THE PASSING OF LEGISLATION ALLOWING FOR TRIAL OF THOSE ACCUSED OF WAR CRIMES AND CRIMES AGAINST HUMANITY

Charles B. Wagner*

The author contends that those who may have perpetrated war crimes, particularly in World War II, are not being adequately pursued in Canada. He argues that extradition is not an adequate means of dealing with those accused of war crimes.

Instead the author favours passage of retroactive legislation so that those individuals may be prosecuted in Canada. He acknowledges that the prospects for such legislation are not great because of political factors he describes. The author also refers to reasons why such legislation might be thought offensive. However, he presents a number of arguments, mostly drawn from international law, to establish that retroactive legislation in these circumstances is an appropriate response and, therefore, should be enacted.

L'Adoption d'une loi pour permettre que les personnes accusées de crimes de guerre et de crimes contre l'humanité soient poursuivies devant les tribunaux

L'auteur soutient que ceux qui ont peut-être commis des crimes de guerre, surtout pendant la deuxième guerre mondiale, n'ont jamais été poursuivis assez vigoureusement au Canada. Il prétend que l'extradition ne suffit pas pour traiter le problème de ceux qui sont accusés de tels crimes.

Il préconise plutôt l'adoption d'une loi rétroactive pour permettre que ces personnes soient poursuivies devant les tribunaux canadiens. Il admet qu'une telle loi a peu de chances d'être votée, et il décrit les facteurs politiques qui s'y opposent. En plus, il évoque des raisons pour lesquelles elle pourrait sembler offensante. Mais d'autre part, il offre plusieurs arguments, tirés pour la plupart du droit international, pour démontrer que dans ces circonstances la législation rétroactive constitue une réaction appropriée et devrait donc être adoptée.

I. Introduction

Background

There may be as many as 1,000 Nazi War Criminals resident

*Consultant to the National Jewish Students' Network.

in Canada.[1] Solicitor General Robert Kaplan helped focus public attention on the presence of suspected war criminals in the spring of 1980 when he met with the Nazi hunter Simon Wiesenthal. Subsequent to the meeting the Solicitor General announced that he was convinced that there were Nazi war criminals living in Canada and that within three months he would have a plan on how to bring them to justice.[2]

As of April 1984 Canada's present position seems to have frustrated any hopes of bringing the bulk of alleged Nazi War Criminals in Canada to trial. Canada maintains that extradition to the Federal Republic of Germany or to the Netherlands is the sole legal means through which the problem can be addressed.[3] The ineffectiveness of Canada's present policy can best be shown by noting that since Kaplan's meeting with Wiesenthal in 1980, only one of the estimated one thousand alleged Nazi War Criminals has been extradited.[4]

In his Bulletin of Information No. 24 dated Vienna, January 31, 1984, Simon Wiesenthal reports that the Documentation Centre appraised Canada of the presence of four alleged Nazi War Criminals through the Canadian Embassy in Vienna on June 13, 1966. Wiesenthal reports that he had asked the Canadian Jewish Congress to intervene with the Canadian Government in a renewed effort to bring these four to trial. As of January 31, 1984 the Documentation Centre has not received word on the results of discussions between representatives of the Canadian Jewish Congress and the Canadian Government.

Extradition of Nazi War Criminals from Canada is an incomplete solution. The bulk of alleged Nazi War Criminals originate from eastern bloc countries such as Poland, Estonia, Latvia, Lithuania and the U.S.S.R.[5] The significance of their national origin lies in the fact that the Federal Republic of

---

[1] Dr. Adelbert Ruekerl, the West German Attorney-General claims there are 1,000 war criminals living in Canada. Simon Wisenthal, a famed Nazi hunter, has been reported as concurring with the West German Attorney-General's estimate. The Federal Justice Department in Ottawa says that there are only a very small number of war criminals in Canada. The R.C.M.P. have files on up to 100 suspected war criminals but many of those files are incomplete. The former president of the Canadian Jewish Congress and McGill law professor, Irwin Cotler, has stated, "We have 75 to 100 names on our files drawn from many sources." See "R.C.M.P. hunt more Nazis", *The Toronto Star,* November 6, 1983, A12.

[2] See "Kaplan vows Action against War Criminals", *The Globe and Mail,* April 21, 1980, 1. See also I.A. Ansell and P. Appleby, "War Crimes in Canada", *Today Magazine, The Toronto Star*, August 28, 1982, 10, 11; B. Stern, "There's Solid Evidence for War Crimes Action", *Canadian Jewish News*, 1981 April 24, 1.

[3] Ansell & Appleby, *supra* note 2.

[4] *Re R. and Federal Republic of Germany and Rauca* (1983), 41 O.R. (2d) 255 (C.A.).

[5] Kenneth M. Narvey, "Trial in Canada of Nazi War Criminals: Overcoming certain *obiter* in *Rauca*" (1983), 34 C.R. (3d) 126.

Germany has demonstrated reluctance to request the extradition of alleged Nazi war criminals of non-German origin even though the crimes committed were sponsored, authorized and directed by Germany during the Second World War.[6]

Possibilities of extraditing alleged Nazi War Criminals are further stifled by Canada's refusal to grant extradition requests to eastern bloc countries. Canada has no extradition treaty with Poland and the pre-Soviet treaties with other countries in the eastern bloc are deemed inoperative.[7] Various ministers in Cabinet have rejected the idea of extradition to the eastern bloc on moral grounds. Without commenting whether or not it was a legally viable option, their fears were that alleged Nazi War Criminals' fundamental human rights would be violated should there be a trial under a communist system of justice.[8]

Retroactive Legislation in Canada

One of several alternatives[9] to extradition of Nazi War Criminals is for Parliament to pass legislation allowing for those accused of war crimes and crimes against humanity to be

---

[6] See correspondence between United States Attorney-General William French Smith and West German Justice Minister Jurgen Schmide, 4 January and 12 February 1982, and covering press release, 11 June 1982 (copies available from the Office of Special Investigations, U.S. Department of Justice, Washington, or from Ken Narvey, Consultant to National Jewish Students' Network, P.O. Box 6062, Station A, Toronto, Ontario).

[7] *Supra* note 5, 127. Countries include: Estonia, Latvia, Lithuania, and the U.S.S.R.

[8] David Lancashire, "The Lax Hunt for War Criminals", *The Globe and Mail*, Thursday, July 21, 1983, 7; "Rauca case Spotlights Policy on War Criminals," *National*, December, 1982, 11; "Are We a Haven for War Criminals", *The Windsor Star*, February 12, 1983, Al; "Kaplan won't risk career to punish Nazis, students say", *The Toronto Star*, Tuesday, May 18, 1982, 28; "Kaplan vows Action against War Criminals"; *The Globe and Mail*, April 21, 1980, 1.

[9] See "Are We a Haven for War Criminals", *The Windsor Star*, February 12, 1983, A2, which quotes Irwin Cotler, Law Professor at McGill University and past president of the Canadian Jewish Congress, as saying Canada could amend the *War Crimes Act* S.C. 1946, c. 73, prosecute under international law for crimes against humanity, or bring into play the *Geneva Conventions Act*, R.S.C. 1970, c. G-3. Also see Interventants Statement *Her Majesty the Queen and the Federal Republic of Germany and Albert Helmut Rauca and Canadian Jewish Congress* Court File 966/82. Also see *Rauca, supra* note 4, 245, where the Ontario Court of Appeal considered and rejected the possibility of prosecuting Nazi War Criminals residing in Canada under the *War Crimes Act* and/or the *Geneva Conventions Act* in the context of the defendant's charter defence. Some authorities note that the findings of the Court of Appeal on this point were *obiter* in that the Court held that the opposite finding would have made no difference to the outcome of the case. For a review of the proposition that Canada can bring Nazi War Criminals to trial under the *War Crimes Act* and the *Geneva Conventions Act*, see Narvey, *supra* note 5.

brought to trial in Canada. The Solicitor-General of Canada, Robert Kaplan, claimed that, if it had been legally possible legislation bringing Nazi War criminals to trial in Canada would have been passed.[10] Kaplan asserted that the actions of the Nazis against the civilian populace were not crimes under Canadian law at the time they were committed. Therefore the Government believed that the passage of legislation to prosecute Nazi war criminals would offend the legal "principle" that forbids retrospective prosecution.

