire Department of Justice. It is a wonderful thing that you are doing in his memory. Thank you.

Allan Ryan: It is appropriate, I think, that this symposium is being held in Michael's memory, since a great value of this Conference has always been the opportunity it provides for prosecutors and investigators who are exploring Holocaust and human rights crimes to come here to Boston, to meet each other, to learn from each other's work, and to share their knowledge with all of us. The opportunity to come together in front of a select audience is one of the great values of this Conference, and one I hope will endure.

Nearly ten years ago, when the Office of Special Investigations was created at the Department of Justice, one of my first priorities as Director was to meet with my counterparts—if that is the right word—in other parts of the world. At that time, I found that the United States was the only country, with the sporadic exception of the Federal Republic of Germany, that was actually prosecuting Nazi war criminals. This was, of course, due largely to the fact that the United States waited so long to do anything, while Germany, East Germany, Poland, the Netherlands, Czechoslovakia, France, and other countries had largely completed their work years before. It was certainly true ten years ago that those countries that had received the largest number of post-war immigrants from Europe—the United States, Canada, Australia, and, to some extent, Great Britain—had done relatively nothing. I take more irony than satisfaction in the fact that a decade later the United States finds itself the leader in Nazi war criminal prosecutions in the English-speaking world, even having undertaken this task as belatedly as we did. Canada, Australia, and the United Kingdom all began for the first time to address the presence of Nazi war criminals in their countries after 1979.

We are fortunate to have with us this morning senior prosecutors from these countries, as well as my former colleague Eli Rosenbaum from the Office of Special Investigations. I have asked each of them to speak on the state of affairs in his country, and to tell us where his country is going in the investigation and prosecution of Nazi war criminals.

Eli is the Deputy Director of the Office of Special Investigations and has been with that office since 1980, with the exception of a couple of years in the mid-1980s, when he was General Counsel for the World Jewish Congress. He was instrumental in bringing to the world's attention the record of Kurt Waldheim, who, although he remains in office, has become a pariah. I was glad to hear that Eli went back to OSI a year ago, and I am very glad that he could be with us today.

Eli Rosenbaum: Thank you. It is amazing for me, having witnessed the birth of this Project only a few years ago, to see how far it has already progressed. It is a small miracle, I think, that the Project has taken off as it has, and that there could already be a Fourth International Conference like this, with eminent authorities flying in from all over the world. It is wonderful to see good friends here, especially the people who have organized these conferences from

the very beginning: Owen Kupferschmid, Bill Mandell, Ruti Teitel. Pardon me, now it is *Professor* Ruti Teitel.

It is very, very good to be here this morning. I have been asked to update this Conference on OSI's progress during the last twelve months. Permit me to put the work of our office in context for those of you who are not familiar with it or who were not here last year, when my colleague, Bruce Einhorn, represented OSI.⁷ We were set up ten years ago as a direct result of legislation enacted by Congress in 1978 expressly to render Nazi persecutors deportable from the United States. That legislation was introduced and championed by then-Congresswoman Elizabeth Holtzman, and that is now known in her honor as the Holtzman Amendment.⁸ Our jurisdiction in these Nazi cases is civil rather than criminal; we are limited to instituting denaturalization and deportation proceedings.⁹ Denaturalization suits, which have as their goal the revocation of United States citizenship, are based on charges of fraudulent and/or illegal procurement of citizenship.¹⁰ These cases are tried in Article III federal courts.¹¹ In contrast, our deportation cases are tried in the various U.S. immigration courts around the country.¹² Many of our deportation cases actually originate as denaturalization cases; once the defendant in a denaturalization case has exhausted his opportunities for appeal, we then—and only then—are able to commence deportation proceedings against him.¹³

It is a frustratingly slow process. Moreover, these cases are, from an evidentiary perspective, extremely difficult. The proceedings are being commenced more than forty years after the events in question, and the crimes were generally committed in such a way that most or all of the witnesses who might be willing to testify were murdered in the course of those crimes. Furthermore, while some captured Nazi documentation of specific crimes exists, its utility is

⁷ In 1988, Bruce J. Einhorn was Deputy Director (Litigation), Office of Special Investigations, United States Department of Justice.

⁸ See 8 U.S.C. § 1182(a)(33), 1251(a)(19) (1978).

⁹ 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. CIN. 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).

¹⁰ See 8 U.S.C.A. § 1451(a)-(i) (West Supp. 1991).

¹¹ See *id.* § 1451(a).

¹² See 8 C.F.R. § 242 (1991).

¹³ See *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

usually very limited, particularly with respect to identifying the perpetrators. Most of the documents that the Nazis and their acolytes created were destroyed during the war. Only a fragment survives, and of necessity we rely very heavily on that fragment.

When OSI was established ten years ago, our friends and supporters candidly told us that they had very limited expectations. Their explanation went something like this: "You will be lucky if you gather sufficient evidence to file a handful of cases—perhaps four or five denaturalization cases at most. And if you win one or two denaturalization suits, we will consider that a victory, because you will have vindicated the rule of law, and you will also have put all of these criminals on notice that tomorrow their day in the dock may come as well. But we don't expect you to succeed in actually deporting anyone. That would, in any event, take more years than are available, due to the advanced ages of these people and the seemingly endless appellate opportunities afforded defendants in these cases. Moreover, what country would accept these Nazis even if they *could* be deported?"

Well, I am very pleased to be able to report to you this morning that OSI's record thus far has vastly exceeded those pessimistic predictions. To date, we have succeeded in stripping thirty-one Nazi persecutors of their U.S. citizenship, and we have deported, extradited, or otherwise removed from this country twenty-five Nazi persecutors. Three of the individuals removed from the United States have already been tried and convicted overseas: Feodor Fedorenko in the Soviet Union,¹⁴ Andrija Artukovic in Yugoslavia,¹⁵ and Ivan Demjanjuk in Israel.¹⁶

¹⁴ In 1984, Fedor Fedorenko was the first person to be deported from the United States to the Soviet Union to face Nazi war crimes charges. See *In re Fedorenko*, No. A-7-333-468 (Immigration Court, Hartford Feb. 23, 1983), *aff'd* 19 I. & N. Dec. 57 (BIA 1984). In June 1986, Fedorenko was sentenced to death by a court in the Crimea in the Soviet Ukraine on charges of treason and for taking part in mass executions at the Treblinka death camp in Poland. William J. Eaton, *Soviets Execute Ex-Nazi Guard Deported by U.S.*, L.A. TIMES, July 28, 1987, at 9. See generally Barbara J. Swartz, Note, *Denaturalization of War Criminals After Fedorenko*, 15 N.Y.U. J. INT'L L. & POL. 169 (1982).

¹⁵ Andrija Artukovic was deported from the United States to Yugoslavia in 1986, where he died in prison on January 18, 1988. See *In re Artukovic*, 628 F. Supp. 1370 (C.D. Cal.), *stay denied sub nom.* *Artukovic v. Rison*, 784 F.2d 1354 (9th Cir. 1986); ALLAN A. RYAN, JR., QUIET NEIGHBORS: PROSECUTING NAZI WAR CRIMINALS IN AMERICA 142-90 (1984).

¹⁶ In 1986, John (Ivan) Demjanjuk was extradited to Israel. See *In re Extradition of Demjanjuk*, 612 F. Supp. 544 (N.D. Ohio), *petition for writ of habeas corpus denied sub nom.* *Demjanjuk v. Petrovsky*, 612 F. Supp. 571 (N.D. Ohio), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). Demjanjuk was sentenced to death by an Israeli court in 1988 after being convicted of mass murder at the Treblinka death camp in Poland. See *John*

Our cases have run the gamut. At one extreme, one might cite the case of Andrija Artukovic, who was the Interior Minister of the Nazi puppet state of Croatia during World War II; or the case of Otto Albrecht von Bolschwing, who was an aide to Adolf Eichmann.¹⁷ At the other end of the "prominence spectrum," one would find the majority of our cases, which involve what one might call the "trigger pullers" of the Holocaust, the people who actually carried out Hitler's plans: concentration camp guards, members of mobile killing units, collaborationist police officials—the nameless, faceless people who actually committed the bulk of the crimes.

OSI's record to date, which I believe is an exceptionally positive one, is primarily a tribute to the dedication of the people who make up our staff—people, of course, like Mike Bernstein. It also reflects the dedication and professionalism brought to OSI (and its predecessor office) by the four individuals who have served at its helm, starting with Martin Mendelsohn, and then, in succession, Walter Rockler, Allan Ryan, and Neal Sher.

