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THE PURSUIT OF NAZI WAR CRIMINALS IN THE UNITED STATES AND IN OTHER ANGLO-AMERICAN LEGAL SYSTEMS

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Following the termination of World War II, a number of suspected Nazi war criminals concealed their backgrounds in order to immigrate to the United States and to other Western democracies. These countries have adopted various responses to the presence of these former enemy combatants.¹

The investigation into Kurt Waldheim typifies the various considerations involved in determining the appropriate disposition of former members of the Nazi forces. In 1987, the Office of Special Investigations (OSI) of the United States Department of Justice determined that President Kurt Waldheim of Austria, the former Secretary General of the United Nations, had assisted or participated in Nazi-sponsored persecutions and was ineligible to enter the United States.² The OSI report documented Waldheim's involve-

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1. See *International Human Rights Conference* (McGill Univ., Montreal, Quebec, 1987), in NUREMBERG FORTY YEARS LATER: THE STRUGGLE AGAINST INJUSTICE IN OUR TIME: INTERNATIONAL HUMAN RIGHTS CONFERENCE, NOVEMBER 1987: PAPERS AND PROCEEDINGS AND RETROSPECTIVE 1993 (Irwin Cotler ed., 1995).

2. See OFFICE OF SPECIAL INVESTIGATIONS, IN THE MATTER OF KURT WALDHEIM 3 (1987). Individuals who are ineligible to enter the United States are placed on the "Watchlist." *Id.* at 5. The so-called Holtzman Amendment renders ineligible to enter the United States any alien who: during the period beginning March 23, 1933, and ending on May 1945, under the direction of, or in association with-

(A) the Nazi government of Germany,

(B) any government in any area occupied by the military forces of the Nazi gov-

ment in transferring civilian prisoners to the Security Police (SS) for slave labor and in deporting civilians and Jews to concentration and death camps. Waldheim also was shown to have been involved in disseminating anti-semitic propaganda, mistreating and executing Allied prisoners, and killing civilians.³

Waldheim served a short stint in the Austrian reserves prior to undertaking the study of law and diplomacy. His studies were interrupted when he was called to active duty following Germany's annexation of Austria in 1938.⁴ Waldheim already had served in two significant military campaigns and had been decorated and promoted to First Lieutenant by the time that he was assigned to the Balkans in 1942.⁵

Germany directed Croatia's merciless campaign of terror against the partisans (Chetniks) and the Serbian civilian population. Waldheim likely was involved in transferring prisoners to the SS or to the Croatian authorities for slave labor,⁶ internment,⁷ and extermination.⁸ Certainly, he also was aware of, and doubtlessly played a prominent role in, the deportation of Jews from his base of operations in Banja Luka. In addition, Waldheim participated in a brutal and lawless operation against the Serbian population in the Kozara mountain region⁹ which resulted in his being awarded a Croatian medal for courageous and valorous conduct.¹⁰ The OSI concluded that the deportation and murder of Serbs, Jews, and suspected political dissidents was the animating objective of Waldheim's combat unit. Its report observed that contending that Kozara and the unit's other operations possessed a purely military objective "is to deny the undeniable and to attempt to rewrite history."¹¹

Waldheim's most notorious and well-documented acts of persecution occurred during his service as a staff and intelligence officer in Greece between 1943 and 1945. He initially was assigned to the Operations Branch of

ernment of Germany,

(C) any government established with the assistance or cooperation of the Nazi government of Germany, or

(D) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

Immigration and Nationality Act (Holtzman Amendment) 8 U.S.C. § 1182(a)(3)(E) (1997), cited and quoted in OFFICE OF SPECIAL INVESTIGATIONS, *supra* note 2, at 4.

3. OFFICE OF SPECIAL INVESTIGATIONS, *supra* note 2, at 3.

4. *See id.* at 21.

5. *See id.* at 28.

6. *See id.* at 43, 61.

7. *See id.* at 60.

8. *See id.* at 59.

9. *See id.* at 54. Waldheim also participated as an interpreter and liaison to Italian troops during a bloody operation in Montenegro and eastern Herzegovina. During this campaign, he attended high-level strategy meetings. *See id.* at 90, 94-95.

10. *See id.* at 74.

11. *Id.* at 78.

the Task Force Southern Greece where he was involved in transmitting reprisal and deportation orders and in monitoring the deportation of Italian soldiers to Germany for slave labor.¹² Waldheim then was shifted to the intelligence branch of Army Group E in Arsakli.¹³ This led to his participation in the deportation of Jews from Corfu¹⁴ and Rhodes¹⁵ and in his involvement in the distribution of anti-semitic propaganda that was designed to incite German troops to countenance and to commit war crimes.¹⁶ Waldheim was the senior official in charge of interrogations and, in at least two instances, turned prisoners of war over to the SS (Security Service, the Nazi Party Police and Military) for execution. He also monitored German reprisals against civilians and may have been personally involved in directing these illegal acts of retaliation.¹⁷

In 1944, Waldheim was assigned to organize and implement reprisals in Yugoslavia.¹⁸ In 1948, the Yugoslav State Committee on Ascertaining the Crimes of the Occupiers and their Collaborators petitioned the United Nations War Crimes Commission to register Waldheim as a war criminal. The Committee endorsed this request and listed Waldheim under the "A" category. This category encompassed those whom the Committee "believes . . . to have committed or been responsible for the commission of war crimes, and is satisfied that there is, or will be at the time of trial, sufficient evidence to justify their prosecution."¹⁹ The OSI report concluded that Waldheim's assistance in military reprisals against Yugoslav citizens and internees, and his participation in the transfer of British and Greek prisoners to the SS for execution, constituted a "possible war crime" as well as "an act of persecution."²⁰ In addition, his involvements in reprisals against Serbians and in the deportation of Jews were considered to be clear cases of racial and religious persecution.²¹

The United States, in 1987,²² determined that Waldheim was an excludable alien and placed him on the "Watchlist."²³ Waldheim, who recently had been elected President of Austria, requested the Austrian Federal Government appoint an independent, international commission of military historians

12. *See id.* at 102-04.

13. *See id.* at 109, 112.

14. *See id.* at 126-27.

15. *See id.* at 130-31.

16. *See id.* at 138.

17. *See id.* at 164-67.

18. *See id.* at 168, 170.

19. *Id.* at 178. There was some testimony that Waldheim may have been involved in the execution and deportation of prisoners in Yugoslavia as well as Greece. *Id.*

20. *Id.* at 202.

21. *See id.* at 201-02.