The then Justice Minister, Mark MacGuigan agreed with Solicitor-General Kaplan's analysis and wrote that, "In present day circumstances, and consistent with Canada's traditional application of the Rule of Law and with the Canadian Charter of Rights and Freedoms, the most effective means of ensuring that overall justice will be done, lies in the realm of extradition."[11]

I will argue that Canada's position on retroactive war crimes legislation is incorrect. The following analysis will attempt to prove that retroactive war crimes legislation would be constitutionally valid on the basis that Nazi Germany's killing, torture and enslavement of enemy non-combatants, unarmed

---

[10] Solicitor-General Robert Kaplan held a constituency meeting on Wednesday, May 19, 1982. Kaplan's sincerity regarding his stand on war criminals was being questioned. He maintained that if it were legally possible, legislation would have been passed. See "Jews Grill Kaplan over War Criminals", *The Toronto Daily Star*, Thursday, May 20, 1982, p.A/3 and "We can't nab Nazis: Kaplan", *The Toronto Sun*, Thursday, May 20, 1982, 68. "No Evidence is Found of Nazi Collaborators", *The Globe and Mail*, Wednesday, May 19, 1982, 9.

[11] Letter dated January 28, 1983, from Justice Minister Mark MacGuigan to President of the Treasury Board, Herb Gray.

"The Honourable Herb Gray, P.C., M.P.
President of the Treasury Board
House of Commons, Ottawa, K1A 0A6
My dear Colleague:

Thank you for your letter of December 6, 1982 submitting the comments of Mr. Jerome Garson of Windsor, Ontario, regarding alleged war criminals in Canada and the means that the Government may have to deal with such persons. It is my view that we should work within existing law to deal with individual cases of alleged war criminals. In present day circumstances, and consistent with the *Canadian Charter of Rights and Freedoms*, the most effective means of ensuring that overall justice will be done lies in the realm of extradition. As you know, we have initiated proceedings for the extradition of Mr. Helmut Rauca to the Federal Republic of Germany and the Government of Canada has taken measures to encourage other countries which have jurisdiction over these offences to seek extradition in appropriate cases.

I am sensitive to the concerns expressed by Mr. Garson and I hope that the measures we have taken will, over time, demonstrate our commitment to adjust resolutions of this question.

Yours sincerely,
Mark MacGuigan"

civilians in occupied territory in war time was a violation of international law.

II. Retroactivity

Retroactivity — Rule of Construction or Rule of Law

There is a presumption in law against the retrospective operation of statutes; however, this presumption is only a rule of construction.[12] Should Parliament intend to pass retrospective legislation and clearly convey this intention by the express wording of the statute, the courts will interpret the legislation retrospectively.[13] Thus any obstacles presented by the rules of statutory construction can be easily overcome by careful and specific drafting.

The Charter of Rights, the Constitution Act, and Retroactive Legislation

Parliament's legislative capacity is subject only to the limitations imposed on it by the *Constitution Act, 1867* and Canada's *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*. The *Constitution Act, 1867* divides all powers of government between the Provincial legislatures and the Federal Parliament. The only limitations on Parliament's legislative powers are the areas of concern allocated to the Provincial legislatures.[14] The *Constitution Act, 1867* contains no bar to Parliament passing retrospective legislation.[15] Legislation for the prosecution of Nazi war criminals would be criminal legislation and section 91(27) of the *Constitution Act, 1867*[16] provides that Parliament has the power to pass criminal legislation in Canada. Therefore the *Constitution Act, 1867* does not impede the passage of a retroactive statute which would allow for the prosecution of Nazi war criminals residing in Canada who are accused of committing war crimes and crimes against humanity.

---

[12] See 36 *Halsbury's Laws of England*, (3d) (London: Butterworths, 1961), 423, paras. 644, 645. See also E. Driedger, *The Construction of Statutes* 2nd ed., (Toronto: Butterworths, 1983).

[13] Note that the terms retroactive and retrospective are used interchangeably in various comments by Canadian officials regarding possible future war crimes legislation. In *Black's Law Dictionary* 5th ed. (St. Paul, Minn.: West Publishing Co., 1979), 1184 and *Re R. and Potma* (1982), 37 O.R. (2d) 189, (H.C.J.), 199 the terms are used interchangeably. Recent Canadian case law suggests "retrospective" refers to procedure and "retraoctive" refers to substance. See *R.* v. *Campagna* (1983), 70 C.C.C. (2d) 236, (B.C. Prov. Ct.) 238-239. In this article the terms will be used interchangeably.

[14] See P.W. Hogg, *Constitutional Law of Canada*, (Toronto: Carswell, 1977), 198.

[15] *Id.*, 200.

[16] *The British North American Act,* 1867, 30 & 31 Vict. c. 3 (U.K.); R.S.C. 1970, App. II, No. 5.

The Charter of Rights and Freedoms

Regarding proceedings in criminal and penal matters, s.11(g) of the Charter of Rights and Freedoms states:

> Any person charged with an offence has the right not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian law or *international law or was criminal according to the general principles of law recognized by the community of nations.*[17] (emphasis added)

A consideration of the history[18] of s.11(g) of the *Charter of Rights and Freedoms* reveals that Parliament has acknowledged that Nazi actions were criminal under international law and not in accordance to the general principles of law recognized by the community of nations. The efforts to arrive at the final form of s.11(g) are testimony to Parliament's intention that legislation to prosecute Nazi war criminals would not infringe upon s. 11(g) of the Charter.[19]

In a Proposed Joint Resolution of October 2, 1980, to the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, the following section was introduced:

> 11. Any one charged with an offence has the right
> e) not to be found guilty on account of any act or omission that at the time of the act or omission did not constitute an offence;
> f) not to be tried or punished more than once for an offence of which he or she has been finally convicted or acquitted;

In November of 1980 the Special Joint Committee received three separate written submissions from the Canadian Bar

[17] Cited in E.L. Greenspan, *Martin's Annual Criminal Code 1982*, (Aurora: Canada Law Book, 1982), 872.

[18] See Intervenant's statement of the Canadian Jewish Congress in *Her Majesty the Queen and The Federal Republic of Germany and Albert Helmut Rauca and Canadian Jewish Congress* court file 966/82 (Court of Appeal). Also see Canada, Department of Justice, *Manuals of Commentaries on the Charter of Rights and Freedoms* ("White Book") tabled in the House of Commons on November 18, 1982 Tab17. [hereinafter cited as *Commentaries*]. See *Re Anti Inflation Act*, [1976] 2 S.C.R. 373; 68 D.L.R. (3d) 452 which is authority for the proposition that the court may consider the legislative history of legislation in order to discern Parliament's intention. Note Ritchie J. with concurrence of Martland & Pigeon J.J., (S.C.R. 438-439) and Beetz J. with the concurrence of de Grandpre J., (S.C.R. 471-472). Also see *Rauca, supra* note 4, 244-45 where the Ontario Court of Appeal quotes proceedings of the Joint Committee on the Constitution of Canada to determine the meaning of s.6 of the *Charter of Rights and Freedoms.*

[19] *Commentaries, supra* note 18, part 17 (section 11(g) — offence according to general principles of law).

Association, the Canadian Jewish Congress and the North American Jewish Students' Network — Canada regarding section 11 (e) and (f) of the proposed Charter.[20] Their concern was that any legislation enabling the government to prosecute Nazi war criminals might be construed as offending the Charter should the killing of civilians in war time not be construed as a violation of international or German domestic criminal law.[21] Responding to the concern over the possibility that section 11 (e) and (f) precluded the passage of future legislation which would enable Canada to prosecute alleged war criminals on January 12, 1981, Justice Minister Jean Chretien presented a group of suggested amendments to the Proposed Joint Resolution of October 2, 1980:

> Representations have been made by the Canadian Jewish Congress and the North American Jewish Students Association and by members of the Committee *to ensure that section 11 (e) and (f) do not preclude the possibility of prosecuting those who are alleged to have committed crimes recognized under international law.* The international Covenant on Civil and Political rights recognized the right of a country to try and punish a person for an offence that was, at the time of its commission, recognized at the time under domestic law. *The covenant also permits trial and punishment of a person for an offence for which he has not been tried and punished in another country.*[22]
>
> *To reflect these principles in the Charter,* the government is prepared to accept an amendment so as to provide that:

---

[20] See *Submission to the Special Joint Committee by the Canadian Bar Association*, November 22, 1980 including appendix: "Study on the Charter and the Convenant"; *Submission to the Special Joint Committee by North American Jewish Students' Network — Canada*, November 25, 1980; *Submission to the Special Joint Committee by Canadian Jewish Congress*, November 13, 1980.