I would like to turn now to the promised update of OSI's activities during the past year. We filed six cases in court during the last twelve months.¹⁸ All of these are what we at OSI call "self-generated" cases. These are, in other words, cases involving individuals against whom we have received no allegations from foreign governments, from survivors, or from any other source. They came to our attention as a result of our systematic efforts over the past several years to check against U.S. immigration rolls the tens of thousands of names we have extracted from captured Nazi personnel rosters—concentration camp guard lists, *Einsatzgruppen* personnel rosters, and the like. We transmit these thousands of names to the U.S. Immigration and Naturalization Service, which then compares them by name (and, where available, date of birth) with information in the INS database of persons who have immigrated to this country during this century. That is actually the manner in

Demjanjuk on His Way to Court, THE INDEPENDENT, Aug. 15, 1991, at 10. His appeal is currently pending before the Israeli Supreme Court. Ohad Gozant, *New Evidence Challenges 'Nazi Ivan' Conviction*, DAILY TELEGRAPH, Aug. 15, 1991, at 7.

¹⁷ See RYAN, *supra* note 15, at 243-44.

¹⁸ *In re Dorth*, No. A08-194-183 (Immigration Court, Chicago filed Jan. 10, 1989); *United States v. Schmidt*, No. 88-C-9475 (N.D. Ill. filed Nov. 8, 1988); *United States v. Inde*, No. 3-88-570 (D. Minn. filed Aug. 22, 1988); *United States v. Kauls*, No. 88-808-PHX-RCB (D. Ariz. filed May 24, 1988); *United States v. Didrichsons*, No. C-88-686-C (W.D. Wash. filed May 27, 1988); *United States v. Kirsteins*, No. 87-CV-964 (N.D.N.Y. filed July 15, 1987).

which OSI has generated nearly all of its cases during the last several years.¹⁹

As I said, OSI filed six cases in the past years; five of them denaturalization cases. We brought suit in Phoenix against Juris Kauls, the former inspector of the guards at the Riga concentration camp system in Latvia. We instituted proceedings against Valdis Didrichsons in Seattle; during the war, Didrichsons served in the Arajs Kommando—a mobile killing unit that also was based in Riga, Latvia. Two of Didrichsons' comrades-in-crime from the same unit were also located in the United States and prosecuted: Mikelis Kirsteins in Syracuse, New York, and Edgars Inde in Minneapolis, Minnesota. In addition, we filed a denaturalization action in Chicago against Michael Schmidt, who was a guard at the Sachsenhausen concentration camp. During the past year, we also filed one deportation case in Cleveland against Johann Dorth, a former SS-man at the Auschwitz death complex in Poland.

OSI won five court orders of denaturalization in the past year. The first was against Antanas Virkutis, who was a warden in a prison in Nazi-occupied Lithuania.²⁰ The second was in Detroit against Peter Quintus, who was an SS guard at the Majdanek death camp in Lublin, Poland.²¹ Quintus' denaturalization order was obtained through a consent agreement, in which he admitted to his service at Majdanek and to his participation in Nazi-sponsored acts of persecution there. We also won a default judgment against Juris Kauls,²² whom I mentioned before; Kauls fled the United States shortly after we instituted proceedings against him. One of Mike Bernstein's cases was also brought to a successful conclusion this year: Stefan Reger, who was an SS guard at the Auschwitz complex in Poland, had summary judgment entered against him in federal district court in Newark, New Jersey.²³ Finally, and perhaps most notably, OSI also won a case in the United States Supreme Court this year against Juozas Kungys, whom we charged with being involved in atrocities in Lithuania during World War II. On May 2, 1989, the Supreme Court validated the test of "materiality" in these

¹⁹ See RYAN, *supra* note 15, at 246-72.

²⁰ United States v. Virkutis, No. 83-C-1758 (N.D. Ill. Apr. 8, 1988) (consent judgment of denaturalization).

²¹ United States v. Quintus, No. 87-CV-70950-DT (E.D. Mich. June 29, 1988) (consent judgment of denaturalization).

²² United States v. Kauls, No. 88-808-PHX-RCB (D. Ariz. Sept. 7, 1988) (default judgment).

²³ United States v. Reger, No. 87-4906 (D.N.J. Sept. 8, 1988) (summary judgment).

cases for which the government had argued.²⁴ Unfortunately, however, when the Court then remanded the case to the same federal district court judge before whom we had unsuccessfully tried the case initially, we had little choice but to settle the suit. The agreement subsequently reached with Kungys required him to give up his U.S. citizenship.²⁵ Although we will not be able to deport him, he is certainly not "out of the woods" yet, so to speak; he still faces, as do all of these people, the possibility of extradition if another government so requests.

During the past year, OSI removed four persons from the United States. Like the previously-mentioned Juris Kauls, Stefan Reger fled the country for West Germany shortly after we brought proceedings against him. The third was a case that had been in the courts for several years (originally as a denaturalization case), that of Conrad Schellong, who had admitted that he was an SS guard supervisor at the Dachau concentration camp; he was deported during the past year to West Germany.²⁶ Finally, there is the case of Boleslavs Maikovskis—a case that also had been in the courts for many years.²⁷ Because Maikovskis faced the possibility of deportation to the Soviet Union, he opted to, in effect, self-deport by fleeing secretly to West Germany, which coincidentally was the same country we had originally sought to designate during the deportation trial. In what I believe was an extraordinary piece of international detective work, his whereabouts in West Germany were traced by OSI's own investigators in a matter of weeks. They were able to ascertain not only the country to which Maikovskis had fled, but also his precise hiding place in Germany.²⁸ Maikovskis is now under arrest and will likely stand trial in Muenster shortly.

²⁴ See *Kungys v. United States*, 485 U.S. 759 (1988). For an analysis of *Kungys* and the materiality standard, see Kirsten Aasen, Comment, *United States v. Kungys*, 3 GEO. IMMIGR. L.J. 387, 390–400 (1989); Shari B. Gerstein, Note, *United States v. Kungys: Clarifying the Materiality Standard in Denaturalization Proceedings?*, 38 AM. U. L. REV. 429, 449–57 (1989); Mary C. Stakun, Note, *Materiality in the Denaturalization Context: Kungys v. United States*, 23 CORNELL INT'L L.J. 161, 171–84 (1990).

²⁵ *United States v. Kungys*, No. 81–2305 (D.N.J. Nov. 14, 1988) (consent judgment of denaturalization).

²⁶ See *In re Schellong*, No. A10-695-922 (Immigration Court, Chicago Sept. 5, 1984), *aff'd*, No. A10–695–922 (BIA July 11, 1985), *aff'd sub nom.* *Schellong v. INS*, 805 F.2d 655 (7th Cir.), *cert. denied*, 481 U.S. 1004 (1986).

²⁷ See *In re Maikovskis*, No. A8–194–566 (Immigration Court, N.Y. June 30, 1983), *rev'd*, A8–194–566 (BIA Aug. 14, 1984), *aff'd sub nom.* *Maikovskis v. INS*, 773 F.2d 435 (2d Cir. 1985), *cert. denied*, 476 U.S. 1172 (1986); see also RYAN *supra* note 15, at 60, 357–58.

²⁸ To put this in context, one might consider the Federal Bureau of Investigation's "Ten Most Wanted" list. Presumably, almost all of the fugitives on that list are, unlike Maikovskis,

I would like to touch briefly on some other highlights of OSI's activities during the past year. We have added numerous individuals to the so-called "watchlist"—the database that is maintained by the Immigration and Naturalization Service and the United States Department of State of suspected Nazi criminals who are to be denied entry into this country.²⁹ The most celebrated person on the list is, of course, Austrian President Kurt Waldheim, whose name was added in 1987.³⁰ In May of this year, we added two thousand additional names to the list, gleaned from archives around the world, of individuals who served in the *Einsatzgruppen*—mobile killing units that Germany sponsored during World War II. Later, we added the names of individuals who were tried and convicted of war crimes by the French government after the war. Moreover, I can report, happily, that the watchlist actually works quite well. In recent years, at least several dozen people have been denied visas by the State Department when their names have been found on the watchlist during the visa application process. While these people can challenge the State Department's decision, very few of them have in fact sought to do so. Also, with the cooperation of INS, we have stopped a number of people at U.S. borders who have somehow managed to get U.S. visas or have departed from countries whose residents are not required to obtain U.S. visas in order to visit this country.