22. The decision to place Waldheim on the Watchlist resulted from the OSI investigation. *See id.* at 5-6, 19-20, 204.

23. Bruce J. Einhorn, *The Implementation of The Bar On Persecutors: The Arthur Rudolph and Kurt Waldheim Cases*, 11 B. C. THIRD WORLD L.J. 203, 207 (1991).

to investigate the allegations against him.²⁴ The Commission concluded that Waldheim must assume a measure of guilt for having been complicit in carrying out reprisals and in executing prisoners of war. He also was implicated for having failed to protest or to impede the deportation and execution of Serbs, Jews, and Allied commandos, and for having acquiesced in the transfer of women, children, and the aged to concentration camps. The Commission noted that Waldheim was thoroughly familiar with these policies as a result of his service as a translator and intelligence officer. He also attended high-level meetings at which these malevolent measures were discussed.²⁵ The Commission concluded that Waldheim not only failed to protest or to impede these policies, but assisted and facilitated Germany's "unlawful actions."²⁶

Waldheim claimed that he was obliged to comply with his superior's commands. The historians, however, noted that the demands of law, morality, and the principles of humanity qualified this obligation. They pointed to a number of instances in which officers resisted orders and had not been subjected to retribution. The Commission, however, recognized that Waldheim, as a young and relatively low-level officer, was not in a position to impede or to influence policy.²⁷

The panel of historians concluded that Waldheim had hoped that all traces of his past would disappear. He responded to the resuscitation of these events by minimizing the significance of his military assignments.²⁸ But, as observed by one member of the panel, the hundreds of documents bearing Waldheim's signature bear witness to the significance of his responsibilities in the Balkans and in Greece.²⁹

In Waldheim's 1985 autobiography,³⁰ he recounted his conscription into the Wehrmacht³¹ and subsequent deployment as a human shield for German troops during the Russian campaign. Following a leg wound, he wrote that he was evacuated to Austria and classified as unfit for military service, thus enabling him to complete his legal studies. Waldheim rationalized that the closing of the Austrian border had made emigration impossible and that his service in the military had insulated him from the type of harassment which had been directed against his politically progressive father. Waldheim fur-

24. See Jehuda L. Wallach, *Report of an Unusual Task: The International Commission of Historians Designated to Establish the Military Service of Lieutenant Kurt Waldheim*, 18 *ISR. Y.B. HUM. RTS.* 273 (1988).

25. See *id.* (citing *Report of the International Commission of Historians Designated to Establish the Military Service of Lieutenant Kurt Waldheim*, at 288, 290-92) [hereinafter *International Commission of Historians*].

26. *Id.* at 292.

27. See *id.* at 292-93.

28. See *id.* at 294.

29. See Wallach, *supra* note 24, at 282.

30. See KURT WALDHEIM, *IN THE EYE OF THE STORM* (1985).

31. See *id.* Waldheim was drafted into the German army following Germany's annexation of Austria in 1938. See *id.* at 16-17.

ther noted that the army had been full of anti-Nazi activists and that he regularly had read and discussed clandestine anti-National Socialist literature.³² He somewhat ingenuously professed in the concluding chapter that “war, with its hecatombs of innocent victims and ravages of minds and material” had “convinced me of just how much men and women all over the world cherish . . . peace and security for themselves and their children.”³³

The OSI noted that Waldheim’s autobiography omitted significant facts and that he also misrepresented his war record in the documents that he submitted to the Justice Department.³⁴ He later explained, when confronted with his actual military record, that he failed to mention his service in the Sudetenland, France, Yugoslavia, and Greece since his activities were of minor significance. The OSI, however, pointed out that following Waldheim’s recovery from his injury, he received various decorations in recognition of his impressive performance in positions of increasing authority and responsibility in military theaters in which German forces had engaged in extreme brutality and violence.³⁵ His claim of insignificance was called into question by a photograph of Waldheim at a high-level meeting between German and Italian commanders.³⁶

A number of German military officers in the Balkans were convicted of war crimes by an American military tribunal following the war. The Court wrote that the defendants compiled a record of depredation and destruction “seldom exceeded in modern history. . . . Mass shootings of the innocent population, deportations for slave labor, and the indiscriminate destruction of public and private property . . . lend credit to the assertion that terrorism and intimidation was the accepted solution to any and all opposition to the German will.”³⁷ Waldheim, had he been prosecuted, likely would have been found criminally culpable of complicity in illegal reprisals, the execution of Allied prisoners, and the deportation of Jews.³⁸

The fact that Waldheim was a staff officer would not have constituted a defense. An American Tribunal, in a related case, ruled that staff officers were liable under international law for formulating, distributing, or implementing clearly criminal orders.³⁹ The Court noted that Hitler depended upon

32. See WALDHEIM, *supra* note 30, at 17-19.

33. *Id.* at 267.

34. See OFFICE OF SPECIAL INVESTIGATIONS, *supra* note 2, at 195-97.

35. See *id.* at 194.

36. See *id.* at 193. This photograph appeared in the N.Y. TIMES, Mar. 4, 1986.

37. United States v. Wilhelm List, XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 1230, 1254-55 (1950).

38. See OFFICE OF SPECIAL INVESTIGATIONS, *supra* note 2; see *supra* notes 6-29 and accompanying text.

39. See United States v. Wilhelm von Leeb, XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 462, 513 (1950) (where eleven high-ranking Nazi military officers were convicted of war crimes and crimes against humanity). See also Matthew Lippman, *War Crimes: American Prosecutions of Nazi*

staff officers to implement his evil designs and that these officers "cannot escape criminal responsibility for their essential contribution to the final execution of such orders on the plea that they were complying with the orders of a superior who was more criminal."⁴⁰ The Austrian Commission also noted that Waldheim must assume a measure of moral guilt, and possibly legal responsibility, for having lacked the courage and strength to meet his "human duty to intervene," to impede, or to halt criminal acts.⁴¹

As United Nations Secretary General, Waldheim was involved in attempting to resolve various international issues. Some of these issues were the Iranian hostage crisis,⁴² the conflict over Cyprus,⁴³ apartheid in South Africa,⁴⁴ the decolonization of Africa,⁴⁵ division in the Middle East,⁴⁶ the economic conflict between industrial and industrializing countries,⁴⁷ the protection of global human rights,⁴⁸ and the plight of refugees.⁴⁹ He later was elected President of Austria.⁵⁰ Was this post-war activity relevant in calculating Waldheim's culpability? Should there be a statute of limitations on Waldheim's moral and legal liability? Would permitting Waldheim to visit the United States denigrate the sacrifice of those involved in halting Nazi aggression? Might this provide moral approbation for Waldheim's misdeeds and permit him to continue to benefit from his misrepresentations? Waldheim already had been resident in the United States for many years during his United Nations service. Would an additional visit be of significant moral import? Did not other European leaders possess questionable war records? Why should Waldheim be singled out? Were not various former Nazis still residing in America? Would not the United States appear more credible if resources were first devoted to prosecuting former high-level Nazi officials who escaped prosecution? Waldheim's exclusion arguably denigrated his status as the elected representative of the Sovereign State of Austria and strained relations with a Central European bulwark against Communist expansion. Was America arrogantly imposing its moral standards on the Austrian State? Did Waldheim's exclusion merely constitute a symbolic gesture that permitted the United States to avoid discussing the more appropriate remedy of criminal prosecution?⁵¹

Military Officers, 6 TOURO INT'L L. REV. 261, 280-88 (1995).