[21] For an analysis of Nazi Germany's Justice Ministry's attitude as well as the Judiciary's attitude towards anti-Jewish government actions, see Raul Hilberg, *The Destruction of the European Jews,* (Chicago: Quadrangle Books, 1961), 293. Also see explanation of Hitler's *de facto* right under the Nazi Germany's domestic law to order killing of Jews, in Sheldon Glueck, *War Criminals: their Prosecution and Punishment*, (New York: Knopf, 1944), 243-245. Moreover, also note that the killing of Jews was still murder under the German criminal code. It was just that it could not be prosecuted in Nazi Germany because the "Fuhrerwille" — will of Adolf Hitler — which condoned the murders, was held to be equal to the law. This made the prosecution for the murdering of Jews impossible. See *Rauca supra* note 4, 233-235.

[22] Even though crimes committed by Nazi war criminals were committed outside of Canada, war crimes are of such international nature that any state may exercise its jurisdiction to try them. See Sharon A. Williams & Armand L.C. de Mestral, *An Introduction to International Laws chiefly as interpreted and applied in Canada* (Toronto: Butterworths, 1979), 149. Also note that Canada will try a person for crimes committed abroad, under certain circumstances. See the *Criminal Code*, R.S.C. 1970, C-34,

> 'Anyone charged with an offence has the right not to be found guilty on account of any act or omission that at the time of the act or omission did not constitute an offence under Canadian or international law and has the right if finally convicted or acquitted of the offence in Canada, not to be tried for it again and, if so convicted, not to be punished for it more than once.'[23] (emphasis added)

Additional concern was expressed that the amendments might not go far enough to ensure that the Charter did not preclude legislation for the prosecution of war criminals. On January 28, 1981, both the government and the Conservative Party responded to that concern and each separately proposed that the following words be added to section 11 (g):

> or was criminal according to the principles of law recognized by the community of nations.[24]

Parliament's apparent intention was that even if Nazi actions were viewed as crimes under international law, they were certainly "criminal according to the principles of law recognized by the community of nations."[25] The Parliamentary Secretary to the Minister of Justice clarified the government's position prior to the vote on the amendments:

> So there is no misconception on this, Mr. Chairman, this clause 11 (g) does not prevent the prosecution of war criminals. By itself it does not do that. It does not stand in the way of prosecution, but by itself it does not allow prosecution. What it does allow is enabling legislation if the Parliament sees fit, so I think that should be clear.[26]

This last statement confirms that s.11 (g) of the Charter was specifically amended to provide for the constitutional validity

---

s.6, which relates to offences committed on aircraft. See also Bill C-19, the proposed *Criminal Law Reform Act, 1984*, s.5, which amends the above by allowing prosecution for offences related to internationally protected persons (s.5(1)), hostage taking and nuclear material (s.5(3)). Bill C-19, s.5(2), 1st reading February 7th, 1984, clarifies *Criminal Code*, s.6(1.2)(c) by stating that one who commits such offences may be tried in Canada if he is present in Canada after the offence has been committed. This application of the universality principle would allow the courts to exercise jurisdiction even where the crime was committed outside of Canada by a foreign national. See letter from Kenneth M. Narvey, consultant to National Jewish Students' Network, to Minister of Justice, Hon. Mark MacGuigan, March 9th, 1984.

[23] Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, No. 36, 12-13.

[24] *Id.*, No. 41, 99. Also note that Article 31(1)c of the *Statute of the International Court of Justice* acknowledges that general principles of law recognized by civilized nations as a source for international law.

[25] *Commentaries, supra* note 18, notes that this last clause was added as "*ex abundanti cautela*".

[26] *Supra* note 23, No. 47 (28 Jan. 1981) 59.

of "enabling legislation" for the prosecution of Nazi War Criminals.

III. War Crimes and Crimes Against Humanity Against International Law

Fundamental Issue — The Status of Nazi Actions under International Law

Parliament can now pass a constitutionally valid statute that would bring to trial individuals who violated international law in the 1930s and 1940s. As such, the sole remaining legal question regarding the passage of legislation for the prosecution of Nazi War Criminals is the status of Nazi actions at international law. If Nazi actions were violations of international law at the time they were committed, there is absolutely no constitutional or legal reason for Parliament not passing legislation allowing for their trial in Canada. The following analysis addresses this fundamental issue.

Sources of International Law

The most authoritative statement of the source of international law is set out in Article 38 of the *Statute of the International Court of Justice:*

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it shall apply:
   (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   (b) international custom, as evidence of a general practice accepted as law;
   (c) the general principles of law recognized by civilized nations;
   (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of law.[27]

Article 38 (1)(b) International Custom as Evidence of a General Practice Accepted as Law

For Nazi actions in the Second World War to constitute violations of customary international law, a two-pronged test must be met:

(1) the conviction with which states viewed their behaviour. In other words, did states consider the purposeful killing of

[27] See *Statute of the International Court of Justice*, June 26, 1945, 59 Stat. 1055; T.S. No. 993; 3 Bevans 1179; 1976 Y.B.U.N. 1052; L. Henkin, R.C. Pugh, O. Schachter, H. Smit, *Basic Documents Supplement to International Law* (St. Paul, Minn.: West Publishing, 1980), 26; Williams & de Mestral, *supra* note 22, 13.

enemy unarmed, non-combatant civilians from the infant to the aged a violation of international law?

(2) did the behaviour of states demonstrate their belief that the acts described above constituted a violation of international law?[28]

All other factors such as uniformity of practice and duration of the custom go to weight and are not conditions precedent for a custom to be considered binding law.[29]

Evidence of custom includes diplomatic correspondence, policy statements, press releases, opinions of official legal advisors, official manuals of legal questions such as military legal manuals, state legislation, international and national judicial decisions, recitals in treaties, a pattern of treaties in the same form, and practice of international organizations, and resolutions relating to legal questions in the United Nations General Assembly.[30] For Nazi actions in World War Two to be contrary to International Customary law, a substantial number of states, as evidenced by their attempts to punish those responsible, had to consider the killing, torturing, robbing and enslavement of civilian non-combatants as crimes.

International Custom Accepted as Law

The psychological subjective acceptance by states that certain activity contravenes international law is commonly known as *opinio juris sive necessitatis*. With respect to war crimes, it involves a recognition by states that they are legally obligated to refrain from policies of genocide and clearing land by the killing of its population if carried on in occupied territories against civilians of enemy countries.[31] I believe that the following examination of the history of the behaviour of states clearly demonstrates the psychological cognizance amongst states that Nazi actions violated obligatory rules regarding laws of war.

The killing of civilians during a war was punished as a crime under international law in 1474. The Archduke of Austria pledged his town of Bresachi in the Upper Rhine to the Duke of Charles in exchange for money. The Duke of Charles installed Peter of Hagenbach as governor of Bresachi. Following the Duke's orders, Peter of Hagenbach murdered and plundered the townspeople of Bresachi. When the Duke of Charles was defeated at the Battle of Nance, Peter of Hagenbach was tried by an International Military Tribunal. Peter of Hagenbach was convicted of "crimes under natural law, and having trampled

[28] See Williams & de Mestral, *supra* note 22, 16-18.

[29] See I. Brownlie, *Principles of Public International Law*, 2nd ed. (Oxford: Clarendon Press, 1973), 4. See also *Asylum Case*, [1950] Int. Ct. of Justice Repts. 266, 276-277; *North Sea Continental Shelf Cases,* [1969] Int. Ct. of Justice Repts. 3, 43.

[30] Brownlie, *supra* note 29, 4.

[31] Williams & de Mestral, *supra* note 22, 17.

under foot the laws of God and man."[32] France, Austria, and the Swiss Leagues recognized that Peter of Hagenbach's acts were in violation of international law for which he was to be held legally accountable and put to death.