Finally, a few brief words about our opponents. OSI has been under attack for many years now by groups that, frankly, would like to see us put out of business. Most of these groups either are based in the extremist fringe of the American political scene—neo-Nazi organizations, Holocaust denial groups, and the like—or else they are based in the Ukrainian and Baltic communities. Significant

still present somewhere inside the United States. Most of them, however, have stayed on the list for years even though virtually every law enforcement officer in the United States has been looking for them. For example, murder suspect Leo Joseph Koury, one of the "Ten Most Wanted," has been listed since April 1979 (footnote provided by panelist).

²⁹ The statutory basis for such exclusion was added to Title 8 in 1978. See 8 U.S.C. § 1182(a)(33).

³⁰ Waldheim, the former Secretary General of the United Nations, was the subject of media disclosures, beginning in March 1986, concerning his wartime activities in the Balkans while serving as an intelligence officer with the German Army. See, e.g., John Tagliabue, *Files Show Kurt Waldheim Served Under War Criminals*, N.Y. TIMES, Mar. 4, 1986, at 1; John McCaslin, *U.S. Bars Waldheim Because of Nazi Past*, WASH. TIMES, Apr. 28, 1987, at 1. See generally *Allegations Concerning Kurt Waldheim, Hearing Before Subcommittee of Human Rights and International Organizations of the Committee on Foreign Affairs*, 99th Cong., 2d Sess. (1986); INVESTIGATION OF KURT WALDHEIM'S WORLD WAR II ACTIVITIES, H.R. DOC. REP. NO. 607, 99th Cong., 2d Sess. (1986).

elements of the leadership of these communities have worked diligently over the years to try to derail our efforts. I must say, happily, that these organizations and activists have been quieter in the past year than in recent years. I hasten to add, however, that two major organizations, both based in the Baltic community and set up for the *sole purpose* of doing battle with the Office of Special Investigations, continue to be active.

We have seen in the past year a resurgence of activity among the supporters of John Demjanjuk, who was extradited to Israel in 1986.³¹ Even though that case has become primarily an Israeli legal matter, his friends have not given up the fight in this country. They have brought various kinds of lawsuits against the Department of Justice and its officials. That, of course, is unquestionably their right. Lately, however, some of them have taken the campaign to a new low—to a strategy that apparently embraces the tormenting of Holocaust survivors, including an elderly man who was an inmate at Treblinka during World War II and who now lives in Switzerland. Although this man was a prisoner in the Treblinka camp, he was held, as Demjanjuk's people well know, far away from the gas chambers, and is therefore unable to make any identification of the operators of those gas chambers. Yet, he is being harassed with phone calls and all kinds of other invasions of his personal privacy. It has gotten to the point where Demjanjuk supporters—including one who is here today, I gather—have taken to distributing a doctored transcript of a telephone conversation with this particular survivor. That, to me, is cruel and absolutely unconscionable.

I will close by saying that under no circumstances will we be deterred by these campaigns; we have not been thwarted in the past, and we will not be in the future. Indeed, we are more active than ever, with more than six hundred cases currently under investigation. We have a talented staff of lawyers, historians, and investigators that is dedicated to pursuing these cases. The Attorney General has made it clear that he backs us fully. We are pleased, moreover, that we now have colleagues working on Nazi cases in both Canada and Australia—and I hope, in the near future, in the United Kingdom as well—and we at OSI look forward to expanding the international cooperative efforts that are already underway.

I am anticipating a very busy and productive year for our office. Thank you again for inviting me here this morning.

³¹ See Michael Hedges, *U.S. Nazi Hunters Railroad "War Criminal", Experts Say*, WASH. TIMES, Sept. 24, 1990, at A1.

Allan Ryan: Thank you, Eli. Mr. William J. A. Hobson is the senior General Counsel to the Crimes Against Humanity and War Crimes Division of the Canadian Department of Justice in Ottawa. Before that, he was the Assistant Deputy Attorney General of the Criminal Law Division. He is the Director of General Counsel to the Vancouver and Toronto offices of the Canadian Department of Justice, and he is now very actively involved in the prosecution of Nazi war crimes cases in Canada.

William J. A. Hobson Q.C.: Thank you, Allan. I would like to start by noting what an honor it is as a Canadian to participate in this panel. For some of you who were not here earlier, there is a reason for me to feel particularly honored by my inclusion in this panel, as it has been dedicated as a tribute to my American colleague at law, Michael Bernstein. To put it simply, Michael Bernstein was a man of great dignity, and in my mind he will always be a hero. In his lifetime, Michael realized the importance of being a part of history, and of helping others to tell their story in the pursuit of justice. He died tragically in this pursuit. I can echo the words of Allan and Eli about what a sweet man and what a competent man he was. In my mind, Michael cared, which was demonstrated by the fact that he participated in addressing past evils to prevent future wrongs.

I would like to speak to you today about the actions the Canadian government has taken to address squarely the problem of war criminals in Canada. In part, we have sought to accomplish this by ensuring that the Nuremberg principles³² and internationally-recognized concepts of war crimes and crimes against humanity will form a permanent part of Canadian law. I would also like to speak to you about Canada's efforts to complete the work that was begun by the Canadian Commission of Inquiry on War Criminals³³ to ensure that all those involved in past crimes and crimes against humanity would be brought to account. Our work in this field is extraordinarily important, not only because of the horrendous

³² See generally Gary Komarow, *International Responsibility*, 29 INT'L & COMP. L.Q. 21 (1980); Dr. Hans Latenser, *Looking Back at Nuremberg Trials with Special Consideration of the Process Against Military Leaders*, 8 WHITTIER L. REV. 557 (1986); Oscar Schachter, *In Defense of International Rules and the Use of Force*, 53 U. CHI. L. REV. 113 (1986).

³³ The Commission of Inquiry on War Criminals was established by Order No. 1985-348 of the Privy Council For Canada, approved by the Governor General on February 7, 1985. See L.C. Green, *Canadian Law, War Crimes and Crimes Against Humanity*, 59 BRIT. Y.B. INT'L L. 217, 221 (1989).

crimes committed in the years before Nuremberg, but because the last forty years have borne witness to the commission of other crimes in other regions and in other conflicts. It was very important to me to see the panel we had yesterday afternoon discussing past conflicts and the problems that the panelists have encountered in bringing about justice for these mass murders.

To meet the need for precise factual information on a number of alleged war criminals in Canada, and to identify the appropriate avenues of legal redress, the Commission of Inquiry on War Criminals was established by the government of Canada in 1985 under the leadership of the Honorable Mr. Justice Jules Deschênes, Chief Justice of the Quebec Superior Court.³⁴ The Commission's report,³⁵ presented on December 30, 1986, provided a basis upon which the government has been able to act decisively and quickly. (For those of you who attended the Conference last year, you will recall that Mr. Justice Deschênes was one of the panelists.) The Deschênes report identified suspected war criminals who had come to Canada, and stated that if the government chose to proceed with its recommendations, such suspects should be dealt with on a priority basis.³⁶ You will hear from others today about the difficulties that are encountered in trying to proceed in this fashion. The Commission also noted that in conducting further investigations, serious evidentiary difficulties would be encountered: the passage of more than forty years and the formidable national, political, and linguistic differences that must be overcome in order to collect the necessary evidence, of which I will give some examples.³⁷ In all cases, the pursuit of an investigation must involve at least one Eastern Bloc country, and in some cases, in order to establish the subject's identity, you must go through five countries. Mr. Justice Deschênes felt that a determined effort could achieve the necessary result within the framework of existing Canadian institutions. The Deschênes Report recommended specifically that the Canadian Royal Mounted Police and the Department of Justice be required to deploy sufficient resources to pursue the investigative process and to take whatever legal actions were warranted.³⁸

³⁴ *Id.*

³⁵ 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].

³⁶ *Id.* at 827-88.

³⁷ *Id.* at 869-91 (App. I-M).

³⁸ *Id.* at 829-30.

The government responded to this recommendation by adopting a "Made in Canada" approach. This means that all people who have committed crimes in foreign countries shall be brought to account in Canada in a manner consistent with Canadian standards of law and evidence, and in accordance with the overriding principles established by the Canadian Charter of Rights and Freedoms.³⁹ This approach also takes into account existing Canadian laws, which allow for extradition,⁴⁰ denaturalization,⁴¹ and deportation⁴² on the basis of rulings by Canadian courts and tribunals. All existing Canadian laws will be resorted to as appropriate.