40. *Id.* at 515.

41. *International Commission of Historians*, *supra* note 25, at 291.

42. *See* WALDHEIM, *supra* note 30, at 156-57.

43. *See id.* at 78-79, 91-92.

44. *See id.* at 98-99.

45. *See id.* at 95-97, 107.

46. *See id.* at 60-61, 75-77.

47. *See id.* at 111, 115, 120-25.

48. *See id.* at 134-36.

49. *See id.* at 147-52.

50. He was elected to this position on June 8, 1986.

51. For an inquiry into the philosophical considerations involved in prosecuting Nazi war criminals, see generally ALAN S. ROSENBAUM, *PROSECUTING NAZI WAR CRIMINALS* (1993).

These types of issues continue to shadow the debate in those countries confronted with determining the appropriate disposition of Nazi war criminals. As recently as March 1998, the German government announced the arrest of a suspected Nazi war criminal accused of a number of killings, including 500 Jews in the Maidanek death camp in Poland in November 1943.⁵² In France, Maurice Papon, a leading official of the Vichy Regime, was convicted in 1998 of complicity in crimes against humanity.⁵³ Lithuania recently became the first former Soviet-ruled country to announce that it would conduct a war crimes prosecution of a former Nazi official.⁵⁴ In May 1998, the Croatian government acquiesced to pressure from Western governments and Jewish organizations and announced that it would seek extradition from Argentina of Dinko Sakic, camp commander of the Jasenovac concentration camp. An estimated 85,000 Jews, Serbs, Gypsies, and Communist partisans had been killed in the camp, and Sakic reportedly had been personally involved in clubbing, shooting, and stabbing thousands of prisoners.⁵⁵

This renewed commitment to bringing Nazi war criminals to justice follows forty years of general inaction. It is estimated that roughly 250,000 individuals were involved in carrying out Nazi atrocities. The Allied Powers and Eastern European States convicted an estimated 35,000 individuals following the war. German courts punished an additional 6,000 defendants. Over eighty percent of these indictments were brought between 1945 and 1949 and only one hundred involved manslaughter or murder; fifteen concerned murders in concentration camps.⁵⁶ Journalist Tom Bower, in 1982, ironically observed that in post-war West Germany “[m]any of those who had given the orders in the Third Reich were again giving the orders. . . . [I]t was those who obeyed the orders who were, in the last resort, expendable, not those who had given orders and who now gave them again.”⁵⁷

The disposition of Nazi war criminals once again challenges the conscience of the international community. These largely sick, infirm, and aged individuals soon will be beyond legal judgment and sanction. This Article surveys the contemporary response to Nazi war criminals in England, Canada, and Australia, and then details the prevailing legal doctrine within the United States. The concluding section sketches the problems of proof and procedure that threaten future efforts to bring former Nazi war criminals be-

52. See Allan Cowell, *Ex-Nazi is Seized; Accused of Gunning Down 500 at Maidanek*, N.Y. TIMES, Mar. 5, 1998, at A5.

53. See Craig R. Whitney, *Ex-Vichy Aide is Convicted and Reaction Ranges Wide*, N.Y. TIMES, Apr. 3, 1998, at A1.

54. See Judith Matloff, *Hip Image Cloaks Lithuania's Past*, CHRISTIAN SCI. MONITOR, Apr. 7, 1998, at 6.

55. See Chris Hedges, *War Crimes Horrors Revive as Croat Faces Possible Trial*, N.Y. TIMES, May 2, 1998, at A1, A4.

56. See TOM BOWER, *THE PLEDGE BETRAYED: AMERICA AND BRITAIN AND THE DENAZIFICATION OF POSTWAR GERMANY* 361 (1982).

57. *Id.* at 378.

fore the bar of justice.

I. NAZI WAR CRIMINALS AND THE INTERNATIONAL COMMUNITY

The Allied Powers repeatedly condemned Nazi atrocities during World War II and warned that those who perpetrated these barbarities would be prosecuted and punished. The Declaration of St. James, in January 1942, announced that a principal aim of the armed struggle against the Reich was bringing accused war criminals before the bar of justice.⁵⁸ President Franklin Delano Roosevelt subsequently warned neutral nations against providing asylum to suspected war criminals.⁵⁹ He admonished that assisting such individuals to escape would be contrary to the war aims of the United Nations and undermine the rule of law.⁶⁰ On August 10, 1943, President Roosevelt attacked Germany's brutal military measures in Poland. He condemned the Reich's killing and deportation of children to Germany for purposes of "Aryanization" and slave labor and denounced the dispatch of adolescents, the sick, infirm, elderly, and females to concentration camps. Roosevelt concluded by affirming the resolve of the United States to punish the instigators and perpetrators of these crimes.⁶¹

The United Kingdom, the United States, and the Soviet Union, on October 30, 1943, issued a statement that served as a blueprint for post-war prosecutions. The tripartite pronouncement vowed that those German officers, combatants, and party members who had been involved in atrocities, massacres, and executions would be sent back for trial to the countries in which they committed their crimes. Those whose delicts were not limited to a single locale were to be punished by the joint decision of the Allied governments. The document warned, in conclusion, that the Allied Powers would pursue alleged war criminals to the "uttermost ends of the earth and will deliver them to their accusers in order that justice may be done."⁶² On March 24, 1944, President Roosevelt affirmed these earlier statements and denounced the Nazi's systematic elimination of the Jews as "one of the blackest crimes of all history"⁶³ and promised that the leaders and the functionaries who planned and perpetrated these atrocities would be pursued and punished.⁶⁴

58. See *Resolution by Allied Governments Condemning German Terror and Demanding Retribution—London, Jan. 13, 1942*, 144 BRIT. FOR. STATE PAPERS 1072, 1073-74 (1952).

59. See *Refuge in Neutral Countries for Axis Leaders Statement of the President (Roosevelt)* (July 30, 1943), in VI DOCS. AM. FOREIGN REL. 190 (1943-44).