As early as 1827, states condemned the killing of innocent civilians in time of war and peace. The perpetrators were said to have violated international law. England, France and Russia intervened in the Greco-Turkish war of 1827 after receiving reports concerning the massacres of civilians.[33] In 1840 the Secretary of State of the United States of America intervened with the Sultan of Turkey on behalf of Jews who were being massacred in Damascus and Rhodes.[34]

In 1872, 1902, and 1903, the United States of America and numerous European governments protested to Russia and Romania over pogroms and other atrocities. The Czarist government inspired raids on Jewish villages which resulted in raping, robbing and kiling of townspeople. The United States declared, "This government cannot be party to such *international wrongs*."[35]

On May 28, 1915, the Governments of France, Great Britain and Russia protested to Turkey regarding the killing of, by some estimates, one and one half millon Armenians:

> [the massacres of Armenian civilians are] crimes against humanity and civilization for which all members of the Turkish government will be held responsible together with its agents implicated in the massacres.[36]

Under international law, war did not totally negate the legal protection accorded to civilian populations. This is clearly shown by the preamble to the Hague IV Convention of 1907, which was declaratory of the unwritten international law.[37] The Fourth Hague Convention, of October 18, 1907, was a convention respecting the Laws and Customs on Land. The preamble of the Convention reads:

> . . . Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare

---

[32] Also see *Henfield's Case* (1793), 11 Fed. Cas. 1099 (Dist. Pennsylvania). For an analysis of the judicial precedents for crimes against humanity see J.T. Brand, "Crimes against humanity and the Nuremberg Trials" (1948-49), 28 *Oregon Law Rev.* 93, 107.

[33] Brand, *supra* note 32, 108. See also L. Oppenheim, *International Law,* 3rd ed. (London & New York: Longmans, Green and Co., 1920-21), 229.

[34] See *U.S. Department of State Publications No. 9*, (Nov. 2, 1929), 153-154. See also Brand, *supra* note 32, 108.

[35] Brand *id.*

[36] E. Schwelb, "Crimes against Humanity" (1946), 23 *Brit. Yearbook Int. Law* 178, 181. Schwelb is quoting from an American memorandum presented by the Greek delegation to the Commission on March 14, 1919.

[37] M. Lachs, *War Crimes: an attempt to define the issues* (London: Steven & Sons Ltd., 1945), 7.

> that, in cases not included in the Regulations adopted by them, *the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.*[38] (emphasis added)

Article XLVI of the Regulations Respecting the Laws and Customs of War which was annexed to the Fourth Hague Convention of 1907 reads:

> *Family honour*, and *rights*, the *lives of persons* and private property, as well as *religious convictions* and practice *must be respected.*[39] (emphasis added)

The preamble of *Hague IV* 1907 indicates that nations would be in violation of international law if they did not treat inhabitants in a manner consistent with the laws of humanity and dictates of public conscience. In the *Zyklon B. Case*[40] before the British Military Court, Article XLVI was held to be binding under international law. In that case, the accused supplied poison gas which he knew would be used for extermination of allied nationals. The Court held that the Nazis violated Article XLVI of the Hague.

The behaviour of the allies in their application of the Hague Convention on Law Warfare of 1907 in the *Zyklon B. Case* and the judgement of the Nuremberg Tribunal clearly demonstrates a psychological recognition by states that violations of the laws of war as outlined in the Hague Convention constituted violations of international law. This is clearly the case in that the Hague Convention was not a binding treaty by virtue of Article II, "the General Participatory Clause." Contracting powers were bound only if all belligerents were party to the Convention.[41] Not all belligerents in the Second World War signed and ratified the Convention.[42] Nevertheless, the Nuremberg Tribunal noted that by 1939 the laws of war laid down by the Hague Convention were universally recognized as

---

[38] Quoted in Leon Friedman, *Law of War, a documentary history*, 1st ed. (New York: Random House, 1972) vol. 1, 309.

[39] *Id.*, 322.

[40] The *Zyklon B. Case*, Law Reports of the Trials of War Criminals (London: H.M.S.O., 1947-49), vol. 1, 93.

[41] Friedman, *supra* note 38, 310: "The provisions contained in the Regulations referred to in Article I, as well as the present Convention do not apply, except between Contracting Powers, and then only if all belligerents are parties to the Convention."

[42] See A. Roberts & R. Guelff, *Documents of the Law of War* (Oxford: Clarendon Press, (1982) 43, 58ff which contains the following tables:

1907 HAGUE CONVENTION IV AND REGULATIONS
CONCLUDING NOTES

Signatures, Ratifications, Accessions, and Successions			
State (*denotes Reservation: see below)	Date of Signature	Date of Ratification (r) Accession (a), or Succession (s)	
Argentina	18 October 1907		
*Austria-Hungary	18 October 1907	27 November	1909 r
Belgium	18 October 1907	8 August	1910 r
Bolivia	18 October 1907	27 November	1909 4
Brazil	18 October 1907	5 January	1914 r
Bulgaria	18 October 1907		
Byelorussian SSR		4 June	1962 s
Chile	18 October 1907		
China		10 May	1917 a
Columbia	18 October 1907		
Cuba	18 October 1907	22 February	1912 r
Denmark	18 October 1907	27 November	1909 r
Dominican Republic	18 October 1907	16 May	1958 r
Ecuador	18 October 1907		
El Salvador	18 October 1907	27 November	1909 r
Ethiopia		5 August	1935 a
Fiji		2 April	1973 s
Finland		30 December	1918 a
France	18 October 1907	7 October	1910 r
*Germany	18 October 1907	27 November	1909 r
German Democractic Republic		9 February	1959 s
Great Britain	18 October 1907	27 November	1909 r
Greece	18 October 1907		
Guatemala	18 October 1907	15 March	1911 r
Haiti	18 October 1907	2 February	1910 r
Italy	18 October 1907		
*Japan	18 October 1907	13 December	1911 r
Liberia		4 February	1914 a
Luxembourg	18 October 1907	5 September	1912 r
Mexico	18 October 1907	27 November	1909 r
*Montenegro	18 October 1907		
Netherlands	18 October 1907	27 November	1909 r
Nicaragua		16 December	1909 a
Norway	18 October 1907	19 September	1910 r
Panama	18 October 1907	11 September	1911 r
Paraquay	18 October 1907		
Persia	18 October 1907		
Peru	18 October 1907		
Poland		9 May	1925 a
Portugal	18 October 1907	13 April	1911 r
Romania	18 October 1907	1 March	1912 r
*Russia	18 October 1907	27 November	1909 r
Serbia	18 October 1907		
Siam	18 October 1907	12 March	1910 r
South Africa		10 March	1978 s
Sweden	18 October 1907	27 November	1909 r
Switzerland	18 October 1907	12 May	1910 r
*Turkey	18 October 1907		
Uruguay	18 October 1907		
USA	18 October 1907	27 November	1909 r
USSR		7 March	1955 s
Venezuela	18 October 1907		

binding international law.[43] I believe that the signatories to the Hague Convention of 1907 and the subsequent judicial decisions based on the Convention constituted behaviour indicative of the *opinion juris sive necessitatis.*

Crimes against humanity and war crimes took another step towards cyrstallization from moral precept to rule of law when a commission appointed by the Preliminary Peace Conference in January 1919, to investigate crimes committed by the Central Powers, issued its report concerning World War One.[44] The Commission condemned Germany and her allies for breach of "established laws and customs" of warfare regarding civilian populations. The commission also found that "all persons belonging to enemy countries who also have been *guilty of offences against laws and customs of war or the laws of humanity are liable to criminal prosecution.*"[45]

The Commission's list of the violations of "laws of war" and "laws of humanity" included: (1) murder, massacres, systematic terrorism (2) putting hostages to death (3) torture of civilians (5) rape (6) abduction of girls and women for the purpose of enforced labour (7) internment of civilians in

---

TOTAL NUMBER OF PARTIES LISTED: 37

BELLIGERENTS IN WWII

The Allies

Argentina	France	Persia
Australia	Greece	Poland
Belgium	Guatemala	San Marino
Bolivia	Haiti	Saudia Arabia
Brazil	Honduras	Turkey
Canada	India	Union of South Africa
China	Iraq	Union of Soviet Socialist Republics
Columbia	Liberia	United Kingdom of Great Britain and Northern Ireland
Costa Rica	Luxembourg	United States
Cuba	Mexico	Uruguay
Czechoslovakia	Netherlands, The	Yugoslavia
Dominican Republic	New Zealand	
Egypt	Nicaragua	
El Salvador	Norway	
Ethiopia	Panama	

THE AXIS

Bulgaria**	Germany	Italy*	Rumania*
Finland	Hungary***	Japan	

*Until 1943. **Until 1944 ***Until 1945

[43] Secretary of State for Foreign Affairs, *Judgement of the International Military Tribunal for the Trial of the German Major War Criminals* (London: H.M.S.O., 1946), Cmd. 6964, 65; G.O.W. Mueller & E.M. Wise ed., *International Criminal Law* (South Hackensack, New Jersey: Rothman, 1965), fn 87. George Schwarzenberger, *International Law,* Vol. II, (London: Stevens and Sons, 1968), 20.