I would like to take a few moments to discuss certain aspects of our Criminal Code Amendments. The legislation in Canada strictly conforms to the Canadian Charter of Rights and Freedoms, and, for this reason, is not retroactive. Section 11(g) of our Charter provides that no person may be found guilty of an offense unless at the time of the act's commission it constituted an offense under Canadian or international law, or was criminal according to the general principles of law recognized by the community of nations.⁴³ This provision is essential to an understanding of the manner by which the Canadian government has proceeded in the amendments to its Criminal Code, as it makes these standards of fairness a reference point for Canadian jurisdiction over both past and future war crimes. The definitions of "war crimes" and "crimes against humanity" in Canadian legislation⁴⁴—and in the jurisdiction created to try these crimes—have, therefore, been shaped by international standards of conduct such as the Geneva Conventions,⁴⁵ the Nuremberg Principles,⁴⁶ and customary international law. It remains to be seen to what extent the law will adopt these principles. We believe that the existing law is not one of retribution or retaliation. The law grants Canadian courts the jurisdiction to try only those international crimes that at the time of their commission would have

³⁹ CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), ch. 11.

⁴⁰ Extradition Act, R.S.C., ch. E-21 (1970), amended by R.S.C., ch. E-23 (1985). See generally 12 CANADIAN ENCYCLOPEDIA DIGEST (Ont. 3rd) Title 61 (1991).

⁴¹ Citizenship Act, R.S.C., ch. C-29 (1976).

⁴² Immigration Act, R.S.C., ch. I-2 (1977).

⁴³ CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), ch. 11.

⁴⁴ Criminal Code, R.S.C., ch. C-46, § 6(1.96) (1985), amended by ch. 37, 1987 S.C. 1105.

⁴⁵ See, e.g., Geneva Convention, Protection of War Victims, Aug. 12, 1949, 6 U.S.T. 3517, T.I.A.S. No. 3365.

⁴⁶ See *supra* note 32 and accompanying text.

constituted an offense in Canada.⁴⁷ The legislation applies to both past and future events; it is not limited to events surrounding the Second World War.⁴⁸

It is useful to consider more fully the jurisdictional basis of this law. The amendments to the Canadian Criminal Code reflect both the traditional jurisdiction of courts over nationals of warring countries and the evolving notion of "universal jurisdiction."⁴⁹ One of the sections also reflects the traditional jurisdiction of courts over the prosecution of crimes committed in the course of war.⁵⁰ States that were parties to a particular armed conflict have a right under international law to prosecute such war crimes. Over the course of time, however, other bases of jurisdiction have been developed and recognized in international law. The most important of these is the principle of "universal jurisdiction," which provides that persons who commit certain types of crimes are to be considered for all practical purposes *international* criminals.⁵¹ War crimes and crimes against humanity are two examples of crimes covered by the principle of universal jurisdiction—torture is another.⁵² To explain the principle in another way, there is growing international agreement that certain acts are clearly so heinous that they create a right on the part of any nation to try the offender if he is found within the nation's borders. Because of the gravity of the crimes falling within the ambit of this principle, the protected rights of the accused are of particular concern in the development of implementing legislation.⁵³

Any trial conducted under the Canadian legislation affords the accused all the procedural safeguards and rights of fair and equitable treatment to which the accused would be entitled in any crim-

⁴⁷ Criminal Code, R.S.C., ch. C-46, § 6(1.91) (1985), amended by ch. 37, 1987 S.C. 1105.

⁴⁸ *Id.*

⁴⁹ For a discussion on the evolving standards of universal jurisdiction, see generally Christopher L. Blakesley, *A Conceptual Framework for Extradition and Jurisdiction and 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 (1945); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788 (1988); Rena Hozore Reiss, *The Extradition of John Demjanjuk: War Crimes, Universal Jurisdiction, and the Political Offense Doctrine*, 20 CORNELL INT'L L.J. 281, 301-07 (1987).

⁵⁰ Criminal Code, R.S.C., ch. C-46, § 6(1.91)(a)(ii), (iii) (1985), amended by ch. 37, 1987 S.C. 1105.

⁵¹ Randall, *supra* note 49, at 789.

⁵² 17 CANADIAN ENCYCLOPEDIA DIGEST (Ont. 3rd) Title 81 § 381 (1991).

⁵³ *Id.*

inal trial before the Canadian courts.⁵⁴ In addition, any defenses available to the accused under international law, both at the time of the crime's commission and at the time of the trial, remain available to him.⁵⁵ In redressing historical wrongs, it is essential that the traditional rights of the accused under our criminal law be preserved.

In Canada, we are often asked why cases that have been identified by the Commission of Inquiry have not yet proceeded through our courts. Last year, the Attorney General said the short answer to this question was that no case will proceed until sufficient evidence is available for the government to present a responsible case. But I would like to tell you what the Canadian Commission of Inquiry actually said. In addition to reviewing hundreds of cases, the Commission has taken special care to put certain cases in a confidential report. Because of the detailed and serious allegations contained in the report, the Commission also recommended that these cases be given high priority by the government. The cases have been and are being given high priority, but, as with all cases, no proceeding is possible until the necessary evidence is available. The Commission did not go abroad to locate witnesses and obtain their evidence; this job was left to the Canadian government. In fact, Mr. Justice Deschênes himself noted that if the government chose to proceed with the Commission's recommendations, a monumental effort would be needed to forge ahead with speed in organizing the work, accessing the results, and counseling foreign governments on the investigation of war crimes.⁵⁶ The Canadian government can only institute proceedings in the courts in cases where the evidence to substantiate the allegations can be assembled. The Commission did not do this work, and so it has become the government's job to see that it is done correctly. More negotiations have yet to be undertaken, and arrangements with foreign governments have yet to be made.

Under these circumstances, I submit that it makes no sense to suggest the government of Canada is dragging its feet in the prosecution of war crimes, or that it is merely duplicating the work of the Commission. The Commission made it clear that the success of war crime endeavors is wholly dependent on the cooperation of

⁵⁴ Criminal Code, R.S.C., ch. C-46, § 6(1.92), (1.93) (1985), amended by ch. 37, 1987 S.C. 1105.

⁵⁵ *Id.*

⁵⁶ COMMISSION REPORT, *supra* note 35, at 891-92 (App. I-M).

foreign governments in determining whether proof of the crime still exists.⁵⁷ If you look at this panel, and at what our colleagues in European countries are doing, you will understand that the competition among us for the time of foreign governments, in order to work on these cases, has increased dramatically in recent years—a fact I note with some sense of pride. There is a new entrepreneurial spirit that has to be brought to bear in gaining the attention of foreign governments such that these cases may be processed in an efficient and effective manner. I think people are overlooking this fact. My colleague, Neal Sher, deserves a great deal of credit for convening a multilateral conference among a number of governments in which we all made considerable headway. As a representative of the Canadian government, I am of course almost constantly working on the foreign relations aspect of these cases. I finish three weeks of trial and I head off to Europe for a few weeks, then I see my family a few months later. That is just the way of life these days.

I think it is also important to recognize the work required in negotiations with foreign governments. The Commission of Inquiry's Report made it very clear that success depends upon this type of cooperation.⁵⁸ The government agreed with Mr. Justice Deschênes' recommendation that no evidence should be gathered in any Eastern European country that did not accede to six conditions of the taking of evidence: (i) the protection of the investigated individuals' reputations through strict confidentiality; (ii) the use of independent interpreters; (iii) access to original documents where relevant; (iv) access to witnesses' previous statements; (v) examination of witnesses in accord with the Canadian rules of evidence; and (vi) the videotaping of witness examinations.⁵⁹ In the twenty-two months during which the Commission prepared its report, the Commission recognized that no evidence had been obtained in Eastern Europe. Despite its many efforts, the Commission was largely unable to obtain evidence abroad. Indeed, in one particular case now before the courts, the government's case is built upon the testimony of one single individual.⁶⁰ The individual had the right to object to taped evidence obtained by a commission in her country. She exercised that right, and we were prevented from taking her evidence. Now, that doesn't mean that you can't obtain any evidence in these

⁵⁷ *Id.* at 869–92.

⁵⁸ *Id.*

⁵⁹ *Id.* at 890–91.

⁶⁰ *See Secretary of State v. Luitjens*, [1989] 2 F.C. 125 (Vanc.).

proceedings; it means that these considerations must be taken into account in advance, before you start the prosecution.

So the Commission's report did not present us with a panacea, and the Commission never suggested that it would. Since much of the research and investigation pertaining to war crimes and crimes against humanity must be carried out abroad, agreements with foreign governments were required. These agreements may be in the form of a memorandum of understanding or a diplomatic note—a bilateral, formal instrument by which a foreign government allows a Canadian team of experts to carry out investigations, gather evidence, and interrogate witnesses on its territory. The world has changed since Allan Ryan first set out on his most noble endeavor. The world is changing in significant ways. We found out that in order to get countries obligated to do this work, and to do it in a way that adhered closely to our six conditions, we had to enter into these types of arrangements.