60. *Id.*

61. *Declaration of the President (Roosevelt) on German Crimes in Poland* (Aug. 30, 1943), in VI DOCS. AM. FOREIGN REL. 191 (1943-44).

62. *Declaration on German Atrocities* (Oct. 30, 1943), in VI DOCS. AM. FOREIGN REL. 231-32 (1943-44).

63. *War Refugees, Statement of the President (Roosevelt)* (Mar. 24, 1944), in VI DOCS. AM. FOREIGN REL. 191 (1943-44).

64. See *id.* at 191.

On May 9, 1945, Germany unconditionally surrendered to the Allied Powers⁶⁵ and pledged to apprehend and surrender all those suspected of having committed, ordered, or abetted war crimes or analogous offenses.⁶⁶ The Allied Powers disagreed over the appropriate disposition of major Nazi war criminals. The British argued that a formal trial would absorb time and resources and provide the Nazi defendants with a propaganda forum. The unprecedented nature of the proceedings and charges would diminish the legitimacy of the trials and the prosecutions would come to be viewed as ritualistic exercises designed to justify the executions of Nazi leaders. German officials clearly were deserving of death and the British believed that these executions could be carried out in a summary fashion without compromising the integrity of the judicial process.⁶⁷ The United States opposed this as violative of the core concepts of justice. In an April 1945 memorandum, the Americans contended that the Nazi leaders had violated the generally-accepted standards of conduct under international law. The principles of justice, equality, and the rule of law animated the war effort and the summary execution of German leaders would undermine the very values that the Allied Powers fought to protect and promote. There was no more basic principle than that punishment only should be imposed following trial. The Americans also pointed out that the prosecution and conviction of Nazi officials would serve to deter others from engaging in wartime atrocities and help to promote the rule of law and to educate the German populous as to the excesses of the Third Reich.⁶⁸ In response, the British agreed to enter into discussions leading to the prosecution of German war criminals.⁶⁹

The Nuremberg Charter of 1945⁷⁰ authorized the International Military Tribunal to prosecute and punish the major war criminals of the European Axis countries for crimes against the peace, war crimes, and crimes against humanity.⁷¹ In the end, the Tribunal found nineteen of the twenty-two defen-

65. See *Unconditional Surrender of German Forces at Berlin*, 39 AM. J. INT'L L. 170 (Supp. 1945).

66. See *infra* note 70, art. 6.

67. See *Aide-Memoire from the United Kingdom* (Apr. 23, 1945), reprinted in REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 18-19 (1943) [hereinafter JACKSON REPORT].

68. See *American Memorandum Presented at San Francisco* (Apr. 30, 1945), reprinted in JACKSON REPORT, *supra* note 67, at 28, 34-37.

69. See *Aide-Memoire From the United Kingdom* (June 3, 1945), reprinted in JACKSON REPORT, *supra* note 67, at 41.

70. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Nazis Powers and Charter of the International Military Tribunal, Aug. 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

71. See *id.* art. 6. The three crimes were defined in Article 6:

(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;

dants guilty on one or more of the charges, and three were acquitted. Twelve were sentenced to death by hanging, three to life imprisonment, and four others to terms of between ten and twenty years in prison. The International Military Tribunal at Nuremberg also declared that the Leadership Corps⁷² and various branches of the Nazi Party were criminal organizations.⁷³ In his report to the President, the chief American prosecutor, Supreme Court Justice Robert H. Jackson, argued that prosecutions also should be brought against various industrialists, militarists, diplomats, and police officials whose guilt differed only in degree from that of the major leaders.⁷⁴

The United States subsequently conducted twelve additional trials of German officials and civilian industrialists under Control Council Law No. 10.⁷⁵ The latter agreement, which closely paralleled the Nuremberg Charter, was an expression of the Allied Powers' sovereign jurisdiction over the Reich. It was intended to provide a uniform legal and procedural basis for the prosecution of accused war criminals within occupied Germany.⁷⁶ The Americans ultimately prosecuted 177 individuals: 142 were convicted; and 35 were acquitted. Twenty-four were sentenced to death; twenty to life imprisonment; and eighty received prison terms ranging from five to twenty-five years. The average sentence was close to ten years. Brigadier General Telford Taylor, the American Chief of Counsel for War Crimes, noted that the sentences had become progressively less harsh as public support and interest in the trials waned.⁷⁷

A third set of proceedings involved the prosecution of accused war criminals before national tribunals under domestic war crimes statutes.

(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 labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, 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 persecutions 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 the domestic law of the country where perpetrated.

72. The Leadership Corps was comprised of the high-ranking officials of the Nazi Party. It was declared to be a criminal organization by the Nuremberg Tribunal. *See* XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INT'L MILIT. TRIB. 501-03 (1948).

73. *See Report to the President by Mr. Justice Jackson* (Oct. 7, 1946), *reprinted in* JACKSON REPORT, *supra* note 67, at 432.

74. *See* Nuremberg Charter, *supra* note 70, at 435.

75. *See* Control Council Law No. 10, *reprinted in* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 250 (1949).

76. *See id.*

77. *See id.* at 90-92.

These trials were conducted in the territories in which the delicts occurred or before national West German or Israeli courts.⁷⁸

The newly-formed United Nations adopted various resolutions which recognized the Nuremberg Principles as fundamental precepts of international law.⁷⁹ In 1946, the General Assembly affirmed “the Principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal.”⁸⁰ The Committee on the Codification of International Law was directed to treat “as a matter of primary importance, plans for the formulation in the context of a general codification of offences against the peace and security of mankind, or of an international criminal code . . . the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.”⁸¹ In a separate resolution, the General Assembly resolved that “genocide is a crime under international law which the civilized world condemns, and for the commission of which principles and accomplices . . . are punishable.”⁸²

In 1950, the General Assembly invited member States to comment on the International Law Commission’s formulation of the Principles of International Law recognized in the Charter of the Nuremberg Tribunal. The Commission’s draft recognized that individuals who committed an act constituting an international crime were responsible and liable to punishment. This was the case regardless of whether or not the act was punishable under domestic doctrine.⁸³ In 1954, the International Law Commission completed the Draft Code of Offenses Against the Peace and Security of Mankind which, although never acted upon by the General Assembly, recognized that the Nuremberg Principles constituted offenses against the “peace and security of mankind.”⁸⁴

The General Assembly subsequently urged States to take all necessary measures to arrest those who were responsible, or who had taken a consenting part, in war crimes and in crimes against peace and humanity as defined in the Nuremberg Charter. Countries apprehending those involved in, or responsible for, such offenses were urged to send these individuals back to the

78. See UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 471-75 (1948).

79. See generally Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT’L L.J. 202, 235 (1979).

80. G.A. Res. 95(I) (1946).

81. *Id.*

82. G.A. Res. 96(I) (1946).

83. See *Formulation of the Nuremberg Principles: Report of the International Law Commission*, U.N. GAOR 2nd Sess., Supp. No. 12, Principle I, at 11, U.N. Doc. A/1316 (1950). Various acts punishable as war crimes and crimes against humanity were legal under the domestic law of the Third Reich. See generally Matthew Lippman, *Fifty Years After Auschwitz: Prosecutions of Nazi Death Camp Defendants*, 11 CONN. J. INT’L L. 199 (1996); Matthew Lippman, *Law, Lawyers and Legality in the Third Reich: The Perversion of Principle and Professionalism*, 11 TEMPLE INT’L & COMP. L.J. 199 (1997).