[44] Brand, *supra* note 32, 110.

[45] *Id.*

inhumane conditions and (8) forced labour of civilians in connection with the operation of the enemy.[46] There are alleged Nazis resident in Canada who are accused of being members of the mobile killing units which killed more than 1,400,000 Jewish civilians in World War Two.[47] This would surely fall under the first classification. The torture of civilians and their deliberate starvation occurred in various ghettos throughout Eastern Europe. The Nazis first concentrated Jews in the ghetto and then terrorized and starved them as the preparatory stage prior to shipment to the death camps.[48] The Nazis's concentration of Jews in ghettos would fall under categories (3), (4) and (7). Jews from all over Europe were abducted and transported to labour camps and death camps. Auschwitz was not just a death camp, but a labour camp which forced civilians to work in connection with the operation of Nazi Germany.[49] These acts fall within categories (6), (7), and (8). Fourteen years before Adolf Hitler ruled Germany, the action of Nazis against segments of the civilian populace of Europe were recognized as outside the legal boundaries of warfare and constituted "offences against laws and customs of war or laws of humanity" and were therefore "liable to criminal prosecution."

On October 25, 1941, President Roosevelt made a statement concerning reports the allies had received about Nazi activities against civilians. These acts of barbarity ". . . only sow the seeds of hatred which will one day bring fearful retribution." Prime Minister Winston Churchill also commented, "*Retribution* for these crimes must henceforward take its place among the major purposes of the war."[50] The Soviet Union circulated two diplomatic notes on November 17, 1941 and January 2, 1942 concerning German actions against Soviet prisoners of war and the activities of the mobile killing units. They announced their efforts to keep a detailed register of Nazi war crimes.[51]

---

[46] Lachs, *supra* note 37, 22.
[47] Hilberg, *supra* note 21, 256.
[48] *Id.*, 144.
[49] *Id.*, 574. Hilberg gives the following chart:

CAMP	Gassing Devices	Industrial Activity	Non-Jewish Inmates
Kulmhof	X		
Belzec	X		
Subibor	X	X	
Treblinka	X	X	
Lublin	X	X	X
Auschwitz	X	X	X

[50] Lachs, *supra* note 37, 94.
[51] *Id.*

On January 13, 1942, the nine governments[52] whose countries were at that time occupied by Germany issued the *St. James Declaration*. They condemned Germany's institution of "terror characterized in particular by imprisonments, mass expulsions, the executions of hostages and massacres." The declaration cited the Nazi actions against civilians as violations of international law, since international law, and in particular the convention signed at the Hague in 1907 regarding the laws and customs of warfare, *did not permit* belligerents in occupied territory to perpetrate acts of violence against civilians. The declaration affirmed that Nazi "acts of violence . . . against civilian populations are at variance with accepted ideas concerning acts of war . . . as these are understood by civilized nations." The governments of the nine occupied countries noted Roosevelt's and Churchill's statements on October 25, 1941 and made punishment of Nazi war criminals, through the channel of organized justice, a principal war aim.[53]

As the *St. James Declaration* indicates, the general consensus of the nations not allied with the Axis powers in World War Two was that Nazi Germany's treatment of civilians in wartime was wrong. This wrong constituted a crime under international law and merited punishment following the war. The three major allied powers responded to the *St. James Declaration* and further communicated their consensus that Nazi war criminals were criminally liable for what constituted violations of international law.

On August 21, 1942, President Roosevelt made a public statement in response to the *St. James Declaration:*

> The United Nations (powers allied against the Axis powers) are going to win this war. When victory has been achieved it is the purpose of the Government of the United States, as I know it for the purpose of the United Nations, to make appropriate use of the information and evidence in respect to these barbaric crimes of the murders in Europe and Asia. It seems only fair that they shall have to stand in courts of law in the very countries which they are oppressing and answer for their acts.[54]

Churchill responded in kind on September 8, 1942, and noted "that those guilty of the Nazi crimes will have to stand before tribunals." That the United Kingdom held customary rules of warfare as legally binding on the Nazis is evident from Churchill's comments on September 8, 1942, "So perish all who do the like again."[55]

---

[52] Belgium, Czechoslovakia, Free France, Greece, Yugoslavia, Luxembourg, The Netherlands, Norway and Poland were signatories to the declaration with observers from the United Kingdom, Canada, Australia, South Africa, India, United States of America, the Soviet Union and China.

[53] The full text of the St. James Declaration of January, 1942 is quoted in Lachs, *supra* note 37, 94-95. See Appendix 1.

[54] Lachs, *supra* note 37, 96.

[55] *Id.*, 97.

The various declarations, public statements and speeches, while perhaps not authoritative pronouncements of law, were not merely political rhetoric, but were indicative of a feeling of states that crimes had been committed and there was a need for their punishment. The difference between these pronouncements and the "kill the Kaiser" declarations following World War One was the political action that followed. On October 7, 1942, Lord Chancellor Simon submitted to the House of Lords the proposal for the formation of the United Nations War Crimes Commission. It was eventually formed by seventeen nations. The sole purpose of the commission was to gather and collate information on Nazi war crimes and crimes against humanity. This Act and the ensuing prosecution of War Criminals demonstrated the psychological acceptance of states of the limiting boundaries of warfare.

This Commission's classification of offences bear similarity to the classifications of crimes under international law made by the commission appointed at the preliminary peace conference following World War One in 1919.[56] The United Nations Commission investigated the atrocities against civilians, the inhumane treatment of civilians in concentration camps, and the killing of noncombatant people in captured territory. Each of these acts was previously recognized as crimes under international law.

On December 17, 1942, the representatives of the nine countries occupied by Nazi Germany, the United States of America, the United Kingdom of Great Britain and Northern Ireland (which included Canada) and the Soviet Union, issued a declaration detailing what they knew of the attempted extermination of European Jewry. The text read:

> "They condemn in the strongest possible terms the bestial policy of cold blooded extermination . . . They *reaffirm* their solemn resolution to ensure that those responsible for these crimes shall *not escape retribution,* and to press on with the necessary practical measures to this end."[57] (emphasis added)

One year after the *St. James Declaration*, the thirty-two Allied powers against the Axis alliance issued the *Moscow Declaration* of 1943. The *Moscow Declaration* emphasized three major points:

> (1) At the granting of any Armistice, those who have been responsible or have taken a consenting part in atrocities, massacres, executions . . . will be sent back to the countries (where they acted against civilians) and be punished according to the laws of these countries.

---

[56] See Friedman, *supra* note 38, 778; R.H. Jackson, "Nuremberg in Retrospect" (1949), 27 *Can. Bar. Rev.* 761, 764; Brand, *supra* note 32.

[57] Lach, *supra* note 37, 97-98.

(2) This is a warning not to continue to participate in these 'atrocities' 'for most assured the Allied Powers will pursue them to the uttermost ends of the earth.'
(3) Crimes without specific geographical location will be punished by a joint decision of the Government of the Allies.[58]

From the fifteenth century until the end of World War Two, the international law, relating to war crimes and crimes against humanity, was not codified. Finally, customary international law was set down in writing in the London Agreement of August 8, 1945[59] and in the Nuremberg Charter annexed to the London agreement which provided for the jurisdiction and general principles under which Nazi War Criminals were to be tried.[60]

---

[58] See Friedman, *supra* note 38, 778, for full text of the Moscow Declaration of 1943.