The inquiry of the Deschênes Commission dealt solely with Nazi war crimes. As a consequence, this issue was given top priority in the agreements Canada has negotiated with foreign governments. To date we have concluded arrangements with the Soviet Union, West Germany, Czechoslovakia, Poland, the Netherlands, Yugoslavia, and Hungary. I am happy to say that some of the individuals I met in these rounds of negotiations are participating in the various panels at this Conference. I think that shows you the extent to which international cooperation is growing in this field.

I want to give you a general idea of the practical matters covered by these agreements. They cover the taking of evidence "by commission," which is where a Canadian court may go into a foreign country and take evidence. Commission evidence may be taken at the instance of the accused or at the instance of the Canadian prosecutor. We insist that a Canadian judge be among the commission members taking the evidence. Quite frankly, as most of these countries have totally different legal systems, they often view the requirement of a Canadian judge on the commission as an intrusion upon their sovereignty. But we insist on this requirement. After all, we will ultimately have to come back to Canada and have whatever evidence has been obtained admitted in a Canadian courtroom. Three obvious defenses will be raised at that stage: one, that the accused was not extended his right of proper cross-examination; two, that the judge did not know Canadian law; and three, that there was not really a trial in Canada, since the trial was held in a foreign country. Naturally we have concerned ourselves with antic-

ipating the types of defenses and arguments that might be raised further down the line, and we believe the presence of a Canadian judge to make rulings of law in accordance with Canadian standards will be necessary to overcome such defenses.

We also insist that the taking of commission evidence conform to Canadian rules of evidence and procedure. Of course, we must also take into account the foreign government's sovereignty and legal requirements for the taking of evidence. The principle I always put forward is that, basically, all the justice systems in the world are geared toward the ascertainment of truth. If we accept that proposition, why should there be a stumbling block in taking evidence that is to be admitted in a Canadian court according to the Canadian rules of procedure and evidence?

Most important from our point of view is that these formal arrangements are assurances to Canadians that our approach to the prosecution of war crimes and crimes against humanity is fair and effective. In the case of war crimes, the government is dealing with crimes that were committed on another continent over forty-five years ago. It is therefore particularly difficult to reconstitute the evidence, trace it back with any accuracy to the events in question, and identify the witnesses. In one case I am involved with now, which has run over a period of nine months, we have over fifty witnesses, six of them from among the world's leading historical experts.⁶¹ People say, "Well, why do you have to call that kind of evidence?" The reason is that sometimes it takes seven people to reconstruct a single historical event. And when you are dealing with a collaborator, where the activities constituting the crime were spread out over a long period of time and more than forty years ago, you need to be able to reconstruct as many events as possible. In order to support a charge in Canada, it must be demonstrated that the crime in question conforms to the definition of a "war crime" or "crime against humanity" in Canadian law, and that it would have constituted a crime in Canada at the time it was committed.⁶²

I do not want to sound pompous when I say this—and because of the criticism that continually seems to arise in Canada, I also don't want to sound defensive—but I really think that Canadians have a right to be a part of the actions taken by their government

⁶¹ *See id.*

⁶² Criminal Code, R.S.C., ch. C-46, § 6(1.91), (1.96) (1985), *amended by* ch. 37, 1987 S.C. 1105.

in response to the Commission's report. In addition to the aforementioned Criminal Code Amendments, our Immigration Act was revised last year to prevent the future entry of war criminals into Canada.⁶³ Amendments were also made to the Citizenship Act that make war crimes a bar to obtaining Canadian citizenship, and that authorize the development and implementation of a screening process for individuals seeking entry into Canada.⁶⁴

We also have two cases currently pending in our courts, both of which I would like to discuss briefly. In the case of *Regina v. Finta*,⁶⁵ a direct indictment was preferred by the Attorney General of Canada on August 18, 1988, charging Mr. Finta with kidnapping, illegal confinement, robbery, and manslaughter—these crimes having taken place in Hungary in June, 1944.⁶⁶ On October 6, 1988, the Ontario Supreme Court ordered rogatory commission evidence to be taken in Hungary and Israel. This evidence has already been taken in Israel and is currently being taken in Hungary. A trial date in the Supreme Court of Ontario has been set for June 5, 1989. One of the issues that will doubtless be raised at that time is the constitutionality of the Criminal Code Amendments.

Proceedings in *Secretary of State v. Luitjens*,⁶⁷ a revocation of citizenship case, are currently before the federal court of Vancouver. Mr. Luitjens is accused of not revealing to Canadian authorities that he was convicted in Holland for war crimes; the result of a trial *in absentia* that was held at the conclusion of the war. Also, the government alleges that Mr. Luitjens' activities as a Nazi collaborator and a member of the auxiliary Landwacht were such that he should have revealed them to the Canadian authorities as part of their assessment of suitable character in granting him Canadian citizenship.⁶⁸ This trial started in Vancouver on September 26, 1988; rogatory commission evidence was taken in Holland in October and November, 1988; the trial resumed on January 4, 1989, was continued on March 1, 1989, and is scheduled to be resumed on April 3, 1989.

I would like to take a moment now to thank a colleague of mine, Dr. Paul Brillman,⁶⁹ who is scheduled to speak in a subsequent

⁶³ Immigration Act, R.S.C., ch. I-2 (1977), amended by ch. 37, 1987 S.C. 1105, 1110-14.

⁶⁴ Citizenship Act, R.S.C., ch. C-29 (1976), amended by ch. 37, 1987 S.C. 1105, 1114-15.

⁶⁵ [1990] 69 O.R.(2d) 557 (H.C.J.).

⁶⁶ *Id.* at 563-64.

⁶⁷ [1989] 2 F.C. 125 (Vanc.).

⁶⁸ *Id.* at 133.

⁶⁹ Dr. Paul Brillman is Special Prosecutor for War Crimes in Holland.

panel and whom you have all come to know. In prosecuting the *Luitjens* case, the cooperation between Holland and Canada has been absolutely outstanding. There have been times when Canada has been accused of moving too fast and too hard in this case, and Paul Brillman has always been there to offer the assistance of the Dutch Ministry of Foreign Affairs or the Special Police Investigation Unit, under his direction and control. One of the members of the Special Police Investigation Unit, Inspector Coppe, will always be remembered by me for two things: his independence—which frankly sometimes left us wondering where we were—and his dedication. If it were not for the dedication of people like Paul Brillman and his colleague Inspector Coppe, we would never be able to get these cases resolved. To them, I would like to extend our heartfelt thanks.

I will conclude with two comments. First, I would like to make absolutely clear that when the Canadian Department of Justice does not talk about its cases and is silent, or when it does not comment on its investigations and is silent, this is not a silence that is designed to withhold information. Rather, the silence of the Department of Justice on such matters is its solemn obligation under Canadian law. At the Human Rights Conference last year at McGill University, the Attorney General put it this way:

It is to the need to protect the rights of the accused that I wish to address the last of my remarks today. Our legal process must continue to maintain the highest standards of law and evidence. As I am sure you are well aware, it is customary to refrain from commenting on the specifics of criminal cases under investigation. If the government has evidence concerning alleged criminal acts by individuals, there is only one proper forum for its release, and that is in the court after a charge has been laid. Our Canadian criminal justice system and fundamental principles of fairness dictate that the names of subjects not be released. Those who have used such an approach, and those who are tempted to do so, should reflect upon the obstacles they create to a fair trial.⁷⁰

For example, imagine that we were to identify a subject in a very short period of time, and in the investigation we discovered that the name of the subject and the town from which the subject emigrated were correct, but the subject's birthday was totally wrong—not just wrong by months, but years. What if you were to go on in the investigation and discover that the subject you had named was not the correct person at all? That may be a trite expression of the

⁷⁰ Attorney General of Canada, Speech at McGill University (Feb. 1987).

principle, but it is important. It is my belief, and I think from what the Attorney General stated that it is his belief as well, that laws and mechanisms should be established in Canada that bring war criminals to justice and address past evils whenever it is legally possible to do so. Such laws and mechanisms will also go a long way toward preventing future wrongs.