84. U.N. GAOR 9th Sess., Supp. No. 9, at 9, 11, U.N. Doc. A/2693 (1954).

countries in which their abominable acts were committed in order that they might be tried and punished.⁸⁵ Fearing that the prosecution of individuals charged with violating the Nuremberg Principles would be barred by various domestic statutes of limitations, the General Assembly, in 1968, adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. The Preamble noted that war crimes and crimes against humanity were among the “greatest crimes in international law.” Further, the “effective punishment” of these offenses constituted an “important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, for furtherance of co-operation among peoples and the promotion of international peace and security.”⁸⁶ On December 15, 1973, the General Assembly adopted a resolution proclaiming the principle of international cooperation in the detection, arrest, extradition, and punishment of persons guilty of war crimes and crimes against humanity.⁸⁷ The resolution, *inter alia*, proclaimed that war crimes and crimes against humanity, wherever they were committed, shall be investigated and that persons suspected of having committed such crimes shall be apprehended, arrested, tried, and punished, if found guilty.⁸⁸ Every State possessed the right to prosecute its own nationals⁸⁹ and States were to assist in detecting, arresting, and bringing to trial those suspected of having committed these crimes and in punishing the guilty.⁹⁰

The resolution further provided, as a general rule, that individuals shall be prosecuted and, if found guilty, punished in the countries in which they committed their crimes. States were to cooperate in extraditing individuals to these States⁹¹ and in collecting information and evidence that would be of assistance in bringing such persons to trial.⁹² States neither were to grant asylum to individuals suspected of having committed war crimes, crimes against humanity, or crimes against peace, nor enact legislation that may be prejudicial to the arrest, extradition, and punishment of such individuals.⁹³

In sum, the United Nations recognized the Nuremberg Principles as part of the fundamental principles of international law.⁹⁴ The General Assembly

85. See G.A. Res. 3(I) (1946).

86. *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, G.A. Res. 2391, U.N. GAOR, 23rd Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968).

87. See *Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30A, at 448, U.N. Doc. A/9030/Add. 1 (1973).

88. See *id.* art. 1.

89. See *id.* art. 2.

90. See *id.* art. 4.

91. See *id.* art. 5.

92. See *id.* art. 6.

93. See *id.* arts. 7-8.

94. See *Report to the President by Mr. Justice Jackson*, reprinted in JACKSON REPORT, *supra* note 67.

also urged States to cooperate in the detection, prosecution, and punishment of those violating these Principles and to extradite offenders to the territories in which their crimes had been committed.⁹⁵ These resolutions, however, have not been interpreted as imposing either a conventional or customary obligation on States.⁹⁶

Following World War II, the disposition of German war criminals appeared to be an issue that largely concerned States on the European continent. However, there was a large influx of migrants into England, Canada, and Australia in the post-war period. The Allied Powers had been faced with the resettlement of roughly eight million persons. This included individuals who were liberated from concentration camps, prisoners of war, workers who were involuntarily transported to Germany, as well as thousands who had fled the advancing Russian armies. Roughly one million of these displaced persons refused to return to their Soviet-controlled homelands and to countries stricken by social and political unrest.⁹⁷ The Allied Powers, desirous of augmenting their labor forces, agreed to resettle these individuals. However, England, Canada, Australia, and the United States soon realized that a number of migrants were suspected of having committed war crimes. All four governments, thus, were forced to confront the issue whether to bring former Nazi functionaries before the bar of justice.⁹⁸

II. A COMPARATIVE PERSPECTIVE: THE UNITED KINGDOM

A. *The Hetherington and Chalmers Report*

In 1988, the British Government responded to allegations that alleged

95. See *supra* notes 87-93 and accompanying text.

96. The relevant United Nations resolutions do not constitute binding conventional or customary law. They are not binding treaties. In addition, they are not deemed to reflect the established and continuous usage and practice of States and also do not constitute binding customary law. See generally MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 23-34 (1982). The United Nations resolutions do not incorporate the strong language requiring States to enact effective penal sanctions contained in the Geneva Conventions. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 49-50, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31. The resolutions also do not incorporate the traditional prosecute or extradite obligation characteristic of various international instruments. See Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1972, art. 7, 28 U.S.T. 1975, T.I.A.S. No. 8532. Other international treaties provide for universal jurisdiction. See International Convention on the Suppression and Punishment of the Crime of "Apartheid," Nov. 30, 1973, art. IV, U.N. Res. 3068 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1974).

97. See S. REP. NO. 80-950, at 8 (1948), reprinted in 1948 U.S.C.C.A.N. 2028, 2035.

98. The first case to bring the issue of Nazi war criminals to public attention was *Attorney General of the Government of Israel v. Adolf Eichmann*, 36 I.L.J. 18 (Jm. Dist. Ct. 1961). Eichmann was convicted of crimes against the Jewish people and was executed. See Matthew Lippman, *The Trial of Adolf Eichmann and the Protection of Universal Human Rights Under International Law*, 5 HOUS. J. INT'L L. 1 (1982).