[59] Text of the London Charter of August 8, 1945 quoted from International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal* (Nuremberg, International Military Tribunal, 1947), 8-9.

[60] *Id.*, 10-11. See Appendix IV.

Charter of the International Military Tribunal

II. *Jurisdiction and General Principles*

Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) *Crimes Against Peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing;
(b) *War Crimes*: namely, violations of the laws or customs of war. Such violations shall include but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or cities, or devastation not justified by military necessity;
(c) *Crimes Against Humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war*, or any persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

*comma substituted in place of semicolon by Protocol of 6 October, 1945.

Under the Nuremberg Charter war crimes were defined as:

> "violations of the laws or customs where such violations shall include, but not be limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory . . . or devastation not justified by military necessity."[61]

Crimes against humanity covered much of the same ground as war crimes but added, "before or during the war"[62] so that the Tribunal could mete out penal sanctions for Nazi Germany's actions against its own nationals prior to the war. The London Agreement expressed the opinion of twenty-six states[63] that Nazi actions had violated international law for which those responsible were legally accountable.

Universal Affirmation of Nuremberg Principles

The decisions of the Nuremburg Tribunal firmly established that Nazi war crimes and crimes against humanity between 1933-45 violated international law. The universal affirmation of the Tribunal's decision came in the form of a United Nations General Assembly Resolution 95(I).[64]

In recognition of its obligation for the "codification" of "international law" the General Assembly took note of the London Agreement of August 1945 and the Charter annexed to it which set up a tribunal "for the prosecution and punishment" of "war criminals." The resolution which was unanimously adopted, "affirm[ed] the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal" which convicted Nazis of war crimes and crimes against humanity. Justice Robert M. Jackson, Associate Justice Supreme Court of the United States and the American Judicial representative at Nuremberg, confirmed that the Tribunal not only based its judgment on the London Agreement of 1945 and the Nuremberg Charter, but also based its judgment on grounds of "antecedent" international law.[65] As such, the General Assembly resolution affirming the Tribunal's judgment thereby affirmed that Nazi war crimes and crimes against humanity were violations of international law at the time of their commission.

This resolution was in fulfillment of the General Assembly obligation under the U.N. Charter, Article 13 paragraph 1(a), to codify international law. The resolution's text uses words

---

[61] *Id.*
[62] *Id.*
[63] See Brand, *supra* note 32, 111.
[64] For text of resolution see G.A. Res. 95, 1 GAOR, U.N. Doc A/64/Add.1, 188 (1946); also quoted in Friedman, *supra* note 38, vol. II, 1027-1028. See Appendix II.
[65] Jackson, *supra* note 56.

and phrases such as "codification, affirms the principles of international law, ..." The use of these words show that the General Assembly considered itself competent to make such a pronouncement of international law. The General Assembly resolution 95(1) created a legal assumption that does not allow proof to the contrary when challenged. Just as customary international law binds all states whether or not they have participated or opposed its development, so does *this* General Assembly resolution 95(I) which is an authentic declaration and codification of customary international legal principles.[66] Canada's challenge to the affirmation by the United Nations in Resolution 95(I), that Nazi actions against civilians constituted crimes under international law, seems all the more strange since as a member of the United Nations, Canada made up part of the unanimous group of states which adopted the resolution.

International Custom — General Practice of States

For war crimes and crimes against humanity to be considered binding customary international law, there must be evidence of a general practice of states showing recognition of war crimes and crimes against humanity as violations of international law. States' prosecutions of people for certain acts would be evidence of their belief that these acts were illegal.

The United States of America, Great Britain, and the Soviet Union on behalf of Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay established the Nuremberg Military Tribunal which prosecuted those guilty of war crimes and crimes against humanity.[67] Before the International Military Tribunal for the Far East, eleven countries including Canada indicted 28 accused for war crimes and crimes against humanity.[68]

The states of Israel, France, West Germany, and the Netherlands have all passed domestic statutes based on the international law classification of Nazi offences and have prosecuted war criminals.[69] The Soviet Union and fellow

---

[66] P.C. Jessup, *A Modern Law of Nations, an Introduction* (New York: Macmillan, 1959), 46; J. Castenada, *Legal Effects of United Nations Resolutions* (New York & London: Columbia University Press, 1969), 1.

[67] *Supra*, notes 57 and 58 and accompanying text.

[68] One example of a war crimes case before the International Military Tribunal held in the Far East was the *Tokyo War Crimes Trial*, November 1948. The decision is reported in Friedman, *supra* note 38, Vol. II, 1029.

[69] See the *Eichman Trial*, 36 International Reports 5 (1968); "Rauca Case Spotlights Policy on War Criminals", *National,* December 1982, 11; "Extradition Request must be refused", *The Windsor Star*, Tuesday, March 1, 1983, A8; "Widow's pleas for Barbie: Shoot him or hang him", *The Globe and Mail*, February 7, 1983, 1.

member states in the eastern bloc have also prosecuted Nazi war criminals for violations of their domestic law and for commission of war crimes and crimes against humanity.[70]

While Canada refuses to pass legislation to prosecute Nazi war criminals for violations of international law concerning civilians during the Second World War, in August 31, 1946 it did pass the *War Crimes Act*. The *War Crimes Act* re-enacts regulations made by the Governor in Council on August 30, 1945 and deals with "violations of the laws and usages of war committed during any war which Canada has been or may be engaged in after the 9th day of September, 1939."[71]

Though the *War Crimes Act*'s definition of war crimes is not as specific as the Nuremburg Charter's, the Act still constitutes evidence of Canada's acceptance that Nazi acts could be prosecuted as war crimes. Canada's acceptance of the lawfulness of postwar trials of war crimes and crimes against humanity can also be gleaned from the pattern of treaties Canada signed in 1947 in Paris with Italy, Romania, Hungary and Finland. Canada required these states to "take all necessary steps" to try persons accused of having committed or abetted war crimes against peace or humanity.[72] In its treaty signed with Japan in 1951, Canada also recognized the lawfulness of war crime trials for acts committed during World War Two.[73]

Canadian practice regarding the legitimacy of war crime trials after the war for acts done in World War Two is further evidenced by its supplying judges and prosecutors for the trial of war crimes in both the International and American British military tribunals for the Far East.[74]

Ex Post Facto Principle and Customary International Law

Critics of the Nuremberg trials raised the *ex post facto* argument as does Canada in its defence of its decision not to pass legislation allowing for the trial of war criminals in Canada. The Nuremberg critics felt that Nazi actions against

---

[70] See "Are We a Haven for Criminals", *The Windsor Star*, February 12, 1983, A2.

[71] *The War Crimes Act,* S.C. 1946, c. 73. For a complete analysis of the *War Crimes Act* and its relevance regarding prosecution of Nazi War Criminals in Canada, see Intervenant's statement of the Canadian Jewish Congress in *Her Majesty the Queen and the Federal Republic of Germany and Albert Helmut Rauca and Canadian Jewish Congress,* S.C.O. (Court of Appeal), Court File 966/82.

[72] *Treaty of Peace with Italy*, 1947 Canada Treaty Series, No. 4, art. 45(1). *Treaty of Peace with Roumania,* 1947 Canada Treaty Series, No. 6 art. 6(1). *Treaty of Peace with Finland*, 1947 Canada Treaty Series, No. 7, art. 9(1). *Treaties of Peace with (Italy, Roumania, Hungary and Finland) Act 1948*, S.C. 1948, c. 71.

[73] *Treaty of Peace with Japan*, 1952 Canada Treaty Series No. 4, art. 11.