Second, I never lose my calm when people ask, "What has happened to the *other* twenty cases?" I simply tell them to look at what Mr. Justice Deschênes' Report really said, and invite them to deal with this issue in a positive manner, as we are doing in a Conference such as this. You cannot do this work unless you are sufficiently committed. You cannot do this work unless you are of sufficient will. In Canada, all of these things have been demonstrated. One thing I will never do, and no one in my section will ever do, is get upset with people who understandably get upset with us. We understand why you get upset, but that is not going to change our dedication; it is not going to change our will. So, if you do not see Bill Hobson react to criticism, it is not because I have nerves of steel, but because I find criticism very healthy. I happen to work in a system where everything is a matter of public record, so I will let the record be examined in another five years to see whether the words I am speaking today bear themselves out. I would like to take this opportunity to thank Allan for sharing his time. We would also like to thank Boston College for giving Canadians an opportunity to participate in this Conference. Thank you very much.

Allan Ryan: Thank you, Bill. I think it is a mark of the reputation of this Conference that prosecutors from as far away as Australia have come to participate. I would like to introduce Graham Blewitt, who is currently the Deputy Legal Director of the Special Investigations Unit, an agency which was established by the Australian Attorney General's Department to investigate the commission of war crimes by Australian citizens. Graham was appointed to this position in September, while he was serving as the senior legal advisor to the National Crime Authority. Prior to that, he gained twenty years of prosecutorial experience in several federal and state positions in Australia.

Graham Blewitt: I would like to commence by reviewing the prosecution of citizens in Australia immediately after the Second World War. I will briefly trace the history of these prosecutions through

the passage of the 1988 War Crimes Amendment Act⁷¹ and outline the main cases under the legislation. I will conclude my discussion by raising some of the political issues involved in the passage of the Australian legislation.

Following the end of World War II in 1945, Australia was, like many other countries, involved in the prosecution of persons who committed crimes related to the war. In 1945, the Australian Parliament enacted the War Crimes Act.⁷² The Act provided for the punishment of "war crimes" as defined therein, including violations of the law and usages of war committed in any place whatsoever—within or beyond Australia—during any war.⁷³ Proceedings under the Act were conducted by a military tribunal, which was authorized to impose penalties ranging from fines and confiscation of property to imprisonment for life.⁷⁴ The Act was fairly restrictive in that it applied only to war crimes committed against citizens of Australia, British subjects, or the citizens of any Allied power.⁷⁵ The Act was applied to a great number of trials in the Pacific region in the immediate post-war period, but has not been invoked by the Australian government since then.

Following the war, the government, cognizant of the geographic size of Australia and the country's relatively small population, and concerned with the plight of the many thousands of refugees crowded into displaced persons camps throughout Europe, adopted a policy of "populate or perish."⁷⁶ Pursuant to that policy, many thousands of migrants were selected to enter into the country. During the period between 1946 and 1959, some 1.2 million people migrated to Australia; 250,000 of these were refugees who were unwilling or unable to return to their country of origin following the war. This level of migration represents one of the largest movements of people from one hemisphere to another in history.

It is now apparent that among the many migrants accepted by Australia during this period were a significant number of persons

⁷¹ AUSTL. C. ACTS, No. 3 (1989) (amending AUSTL. C. ACTS, XLIII, § 3, No. 48 (1945)) (copy on file at the Boston College Third World Law Journal office).

⁷² AUSTL. C. ACTS, XLIII, § 3, No. 48 (1945) (amended 1989) (copy on file at the Boston College Third World Law Journal office).

⁷³ *Id.*

⁷⁴ *Id.* § 11.

⁷⁵ *Id.* §§ 7, 12.

⁷⁶ See generally Phillip Lynch, *Australian Immigration Policy*, in AUSTRALIAN IMMIGRATION POLICY (Hew Roberts ed., 1972).

who had committed war crimes. These persons were presumably able to blend in with the genuine refugees Australia had sought to admit. From time to time, allegations were made that war criminals had entered Australia after World War II, but these claims were generally either rejected or ignored. In 1986, a radio program went to air that presented irrefutable evidence of the presence in Australia of war criminals who had never been made to account for their crimes. In response to growing pressure following this broadcast, the government of Australia appointed a man named Andrew Menzies, a former senior public servant, to review the material related to the entry of suspected war criminals into Australia.⁷⁷ Following his review, Menzies submitted a report to the Australian government which provided evidence that there were indeed war criminals living in Australia.⁷⁸ The government's response was to establish a Special Investigations Unit (SIU) to investigate allegations against specific persons living in Australia—the Unit of which I am the Deputy Director.

The SIU is a part of the Attorney General's Department of Australia. In conjunction with the creation of the Unit, the government also put forward a number of amendments to the 1945 War Crimes Act, an initiative which ultimately led to the passage of the War Crimes Amendment Act of 1988. I will have more to say about that Act later in the discussion. It is the function of SIU to gather evidence related to persons who are alleged to have committed war crimes. This evidence will eventually enable the government to place these persons on trial before Australian juries on war crimes offenses, rather than seeking their deportation or extradition.

The SIU has received in excess of 560 allegations relating to the commission of war crimes. Of this number, some 276 investigations are currently ongoing.⁷⁹ By and large, the allegations received by SIU involve persons who are accused of committing crimes in the Baltic states—Latvia, Lithuania, and Estonia—and in Byelorussia, Hungary, and Yugoslavia. While a number of German nationals did migrate to Australia after the war, most of these persons have either returned to Germany or died. Of the 276 current investigations, SIU is concentrating on the more serious or high-profile cases. Such cases generally involve allegations of mass murder.

⁷⁷ *Australia Links 70 to War Crimes*, N.Y. TIMES, Dec. 6, 1986, at 8.

⁷⁸ *Id.*

⁷⁹ See Special Investigations Unit Annual Report 1989 (copy on file at the Boston College Third World Law Journal office).

Although 276 cases are being investigated, it is highly likely that only a very small percentage of these cases will actually result in prosecutions. It is interesting that in a majority of the SIU's cases, the question of the subject's identification is not likely to become a major issue. Rather, we expect that persons under investigation will contend that they did not commit the acts alleged against them; that is, they will say that the allegations against them are either false or fabricated. The investigations being carried out by the SIU have been greatly assisted by the existence of good-quality photographs taken of the persons under investigation when they migrated to Australia immediately following World War II. These photographs are very useful in helping our witnesses to identify suspects.

Regarding SIU's investigations of war crimes committed in the Baltic states, Hungary, Yugoslavia, and Byelorussia, it is necessary to rely on the Soviet Union to supply relevant documentation supporting the allegations against persons thought to be living in Australia. We have been somewhat frustrated in trying to obtain prompt responses to our requests from the Soviet Union. Recent developments, however, suggest that the Soviets will be more responsive in the future to requests for this material. Perhaps one reason for the Soviets' delay has merely been the competition that has arisen among the various countries seeking prosecution of these war criminals.

I mentioned that it is the function of the SIU to gather evidence that will lead to the prosecution of these war criminals. It is worth repeating, however, that any prosecution that does take place will be conducted in the Australian criminal courts before juries. Furthermore, it will be necessary in any such trial for the government to establish the guilt of the accused beyond a reasonable doubt. It is therefore incumbent upon the prosecution to establish by cogent evidence that the accused is guilty of war crimes. This approach is somewhat different from that prevailing in the United States. Without oversimplifying matters, the situation in the United States is that proceedings are initiated against war criminals to deprive them of their citizenship and, in appropriate cases, to deport them.⁸⁰ Australia, however, unlike the United States, is a signatory to the United Nations Convention on the Reduction of Statelessness.⁸¹ Broadly speaking, this means that the Australian government is not

⁸⁰ See, e.g., *Fedorenko v. United States*, 449 U.S. 490 (1981).

⁸¹ Convention on the Reduction of Statelessness, *opened for signature* Aug. 30, 1961, 989 U.N.T.S. 175.

able to divest a person of his or her citizenship and to reduce that person to a position of statelessness.

I would like to return to the War Crimes Amendment Act of 1988. This Act amends the 1945 War Crimes Act to provide for the prosecution of Australian citizens or persons residing in Australia who are alleged to have committed war crimes. The Act applies to war crimes committed against any person in Europe from September 1, 1939 to May 8, 1956.⁸² For an act committed overseas to be classified a war crime, it must have been an offense under Australian criminal law at the time it was committed.⁸³ In addition, the crime must be shown to be part of a war or conflict in the manner set forth by the Act.⁸⁴ Although the acts that satisfy these tests would also be war crimes under international law, Australian courts will not be required to apply international law in determining whether a crime has been committed.