Nazi war criminals were residing in the United Kingdom. Sir Thomas Hetherington and William Chalmers were appointed to study whether to amend statutory standards "in order to make it possible to prosecute for war crimes persons who are now British citizens or resident in the United Kingdom."⁹⁹ Hetherington and Chalmers' analysis was limited to murder, manslaughter, or genocide committed within Germany and in the German occupied territories during World War II.¹⁰⁰

Their completed report noted that most of the accusations lodged against individuals resident in the United Kingdom were directed against former residents of the Baltic States, Byelorussia, and the Ukraine. These territories were marked by a historically-recurrent conflict between indigenous nationalism and the territorial ambitions of outside powers. In the twentieth century, the entire area gradually became subordinated to the Soviet Union. The area's inhabitants viewed the invading German forces that swept into Russia understandably as liberators. Hitler's unarticulated aim, however, was to evacuate or assimilate the indigenous populations and to colonize these countries with ethnic Germans. The Reich's short-term strategy was to encourage nationalist sentiment in order to mobilize support for the war against Russia. Part of this plan involved the promotion of anti-Soviet and anti-semitic animus. The Jews were portrayed as Soviet supporters and sympathizers and were targeted for extermination. The success of this strategy is evident from the fact that the Germans and their Baltic subalterns killed virtually all the Jews in Lithuania, Estonia, and Latvia.¹⁰¹

Some Soviet satellites defied the Reich's liquidation policy. The local population in Byelorussia, for instance, quickly became disillusioned with the German occupation and refused to participate in the pogroms against the Jews. German and Baltic forces moved in and expeditiously liquidated the territory's fifty thousand Jews. In contrast, the Ukrainians required little encouragement and the indigenous, volunteer militias systematically gathered and exterminated the Jewish population.¹⁰² The ability of the international agencies and the Allied Powers to screen prospective migrants in an effort to prevent the entry of war criminals was limited by deficiencies in the available databases. The United Nations War Crimes Commission (UNWCC) and the Central Registry of War Crimes and Security Suspects (CROWCASS), the two systems established to catalogue the identity of alleged war criminals, were under-staffed and under-funded and received virtually no coop-

99. SIR THOMAS HETHERINGTON & WILLIAM CHALMERS, REPORT OF THE WAR CRIMES INQUIRY ii (1989) [hereinafter HETHERINGTON & CHALMERS].

100. *See id.*

101. *See id.* at 5-11. The Germans later deployed the Balts in Byelorussia and Poland. Many of the members of the Baltic units later were drafted into the Waffen SS Units on the Eastern Front.

102. *See id.* at 11-14. The Ukrainians subsequently served in Poland and formed the core of the volunteer Falacia Division which was formed in 1943 to fight the Red Army on the eastern front.

eration or support from the suspicious Soviets. Both systems were comprised of a number of independent and uncoordinated lists, which made tracing the names of visa applicants cumbersome and complex. Following the war, the British participated in prosecutions of the major war criminals, but the inefficient identification system resulted in thousands of others inadvertently being freed from Allied prisoner of war camps. By 1950, the British had lost interest in further war crimes prosecutions. The Western world was exhausted from war and desired to look to the future. The Cold War conflict with the Soviets had become a major concern and it was feared that additional trials would strain relations with West Germany, which was viewed as a valuable bulwark against Soviet expansion. The sheer numbers of individuals potentially subject to criminal prosecution also made the prospect of a renewal of war crimes trials appear to be an overwhelming task. Selecting a small number of individuals for prosecution inevitably would be criticized as a selective and senseless exercise in victor's justice. In addition, war crimes trials were of little interest to the British populous which was concerned with post-war economic recovery. Others feared that additional prosecutions would fuel support for the establishment of a Jewish homeland in Palestine.¹⁰³

The British remained confident that suspected Nazi war criminals had not entered the country. Extradition requests by the Soviet Union were viewed as an exercise in Cold War propaganda and routinely were rejected on the grounds that there was no extradition treaty between the two countries. In 1950, the British closely considered the deportation of a doctor accused by Poland of having participated in medical experiments and selections for the gas chambers at Auschwitz. The doctor's name appeared on the UNWCC list, but the British government determined that the passage of time mandated against deporting an alien at the request of a foreign government which only was required to establish a *prima facie* case that the accused was a war criminal. This was a clear indication that alleged war criminals might be resident in Great Britain. Nevertheless, the British government announced that it no longer considered itself obligated to surrender war criminals and, over the course of the next decades, proceeded to reject five Soviet extradition requests.¹⁰⁴

Hetherington and Chalmers concluded that, despite this pronouncement, the English government remained committed to prohibiting the entry of alleged war criminals. This was complicated by the fact that a post-war labor shortage compelled the British to aggressively recruit foreign workers from displaced persons and prisoner of war camps and from the 115,000 members of the Polish armed forces resident in the United Kingdom. The Allies were reluctant to defy the desire of members of these groups to remain in the West rather than to return to territories which had been absorbed by the Soviet

103. See *id.* at 19-29.

104. See *id.* at 29-33.

Union. Many fought for the Germans against what they viewed as Soviet imperialism and faced the prospect of incarceration or execution if sent behind the Iron Curtain. The British sedulously screened those entering England, but the international databases of suspected war criminals contained little material concerning events in Eastern Europe. This was compounded by the unorganized and unstructured nature of these lists and by the difficulty in transliterating names.¹⁰⁵

The British adhered to the position that an individual's prior membership in the Waffen SS did not render him ineligible for entry. The Germans conscripted many of the foreign members of these units and deployed them against the Russians instead of placing them in concentration camps. However, others served in auxiliary police units which were involved in war crimes. The migrants admitted to England as voluntary workers also included 8,000 Ukrainian members of the Galicia SS Division, a unit that was accused of committing atrocities in Czechoslovakia and in Yugoslavia. Hetherington and Chalmers observed that the significance of an applicant's membership in these units likely was not fully appreciated by those charged with migrant screening. Nevertheless, once having gained entry into the United Kingdom, those accused of war crimes were safe from deportation or extradition to the Soviet Union, as evidenced by the refusal of a Russian request to repatriate 124 officers in the Galicia SS Division, such refusal based upon a purported lack of evidence.¹⁰⁶

Hetherington and Chalmers reluctantly concluded that there were few available avenues of redress against alleged war criminals currently residing in the United Kingdom. Their report noted that English law provided for extra-territorial jurisdiction over murder and manslaughter, but that this did not extend to acts committed abroad by individuals who, at the time, were not British subjects. Following World War II, the British prosecuted persons accused of war crimes before military courts sitting in Europe and in the Far East. These courts were convened under the authority of a Royal Warrant issued on June 14, 1945. These tribunals adhered to military procedures and were provided with jurisdiction over all war crimes, irrespective of the territory in which they were committed. Hetherington and Chalmers noted that it was open to question whether the Royal Warrant would authorize prosecutions within the United Kingdom. At any rate, they contended that it would be unacceptable to prosecute individuals before a military court sitting without a jury, forty years following the cessation of hostilities. An existing statutory provision did provide British courts with extra-territorial jurisdiction over any individual accused of grave breaches of the 1949 Geneva Conventions, including murder and manslaughter. However, this had not been given retroactive effect. In addition, a trial for genocide within the

105. *See id.* at 43.

106. *See id.* at 36-42.