[74] *The Treaty of Peace (Japan) Act*, 1952, c. 50. See also *supra* note 71.

civilians were not crimes under international law at the time of their commission and, as such, the trials offended the *ex post facto* principle.[75]

The prohibition against retrospective penal legislation cannot be applied to customary international law. Like the early English common law, international law has no legislature to pass statutes defining acts as criminal. The early common law courts, when confronted with a novel situation, did not absolve the accused of his culpability. The courts held him accountable since they assumed his act was always criminal in the common law and it only had to be found, clarified, and declared as such in the Court's decisions. One example was murder. Murder and its punishment was not defined by any statute in England, but its recognition as a crime is a product of the common law. Just as the first person punished for murder by the common law courts could not claim it was *ex post facto* law, so the war criminal charged with war crimes or crimes against humanity cannot claim exemption by the *ex post facto* principle. To apply the *ex post facto* principle to the common law or to customary international common law would have strangled it at birth. The courts could have never declared acts to have violated the law since no other court had yet established that law.[76]

Judicial decisions of international military tribunals in the fifteenth century, the Hague IV Convention of 1907, military and political intervention to save civilians and condemn the abuses of human rights were all used as antecedents in the common law method to define Nazi actions against civilians as war crimes and crimes against humanity.

Justice Robert M. Jackson commented on the common law authorship of the Tribunal's decisions and rejected the *ex post facto* argument. While Jackson did not deny that the Tribunal's authority was based on the London Agreement of August 8, 1945, he stated that the Tribunal's decisions "did not rest upon it, but explored its antecedents in the common law method, and rested in part, upon common law justifications as well as upon the Charter."[77]

Various Legal Opinions Across Canada

The Canadian Bar Association

On September 3, 1981, the Canadian Bar Association unanimously passed a resolution calling on Parliament to pass

---

[75] For arguments concerning why the Nuremburg Tribunal's decisions were not *ex post facto,* see Brand, *supra* note 32, 115; Jackson, *supra* note 56, 763 which is the text of Jackson's address to the 31st Annual Meeting of Canadian Bar Association on September 1, 1949.

[76] See Brand, *supra* note 32, 116; Jackson, *supra* note 56, 765 for an analysis of similarities between English common law and international customary law.

[77] Jackson, *supra* note 56, 765.

legislation "to allow for trials of those accused of war crimes and crimes against humanity." The resolution was based on an analysis of the "International Covenant on Civil and Political Rights" and the Charter of Rights and Freedoms in the Canadian Constitution Act.[78]

Ontario High Court and Court of Appeal

In the recent *Helmut Rauca*[79] case, the defence presented the possibility of the passage of retroactive legislation to prosecute alleged Nazi war criminals in Canada as a reason for not allowing Rauca's extradition. The accused claims that with the possibility of such a "domestic option" it would not be "reasonable" within the meaning of the new Canadian Charter of Rights and Freedoms to extradite. The Honourable Gregory Evans, Chief Justice of the Supreme Court of Ontario, noted, "Retrospective legislation is rightfully viewed with suspicion and when it invades the field of criminal law, it is especially repugnant. I do not consider these to be viable alternatives."[80]

The concern of Evans C.J.H.C. over retrospective legislation did not deter him from enforcing the 1977 Treaty of Extradition between Canada and the Federal Republic of Germany[81] and *The Extradition Act*, S.C. 1877 c.25 s.7, even though they applied to crimes committed before its coming into force. Perhaps Evans, C.J.H.C.'s, comment regarding possible future war crimes legislation was an expression of distaste for retroactive legislation in general but not a comment on its legality or appropriateness in this context.

On appeal, the Ontario Court of Appeal considered the same argument on behalf of Rauca. The Court noted:

> We can only repeat that we are not persuaded that *at present* there is such an alternative to extradition as to make extradition an unreasonable limit not demonstrably justifiable in a free and democratic society.[82] (emphasis added)

The significance of these comments is that by the Court of Appeal saying that "at present" there is no such alternative, it implies that legislation could be passed at some future date and such legislation would be constitutionally valid. This interpretation of the Court of Appeal's remarks is reinforced because their comments refer back to the previous paragraphs which discuss the possibility of the enactment of future retroactive criminal legislation. The Court of Appeal does not comment on Justice Evans' remarks which might be construed as not allowing for retroactive criminal legislation.

---

[78] *Resolution of the 63rd annual meeting of the Canadian Bar Association*, National, September 1981, 22. See Appendix III.

[79] *Federal Republic of Germany* v. *Rauca* (1983), 38 O.R. (2d) 705 (H.C.J.).

[80] *Id.*, 717.

[81] Can. Gaz. PT. I 3rd November, 1979, 6777-87 in force September 30, 1979.

[82] *Supra* note 4, 246.

Ken Narvey was a member of the Canadian Jewish Congress' legal team that was granted intervenants status by the Court of Appeal in the Rauca trial. He speculates[83] that Evans C.J.H.C. may have rejected the idea of retroactive legislation bringing war criminals to trial in Canada because the High Court did not have the background materials[84] detailing the history of how Parliament specifically amended s.11 (g) of the Charter to allow for the constitutional validity of such legislation. In contrast, the Court of Appeal did receive the background material on s.11 (g) of the Charter in the material filed by the Canadian Jewish Congress in support of its application to intervene. Unlike Evans C.J.H.C. of the High Court, the Ontario Court of Appeal did not reject the possibility of Parliament passing retroactive criminal legislation to cover the situation of Nazi war criminals resident in Canada.[85]

Narvey notes that Evans C.J.H.C. may have based in part his decision not to consider s.11 (g)'s effect on retroactive criminal legislation on the basis of the crown counsel's submissions in the *Rauca case* that Canadian jurisdiction is basically intraterritorial and therefore provisions under s.11 of the Charter apply only to crimes committed in Canada.[86] Clearly, the crown counsel was mistaken. As Mr. Narvey correctly points out:

> Canada's full power to legislate extraterritorially is part of the Constitution Statute of Westminister, 1931 (22 Geo.5) c.4 (also R.S.C. 1970 App.II, No.26), s.3 and Constitution Act, 1982, s.52, and Sched., item 17. Whenever it (Canada) does so (e.g., in providing in s.6(2) of the Criminal Code, R.S.C. 1970, c.34, for the trial in Canada of offences committed abroad by Canadian public servants), clearly all Charter guarantees apply.[87]

Opposition to Retroactive War Crimes Legislation

In his article *A Question of Emphasis: The States' Burden in Federal Republic of Germany v Rauca*[88] Neil Finklestein offers the view that retrospective legislation for trial of war criminals residing in Canada contemplated by s.11 (g) of the Charter is prohibited by s. 7 of the Charter. Finkelstein maintains that such legislation would infringe upon the principle of fundamental justice in s.7.

To answer this argument one must draw a fundamental

---

[83] Narvey, *supra* note 5, 133.

[84] See *supra* note 18.

[85] See *Rauca supra* note 4. Also note that credence is lent to Narvey's claim that the background materials were used in that the Court of Appeal specifically comments, *supra* note 4, 244-45, on the proceedings of the Joint Committee on the Constitution of Canada with reference to s.6 of the Charter.

[86] Narvey, *supra* note 5, 134.

[87] *Id.*

[88] (1983), 30 C.R. (3d) 112, 120.

distinction. While punishment for an act that was not criminal at the time of commission would violate the principles of fundamental justice, punishment for violations of international law such as war crimes would not violate the principles of fundamental justice. For example, in his January 31 report from Vienna,[89] Simon Wiesenthal alleged certain specific instances of people who collaborated with the Nazis and who are still living in Canada. These Nazi-sponsored activities described by Wiesenthal violated the customary international laws of war. These actions were crimes at the time they were committed. New legislation allowing for prosecution of alleged Nazi war criminals would be retrospective only in so far as there was no procedure prior to the passing of such legislation to bring Nazi war criminals to trial in Canada. Such legislation would not retroactively classify innocent acts as criminal acts.

Recognition that the principles of fundamental justice would not be violated by the punishment of those who committed crimes under international law and that such actions are outside the objection against retrospective legislation can be found in:

(1) the *Universal Declaration of Human Rights of 1948* (article 11 (2));
(2) the *European Convention of Human Rights of 1950* (article 7);
(3) the *International Covenant of Civil and Political Rights of 1966* (article 15); and
(4) the *Canadian Charter of Rights and Freedoms* (s.11 (g)).

I believe that the principles of fundamental justice would not be violated by retrospective legislation providing for the trial of war cimes. Rather, Nazi actions were contrary to the international laws of war and the prosecution of war criminals for these acts would add bricks and mortar to the edifice of the principles of justice.