The Act specifically excludes any defense based on orders from a superior officer⁸⁵—an exclusion which is consistent with the post-war proceedings at Nuremberg.⁸⁶ It does provide, however, that the accused may assert a defense that the act alleged to be an offense was in fact permitted by the laws of war and was not committed as a crime against humanity under international law.⁸⁷ The maximum penalty for an offense under the Act, which is reserved for the crime of willful killing, is imprisonment for life, although lesser terms may also be imposed.⁸⁸ For any other offense, the maximum sentence is twenty-five years in prison.⁸⁹

The Act was passed by the Australian Parliament on December 21, 1988, and came into force on January 25, 1989. The Act substantially repeals the provisions of the 1945 Act and commences with the following preamble:

WHEREAS

A) concern has arisen that a significant number of persons who have committed serious war crimes in Europe during World War II may since have entered Australia and become Australian citizens or businesses;

⁸² War Crimes Amendment Act, §§ 3(a), 5.

⁸³ *Id.* § 6.

⁸⁴ *Id.* § 7.

⁸⁵ *Id.* § 16.

⁸⁶ Agreement for the Prosecution and Punishment of Major War Criminals of European Axis, *opened for signature* Aug. 8, 1945, art. VII, 59 Stat. 1544, 1548, 82 U.N.T.S. 279, 288.

⁸⁷ War Crimes Amendment Act, § 17.

⁸⁸ *Id.* § 10(1).

⁸⁹ *Id.* § 10(2).

B) it is appropriate that the persons accused of such war crimes be brought to trial in the ordinary criminal courts in Australia; and

C) it is also essential, in the interest of justice, that a person so accused be given a fair trial, with all the safeguards for accused persons in trials in those courts, having particular regard to matters such as the gravity of the allegations and the lapse of time since the alleged crimes.⁹⁰

The Act provides that a person who, during the period covered by the Act, committed a war crime is guilty of an "indictable offense" against the Act—that is, guilty of an offense that is triable on indictment before a jury.⁹¹ In Australia, criminal juries are composed of twelve persons. The Act defines a person accused of war crimes as any natural person who is an Australian citizen, a resident of Australia, a British subject, or a citizen of a country allied with Australia in the conduct of war.⁹² The same Act defines war as any armed conflict between countries, whether declared as war or not, or any civil war or similar armed conflict, so long as it occurred in Europe during the period covered by the Act.⁹³

War crimes are dealt with in Section 7 of the Act. This section provides that a "serious crime" is a "war crime" if it were committed (1) in the course of hostilities in a war; (2) in the course of an occupation; (3) in pursuit of a policy associated with the conduct of a war or occupation; or (4) on behalf of, or in the interests of a power conducting a war or engaged in an occupation.⁹⁴ This section further provides that a "serious crime" is a "war crime" when it is committed (1) in the course of political, racial, or religious persecution; (2) with intent to destroy, in whole or in part, a national ethnic, racial, or religious group as such; and (3) in the territory of the country that was then involved in the war or that was the subject of invasion.⁹⁵

Section 6 of the Act deals with what I would call "serious crimes." This section provides that an act is a "serious crime" when, if it had been committed in a part of Australia under the law then in force in that part, it would have constituted an offense such as murder, rape, wounding, and so on.⁹⁶ The section also provides

⁹⁰ *Id.* § 3.

⁹¹ *Id.* § 9.

⁹² *Id.* § 5.

⁹³ *Id.*

⁹⁴ *Id.* § 7.

⁹⁵ *Id.*

⁹⁶ *Id.* § 6(1).

that an act is a "serious crime" if (1) it were committed outside of Australia during the period covered by the Act, and (2) would have been a "serious crime" under the law of some part of Australia at the time it was committed.⁹⁷ The section further provides that the deportation of any person to—or the internment of any person in—a death camp, slave labor camp, or any place where a person was subjected to treatment substantially similar to that prevailing in a death or slave labor camp, is a "serious crime."⁹⁸ The section also defines "serious crimes" for persons who were aiders, abettors, or conspirators to the commission of serious crimes.⁹⁹

The intent of the War Crimes Amendment Act of 1988 is to characterize, in terms already found in Australian law, the acts defined as "war crimes" under international law. A list of offenses contained in Section 6 generally describes actual offenses existing under the laws of each state and territory in Australia as in force from time to time during the period covered by the Act.¹⁰⁰ Section 6 also allows an Australian court to take into consideration any defense that may have been viable in a proceeding conducted in the state or territory defining the offense.¹⁰¹

Section 11 is one of the sections dealing with the adjudication of cases. It provides that a person shall not be charged with an offense unless he or she is an Australian citizen or resident of Australia.¹⁰² The possibility of private citizens bringing private actions against an accused war criminal is specifically excluded by Section 12, which provides that prosecutions under the Act may only be commenced by the Attorney General or the Director of Public Prosecutions.¹⁰³

Section 16 excludes defenses based on the receipt of orders from a superior officer or authority.¹⁰⁴ The provision states, however, that where a defendant is determined to have acted in fact under orders from his superiors, that fact may be taken into account in determining the proper sentence.¹⁰⁵ Section 17 deals with defenses based on the laws, customs, or usages of war. The purpose

⁹⁷ *Id.* § 6(3).

⁹⁸ *Id.* § 6(4).

⁹⁹ *Id.* § 6(5).

¹⁰⁰ *Id.* § 6.

¹⁰¹ *Id.* § 6(2).

¹⁰² *Id.* § 11.

¹⁰³ *Id.* § 12.

¹⁰⁴ *Id.* § 16.

¹⁰⁵ *Id.*

of this section is to ensure that a person charged with an offense under the Act will not be convicted of the offense if he or she can raise credible evidence that his or her actions were not contrary to the laws, customs, or usages of war and did not constitute crimes against humanity. Such a defendant will not be convicted unless the prosecution can rebut this evidence beyond a reasonable doubt.

It may be interesting to touch on some of the concerns that arose during the passage of the War Crimes Amendment Bill through the Australian Parliament. A great deal of public debate was generated by the Bill, and perhaps the most contentious issue was whether Australian ex-servicemen would be exposed to liability as potential war criminals. The government took the firm stand that, although the legislation was aimed at those responsible for the mass exterminations in Europe during the war, there could be no justification in light of Australia's international obligations for excluding the prosecution of Australian ex-servicemen if evidence that they were involved in war crimes were to come forward. Despite a very strong push from pressure groups, and from the Parliamentary opposition themselves, the War Crimes Amendment Act makes no exception for Australia's own servicemen. Another matter that caused some controversy—and, to a certain extent, still does—was whether it is simply too late to pursue war criminals for offenses committed more than forty years ago outside Australia. An associated concern was with the huge cost involved in resolving these prosecutions. These issues generated much debate, but ultimately had no bearing on the Act's passage through Parliament.

Suggestions were made from time to time that the main reason the government was seeking to introduce the legislation was to appease Jewish demands that action be taken to bring war criminals living in Australia to justice. The government rejected such claims. The various Jewish organizations in Australia, and the Jewish community itself, kept a very low profile during the debate over the Act. In a recent Australian television program, the question was put to Mr. Izzy Liebler, the Chairman of the Executive Council of Australian Jewry, whether the War Crimes Amendment Act might arouse anti-Semitic feelings or give rise to reprisals against the Jewish community. Mr. Liebler responded that if the price of bringing war criminals to justice were a backlash toward Australian Jews, then this would simply be the price that would have to be paid.

The final points I would like to touch on are the various safeguards included in the War Crimes Amendment Act. First, where extradition is sought by the government under the existing extra-

dition laws, a magistrate is required to be satisfied not only that there is a reasonable basis for believing that the offenses for which surrender is sought constitute "war crimes," but also that the government has established a prima facie case that the person accused committed the extraditable offense.¹⁰⁶ That is to say that before granting the extradition, the magistrate must conclude that the evidence provided by the government in support of the extradition request would be sufficient under Australian law to warrant the accused being put on trial in a criminal court.¹⁰⁷ This provision has effect despite any law or treaty to the contrary, and departs from the modern approach to extradition in that it requires the magistrate to be satisfied to an unusually high standard.