United Kingdom was statutorily limited to acts committed after 1969.¹⁰⁷

Contemporary British law provided that an individual could be extradited to stand trial for murder, manslaughter, or genocide to any country in the world, regardless of whether there was an extradition treaty.¹⁰⁸ But, the report noted that the British government retained doubts concerning the quality of justice in Russia and remained reluctant to extradite individuals to a country which still suffered from the severe wounds inflicted by the Nazi regime. Extradition to the newly-independent Baltic States was complicated by the fact that individuals would be facing trial for acts committed on territories which, forty years ago, were part of the Soviet Union.¹⁰⁹

Deportation was another option. English law prohibited the deportation of British citizens. As a result, individuals first would have to be deprived of their citizenship. The latter step was reserved for those rare occasions in which a naturalized citizen was convicted of a serious crime. Hetherington and Chalmers expressed doubts whether the Immigration Appeals Tribunal and Secretary State would adopt the view that the continued presence of an elderly, alleged war criminal, who lived without incident in the United Kingdom for over forty years, was inimical to the public welfare. Deporting individuals to countries in which they were subject to trial for the same offense for which they were deported also would be subject to attack as disguised extradition. On the other hand, deportation without the expectation of criminal prosecution would not significantly advance the interests of justice.¹¹⁰

Hetherington and Chalmers advised that the United Kingdom fill the lacunae in existing law and adopt a criminal statute directed against war crimes committed during World War II.¹¹¹ The proposed statute would not constitute retroactive punishment. State-sponsored murder and manslaughter in an occupied territory during wartime were recognized as crimes under international law several decades prior to the initiation of World War II. There was a consensus among legal scholars that the Allied Powers possessed extra-territorial jurisdiction over war crimes which could be asserted through the passage of domestic legislation which vested either their domestic courts, or a multilateral tribunal, with international jurisdiction. In addition, international law prohibited the imposition of a statute of limitations on the prosecution of war crimes.¹¹²

107. See *id.* at 55-56, 59.

108. See Criminal Justice Act Ch. 33 (1988), *cited and quoted in id.* at 57.

109. See HETHERINGTON & CHALMERS, *supra* note 99, at 56-57.

110. See *id.* at 58-60.

111. See *id.* at 60-61. The United Kingdom gradually had extended its criminal jurisdiction beyond its territorial boundaries. This generally was reserved for offenses which were punishable under international treaties which required States either to extradite or to punish offenders.

112. See *id.* at 61-63 (citing Hague Convention: Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 46, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631).

Hetherington and Chalmers, however, argued that there was no jurisdictional basis for prosecuting alleged war criminals for either crimes against humanity or genocide. They contended that prior to World War II, international law had not been extended to encompass those killings committed by a State which were not directly related to an international armed conflict. The Nuremberg Charter of 1946 authorized the prosecution of crimes against humanity; large-scale acts of violence committed by a State against its own citizens or against the residents of territories which were annexed without resort to military force. However, the Nuremberg judgment required these acts to be undertaken in connection with a war of aggression. The report contended that crimes against humanity were not recognized as an independent crime under international law prior to Nuremberg. They were created to combat the evil of the Hitlerite regime and were not the product of a pre-existing multilateral agreement or customary international law.¹¹³

Hetherington and Chalmers also concluded that prosecutions could not be undertaken for acts of genocide committed during World War II. They argued that genocide was not recognized as a crime prior to the Nuremberg Judgment and only was fully defined as an international delict in 1948. The term was used in the Nuremberg indictment to describe the murder and ill-treatment of the civilian population of an occupied territory, but was absent from the judgment.¹¹⁴ The authors of the report thus concluded that the prohibition on retroactive punishment barred prosecution for crimes against humanity and genocide. However, Great Britain was authorized under international law to adopt legislation asserting jurisdiction over war crimes committed during World War II because such acts were regarded as offenses under international law at the time of their commission.¹¹⁵

Hetherington and Chalmers cautioned that support for the proposed legislation punishing war crimes must be tempered by the practical problems associated with the prosecution of alleged Nazi war criminals resident within the United Kingdom. The inquiry considered 301 allegations of war crimes; in only four of these were there adjudged to be a realistic chance of conviction for murder. One of the four accused already had died and another was suffering from poor health. Investigations in the other 297 cases were hindered by various factors, including difficulties in tracing the alleged perpetrator, the death of the accused, the unavailability of witnesses, and insufficient evidence or charges that did not amount to murder or man-

113. *See id.* at 62.

114. *See id.* Crimes against humanity are defined in article 6(c) of the Nuremberg Charter. *See Whitney, supra* note 53. Genocide was defined and punished in the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

115. *See HETHERINGTON & CHALMERS, supra* note 99, at 63-64. *See also id.* at 63 (citing International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 15(1), U.N. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967)). Article 15 provides, in part, that an individual shall not be held criminally liable of a criminal offense "on account of any act of omission which did not constitute a criminal offense, under national or international law, at the time when it was committed." *Id.*

slaughter.¹¹⁶

The report also queried whether Great Britain should undertake the criminal prosecution of the relatively small number of alleged Nazi war criminals. These individuals had lived in the United Kingdom for over forty years and the decision had been made some years ago to abandon war crimes prosecutions. Trials would prove costly and the accumulation of evidence would be complicated and complex. In some cases, the accused also might be able to present compelling excuses or defenses, such as necessity or superior orders.¹¹⁷

In the end, Hetherington and Chalmers concluded that such objections were not compelling. These were monstrous crimes that could not be condoned and their prosecution hopefully would serve as a deterrent. A formal decision to abandon war crimes prosecutions never had been made and a failure to act would taint the United Kingdom as a haven for war criminals. The decline of Soviet communism resulted in greater access to evidence, such as witnesses and documents, which had been adjudged to be credible by courts in other countries. Further, the "superior orders" defense was not recognized in the military codes of Germany or the United Kingdom. The lapse of time also was of little legal concern since this did not constitute a bar to the prosecution of murder under either domestic or international law and prosecutors were free to exercise their discretion and to drop charges in the interests of justice.¹¹⁸

In summary, Hetherington and Chalmers recommended the adoption of legislation extending jurisdiction over the war crimes of murder and manslaughter committed in Germany or in German occupied territory during World War II. Individuals would be subject to prosecution regardless of their nationality at the time of the alleged offense. The report recommended against including other war crimes, such as rape, on the grounds that English law already recognized extra-territorial jurisdiction over homicide and that the problems of proof were compounded in the case of other offenses. The report conceded that it was offensive that this proposed legislation would not encompass mass murder committed within Germany prior to World War II and in peacefully-annexed territories. However, there was a question whether the prosecution of these crimes against humanity might constitute *ex post facto* punishment. In addition, most of the cases that had been brought to the attention of investigators concerned crimes committed in German occupied territory.¹¹⁹ Hetherington and Chalmers recognized that the enforcement of this legislation depended upon overcoming problems of proof. Many witnesses were elderly, lived in isolated locales, spoke foreign languages, and would be testifying as to events which had transpired over forty years