Conclusion

The last cabinet headed by Prime Minister Pierre Elliot Trudeau was adamantly opposed to retroactive criminal legislation which would bring Nazi war criminals to trial in Canada. In order for the Liberal government to maintain that war crimes legislation violates the rule against retrospective legislation, Canada's position must be that the Nazis' killing of unarmed non-combatant Jewish civilians in occupied enemy territory was not a crime under international law nor was it criminal according to the general principles of law recognized by the community of nations at the time of commission. This argument would then conclude that since there was no legal prohibition against the killing of Jewish civilians, Nazis who participated in the killing cannot be punished for what did not

[89] Bulletin of Information, No. 24, Vienna, January 31, 1984.

amount to a violation of law. I believe that the Government's position on this issue is incorrect in law and is a position that cannot be defended.

Nazi acts of murder, enslavement and torture of civilians in occupied enemy territories were contrary to the international laws of war in 1939. This was established by antecedent international common law, post war Nuremberg and Tokyo War Crime Trials and affirmed by the unanimous United Nations General Assembly Resolution 95(1). Therefore War Crimes legislation would be retrospective only with respect to procedure. Such legislation would be a previously unavailable mode to prosecute those whose acts were recognized as criminal at the time of commission. Alleged Nazi war criminals could not use the defence that their killing of unarmed non-combatant civilians was legal at the time of commission.

Those distressed with the failure to act on the question of war crimes are now more ill at ease than ever in that the age of the average Nazi war criminal does not allow for much more time to influence politicians to bring Nazi War Criminals to trial in Canada. While this may have all the ingredients of a potential powder keg, no party leadership has stated that it would change the status quo. As such the prospect of having war crimes trials in Canada seems to have been circumvented by letting the problem of Nazi war criminals in Canada just die away.[90]

APPENDIX I

ST. JAMES DECLARATION, JANUARY 1942

Whereas Germany, since the beginning of the present conflict which arose out of her policy of agression, has instituted in the occupied territories a terror characterized in particular by imprisonments, mass expulsions, the executions of hostages and massacres,

And whereas these acts of violence are being similarly perpetuated by the Allies and Associates of the Reich and, in certain countries, by the accomplices of the occupying Power,

And whereas international solidarity is necessary in order to avoid the repression of these acts of violence simply by acts of vengeance on the part of the general public, and in order to satisfy the sense of justice of the civilized world,

Recalling that international law, and in particular the Convention signed at the Hague in 1907 regarding the laws and

[90] A case in point is a 1948 immigrant to Canada, Harald Pontulis, who was convicted *in absentia* in Latvia of complicity in the murder of 5,128 Jews and 311 gypsies. Documents and witnesses linked Pontilus to the murders in Latvia. The judgment of the Latvia Court describes how Pontilus finished off dying Jews with his pistol. On July 4, 1982 Harald Pontilus died quietly in his home in Willowdale, Ontario. See Ansell & Appleby, *supra* note 2.

customs of land warfare, do not permit belligerents in occupied territories to perpetrate acts of violence against civilians, to bring into disrepute the laws in force, or to overthrow national institutions,

The undersigned representatives of: the Government of Belgium, the Government of Czechoslovakia, the Free French National Committee, the Government of Greece, the Government of Luxembourg, the Government of the Netherlands, the Government of Norway, the Government of Poland and the Government of Yugoslavia

(1) do affirm that acts of violence thus perpetrated against civilian populations are at variance with accepted ideas concerning acts of war and political offences, as these are understood by civilized nations,
(2) take note of the declaration made in this respect on 25th October, 1941, by the President of the United States of America and by the British Prime Minister,
(3) place amongst their principle war aims the punishment, through the channel of organized justice, of those guilty and responsible for these crimes, whether they have ordered them or in any way participated in them,
(4) determine in a spirit of international solidarity to see to it that (a) those guilty and responsible, whatever their nationality, are sought for, handed over to justice and judged,
(5) that the sentences pronounced are carried out.

In faith whereof the signatories duly authorised have signed the present Declaration.

LONDON, January 13, 1942.

APPENDIX II

RESOLUTION 95(1) OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS

The General Assembly,

Recognizes the obligation laid upon it by Article 13, paragraph 1, subparagraph (a) of the (U.N) Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification; and

Take note of an Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter [of Nuremberg] annexed thereto, and of the fact that similar principals have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed in Tokyo on 19 January 1946;

Therefore

Affirms the principles of international law recognized by the

Charter of the Nuremberg Tribunal and the judgment of the Tribunal;

Directs the Committee on codification of international law established by the resolution of the General Assembly on 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against peace and security of mankind, or of an International criminal code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.

Unanimously adopted.

APPENDIX III

RESOLUTION OF THE 63rd ANNUAL GENERAL MEETING OF THE CANADIAN BAR ASSOCIATION

WHEREAS the Canadian Bar Association Constitutional and International Law Section passed a resolution at its annual meeting in 1980 stating "A number of persons now resident in Canada have been accused of having committed war crimes and crimes against humanity while in the service of the Nazis in Europe during the Second World War,";

WHEREAS the section resolved that it "study any legal impediments which may exist to the bringing to justice of Nazi war criminals who may be found in Canada, with a view to proposing to governments appropriate means of removing any such impediments,";

WHEREAS the War Crimes Act and regulations provide for prosecution of war crimes, but not of crimes against humanity;

WHEREAS the War Crimes Act and regulations provide for military, and not civilian trial;

WHEREAS the War Crimes Act and regulation may be limited to prosecution of crimes committed against Canadian military personnel;

WHEREAS the International Covenant on Civil and Political Rights provides that the covenant shall not "prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations,";

WHEREAS the Charter of Rights in the proposed Constitution of Canada provides that a person may be found guilty of an offence that "constituted an offence under Canadian or International Law or was criminal according to the general principles of law recognized by the community of nations,";

WHEREAS war crimes and crimes against humanity were crimes at International Law and were criminal according to the general principles of law recognized by the community of nations, both before and during World War II;

WHEREAS the War Crimes Act of Canada is limited to violations of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the ninth day of September 1939;

WHEREAS the section believes that Canada should assume jurisdiction over war crimes and crimes against humanity, generally, whether the crimes were committed during a war in which Canada was engaged or not.

BE IT RESOLVED THAT legislation be passed:

a) to allow for civilian trials of those accused of war crimes and crimes against humanity;

b) to allow for prosecution for war crimes and crimes against humanity whether or not committed during any war in which Canada has been or may be engaged;

c) to make clear that Canadian legislation applies to war crimes and crimes against humanity committed against civilians, provided the accused is found in Canada.

APPENDIX IV

LONDON AGREEMENT OF 8 AUGUST 1945

Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis.

WHEREAS the United Nations have from time to time made declarations of their intention that war criminals shall be brought to justice;

AND WHEREAS the Moscow Declaration of 30 October 1943 on German atrocities in Occupied Europe stated that those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free Governments that will be created therin;

AND WHEREAS this Declaration was stated to be without prejudice to the case of major criminals whose offenses have no particular geographic location and who will be punished by the joint decision of the Governments of the Allies;

NOW THEREFORE the Government of the United States of America, the Provisional Government of the French Republic, the Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics (hereinafter called "the Signatories") acting in the interests of all the United Nations and by their representatives duly authorized thereto have concluded this Agreement.

Article 1. There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular goegraphical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.

Article 2. The constitution, jurisdiction, and functions of the International Military Tribunal shall be those set out in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement.

Article 3. Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavours to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories.

Article 4. Nothing in this agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.

Article 5. Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence.

Article 6. Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals.

Article 7. This Agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any signatory to give, through the diplomatic channel, one month's notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance of this Agreement.

IN WITNESS WHEREOF the Undersigned have signed the present Agreement.

DONE in quadruplicate in London this 8th day of August 1945 each in English, French, and Russian, and each text to have equal authenticity.

For the Government of the United States of America

/s/ ROBERT H. JACKSON

For the Provisional Government of the French Republic

/s/ ROBERT FALCO

For the Government of the United Kingdom of Great Britain and Northern Ireland

/s/ JOWITT

For the Government of the Union of Soviet Socialist Republics

/s/ I. NIKITCHENKO
/s/ A. TRAININ