Second, the Act authorizes the Attorney General to approve legal or financial assistance for an applicant who is charged with an offense under the Act.¹⁰⁸ Third, the Act provides that the normal rules of evidence and procedure are applicable to all common law defenses raised in proceedings under the Act, and that courts hearing such cases may exercise all powers granted to them by these rules, including the powers necessary to prevent an abuse of process.¹⁰⁹ Fourth, a trial judge may, in the interest of justice, stay the proceedings if (1) the defendant is unable to obtain exculpatory evidence that would have been available but for the lapse of time or some other factor beyond the defendant's control and (2) is thereby prejudiced in the preparation or conduct of his defense.¹¹⁰ Fifth, the Act provides that the defendant may apply to have the proceedings removed to another state.¹¹¹ The court is required to allow the defendant's request for removal unless the defendant is a resident of the state or territory where the proceedings are being conducted, or is not a resident of the state or territory to which he seeks to have the proceedings removed.¹¹² Only the Attorney General or the Director of Public Prosecutions may commence an action against a suspected war criminal. Thank you very much.

Allan Ryan: Mr. William Chalmers was appointed to the British War Crimes Inquiry in February, 1988. The Inquiry's task is to consider

¹⁰⁶ *Id.* § 22.

¹⁰⁷ *Id.* § 19.

¹⁰⁸ *Id.* § 13.

¹⁰⁹ *Id.* § 13(5).

¹¹⁰ *Id.* § 14.

¹¹¹ *Id.*

¹¹² *Id.* § 14(4).

whether British law should be amended to allow for the prosecution of Nazi war criminals. Mr. Chalmers also served as the Crown's agent for Scotland prior to his appointment to the War Crimes Inquiry.¹¹³

William Chalmers: I would like to thank those responsible for organizing this Conference for inviting me here today. What has happened in Britain over the last forty years to facilitate the prosecution of Nazi war criminals? The short answer to this question is "nothing;" we have had no prosecutions, or undertaken any other positive acts. There has been a great deal of criticism about that, however.

In Parliament, a group representing all political parties has banded together to try to persuade the government to take some action. The media has been very critical. We have become accustomed to the sort of banner headline, "Britain: A Haven for War Criminals." Eventually, the government decided last year to take action, but only to the extent of setting up a War Crimes Inquiry. To carry out this Inquiry, the government brought back a couple of old war horses who had quietly gone to graze: my colleague, Sir Thomas Hetherington, who was Director of Public Prosecutions for England and Wales, and myself. The mission of the Inquiry is as follows: (1) to obtain and examine relevant material, including material held by government departments, documents that have or may be submitted by the Simon Wiesenthal Center, and other materials relating to possible war crimes allegations against persons who are now British citizens or residents in the United Kingdom;¹¹⁴ (2) to interview persons who appear to possess relevant information relating to such allegations; (3) to consider, in light of the likely probative value of any evidence collected through research or witnesses, whether the laws of the United Kingdom should be amended to allow for the prosecution of war criminals who are now British citizens or residents in the United Kingdom; and (4) to advise Her Majesty's government accordingly. In short, the functions of the Inquiry are to consider whether the law should be amended to prosecute someone in our courts who was neither a British citizen nor in Britain at the time he committed a crime, and to investigate

¹¹³ The Crown Agent for Scotland also serves as the head of the Procurator Fiscal's Service—the prosecution agency in Scotland (footnote provided by panelist).

¹¹⁴ For purposes of this Inquiry, the term "war crimes" extends only to crimes of murder, manslaughter, or genocide committed in Germany or in the territories occupied by German forces during the Second World War (footnote provided by panelist).

allegations. In this respect, the Inquiry is somewhat different from the Deschênes Commission in Canada and the Menzies Inquiry in Australia, in that we are obliged to go abroad and determine whether there appears to be a *prima facie* case against anyone.

You will gather that this is very much a restricted undertaking. We are concerned only with the Second World War. We are concerned only with acts committed in Germany or in the territories occupied by Germany. We are concerned only with persons who were not British at the time they committed such crimes, but who are now British citizens or resident in Britain. In connection with the task of deciding whether to change the law, the slant in the United Kingdom is toward the type of legislation that has been enacted in Canada and Australia, and not toward the type of proceedings that take place in the United States. Naturally, we have been looking very carefully at what the Canadians and the Australians have done. Although in broad principle, these two countries may appear to have done the same thing, the actual legislation contains considerable variations.

We are at a stage where we are agonizing over the question whether to do anything or not. Canada, Australia, and the United States have all been through this process, but the question is brand new to us. On the one hand, there are many arguments in favor of doing nothing. The legal purists do not like extraterritorial jurisdiction. They also do not like retrospective legislation, although we are not so much declaring a new crime retrospectively as we are making it competent procedurally to do something that one could not competently do forty years ago. Further, there are the semi-legal objections having to do with the difficulties of obtaining evidence. In Britain, we are fairly strong in our adherence to a best evidence rule, whereby evidence is to be given orally, in court, and in the presence of judge, jury, and the accused.¹¹⁵

As we have gone about the world, we have encountered great cooperation in pursuing our investigations. Even in the Soviet Union, we are now being told that witnesses whose testimony we seek to obtain may be allowed to travel to Britain to give evidence, so long as they are well enough and willing to do so. Of course, many difficulties remain in this regard, as many witnesses are old, infirm, and simply unfit to travel. Also, many potential witnesses are dead, although their statements have often been recorded be-

¹¹⁵ See generally M.N. HOWARD ET. AL., *PHIPSON ON EVIDENCE* 117-22 (14th ed. 1990); RUPERT CROSS, *EVIDENCE* § 3, at 11-13 (3rd ed. 1967).

fore their deaths. These are obstacles that would seem to me to be insuperable in the proper conduct of an investigation. Yet, the Canadians and Australians have obviously surmounted these problems and provided the solutions in their legislation. I suppose that the stronger arguments are to be found in the area of public policy.

The question before us is, should we do this? What is to be gained by sending a seventy year-old man to prison for the rest of his days for something he did a half century ago? It is said that Nuremburg was sufficient, that it dealt with the "big fish"—the Goerings and so on. If one is looking for justification in prosecution, one will find it at Nuremberg, since these trials will surely be a deterrent to others who may contemplate such policies in the future. Clearly, the allegations that have been made in our current investigations concern primarily the little ones, the "small fish"—not the people who determined policy but the people who pulled the triggers. Some would argue that we should not concern ourselves with these little ones, that we should leave matters be and focus our attentions on the future.

Another argument is that Britain simply does not have the resources to conduct these prosecutions thoroughly. Those of you in law enforcement will recognize that you never have the money or the resources for everything you hope to accomplish. Indeed, I used to think my biggest arguments were not in court seeking a conviction, but in my battles with the Treasury. It is undoubtedly true that money and resources are very tight. The ordinary crime, which must be dealt with, is always getting larger; the trials seem to take longer and there are often specific and novel problems that must be addressed. For example, when Pan Am flight 103 crashed in Lockerbie, Scotland a few months ago, resources had to be diverted. The police, the other investigators, the forensic scientists, the pathologists, and the prosecutors were all there, beavering away, in the sleepy little town of Lockerbie where the crime rate is practically nil. That is the sort of thing that happens, and the agency must be able to provide for these unforeseeable contingencies out of its already-tight budget.

If it were said, "All right, go ahead and pursue these investigations and prosecutions," the representatives of every political lobby would say, "Don't waste our money on that, buy some more hospital beds instead." Educators would say, "We could build a better school with that money." And there would be others who would say, "If you want to use that money to relieve suffering, what about famine relief for Third World countries?" There are always

plenty of ways for public money to be expended, and our task is to assess the priority of a matter such as the prosecution of war crimes.

As Allan Ryan so clearly said in his book, *Quiet Neighbors*,¹¹⁶ these people whom we seek to punish have been in our country for more than forty years; they have kept their heads down, their noses clean, and they have posed no particular problems. They are "good citizens," you might say. Do we owe them something for their good citizenship over the last forty years? Then, of course, there are the people who say that the Holocaust never happened, and that we should discount the evidence produced by the Soviet Union as a sinister plot to discredit the refugees living abroad. On the other side of all this, the argument is very simple and very clear: nothing should prevent the punishment of those responsible for the horrendous atrocities of the Holocaust. These are the issues on which we have to deliberate. As I said, although these questions are familiar in other countries, they are new to us.

We have carried out a number of investigations in various parts of the world to see whether there are cases that appear to be worthy of prosecution. We hope to make our report in a few months' time. We have not finalized our report and I cannot tell you what it will say or what our recommendations will be. In any event, it is ultimately for the government to decide what to do in light of the report. And, of course, even if the government does decide to enact enabling legislation, it is still for the appropriate prosecutor to decide whether or not to prosecute. These are purely matters of conjecture. All I can say at this time is thank you for allowing me to be here. Having had the opportunity to listen to the other panelists, I have hopefully learned from the experience.

¹¹⁶ See generally RYAN, *supra* note 15.