116. See HETHERINGTON & CHALMERS, *supra* note 99, at 92-93.

117. See *id.* at 94.

118. See *id.* at 94-95.

119. See *id.* at 92-98.

ago. Others were dead. Prosecutors would be forced to present evidence in the form of videotape, satellite networking, affidavits, depositions, and investigative files. Juries would have to be cautioned and carefully instructed as to the weight to be accorded to the various forms of proof.¹²⁰

Despite these difficulties, the report argued that extradition was not a viable option. The judicial system in Russia remained subordinate to the Soviet political machine and defendants were not guaranteed meaningful procedural protections. Public opinion likely would not tolerate extradition to a country that had demonstrated a reluctance to prosecute those responsible for committing crimes during communist rule.¹²¹

In 1991, the recommendations contained in the Hetherington and Chalmers report were incorporated into the War Crimes Act of 1991.¹²² The Act provided that proceedings for murder, manslaughter, and culpable homicide may be brought against a citizen or resident of the United Kingdom, regardless of the individual's nationality at the time of the alleged offense. Jurisdiction was extended to such violations of the laws and customs of war, committed between September 1, 1939, and June 5, 1945, in territories which were part of Germany or under German occupation. Individuals who were British citizens or residents on, or subsequent to, March 8, 1990, were encompassed within the Act. The Act, thus, omitted acts of murder which were not sufficiently connected to an act of aggressive war to constitute a war crime.¹²³ In addition, the restriction to persons who were citizens or residents of England on, or after, 1990 precludes the punishment of individuals who were part of the large transient population of persons who moved through Great Britain and subsequently settled in Australia, Canada, or the United States. These individuals presumably were not considered to possess a sufficient relationship with Great Britain to sustain a jurisdictional claim. Of course, in these cases, the individuals' current state of nationality or residence might undertake legal action.¹²⁴

III. A COMPARATIVE PERSPECTIVE: CANADA

A. *The Rauca Case*

In 1983, Canada took its first action in over thirty years against an accused Nazi war criminal when it agreed to extradite Helmut Rauca to West Germany.¹²⁵ The Ontario Court of Appeal, in approving Rauca's extradition,

120. *See id.* at 98-102.

121. *See id.* at 102-03.

122. *See* War Crimes Act 1991, ch.13 (Eng.) [hereinafter English Act].

123. *See id.* § 1(a)(b), ch.13.

124. *See generally* HETHERINGTON & CHALMERS, *supra* note 99, at 42, 95-96.

125. *See generally* DAVID MATAS, JUSTICE DELAYED NAZI WAR CRIMINALS IN CANADA (1987); HAROLD TROPER & MORTON WEINFELD, OLD WOUNDS, JEWS, UKRAINIANS AND THE HUNT FOR NAZI WAR CRIMINALS IN CANADA (1989).

ruled that the order did not contravene the defendant's right as a citizen to reside in Canada and that the crimes with which he was charged were within the jurisdiction of the Federal Republic of Germany.¹²⁶

Rauca was alleged to have served as an officer in a killing squad stationed in German-occupied Lithuania. The five-count German warrant charged Rauca with ordering the removal and subsequent execution, in August 1941, of approximately 534 persons from the Kowno ghetto. A month later, he allegedly beat and shot a Jew suspected of concealing a silver fork. Shortly thereafter, Rauca purportedly ordered the arrest and execution of 1,845 Jews apprehended on the streets of the Kowno ghetto. He was further charged with having ordered the execution of an additional 9,200 Jews at the end of October 1941. In December 1943, Rauca, along with two other officers, allegedly executed the wife and family of the Chief Rabbi of the Kowno ghetto. These allegations were supported by depositions sworn by survivors of the Jewish ghetto. Following the war, Rauca was detained and held in custody by American forces for three years, and was released in 1948. He immigrated to Canada two years later, worked as a farm laborer and hotel manager in Ontario, and in 1956, became a naturalized Canadian citizen.¹²⁷

The Ontario Court noted that in July 1941, Hitler declared the Baltic States, together with a portion of Byelorussia, to be the territory of the Reich Commissariat¹²⁸ under the rule of the Reich Minister for the Occupied Eastern Territories. This resulted in offenders being subject to the jurisdiction of Nazi courts sitting in these territories. The Canadian Tribunal observed that the Reich ordered, condoned, and tolerated the killing of Jews despite the fact that murder was punishable with life imprisonment under the German criminal code. West German courts subsequently claimed jurisdiction over these acts on the grounds that the Federal Republic of Germany was a reorganized version of the Third Reich. In 1979, West Germany had entered into an extradition treaty with Canada recognizing murder as an extraditable offense.¹²⁹

The Ontario Court ruled that the right of a citizen to remain in Canada, as protected by the Canadian Charter of Rights and Freedoms,¹³⁰ was subject to reasonable limits.¹³¹ Canada historically had entered into extradition treaties and exchanges with other States in order to ensure that offenders were brought to the bar of justice. Canada only assumed extra-territorial jurisdiction over the criminal conduct of its nationals in limited instances. Extradition appeared to provide the single avenue available to ensure that the

126. See *In Re Federal Republic of Germany and Rauca* [1983] 445 D.L.R.3d 638.

127. See *id.* at 642-46.

128. The four territories were consolidated into a single military district under the control of the Reich. Eventually, it all was to be annexed into the Reich.

129. See *id.* at 648-49.

130. Canadian Charter of Rights and Freedoms §§ 1, 6, *quoted and cited in id.* at 653.

131. See *id.* at 654-55.

seventy-five year old Rauca was brought to trial. Rauca's prosecution in Germany was consistent with the text of international human rights treaties, none of which prohibited the extradition of a State's own nationals.¹³² The Appellate Court also noted that its interpretation of the Charter of Rights and Freedoms was consistent with Canada's desire to bring to justice those who participated in atrocities and war crimes during World War II.¹³³

The *Rauca* case served as the catalyst that stimulated the Canadian government to undertake a comprehensive study of the appropriate disposition of alleged Nazi war criminals resident within its territory.

B. The Deschenes Commission

In 1985, the Canadian government appointed a commission of inquiry on war crimes headed by Jules Deschenes, Chief Justice of the Quebec Superior Court.¹³⁴ The Commission was charged with investigating the entry and presence of alleged war criminals in Canada and with recommending action to bring these individuals to the bar of justice.¹³⁵

Following World War II, Canada was less active in war crimes prosecutions than the other Allied Powers. It conducted only four trials involving seven defendants prior to repatriating its nationals from Europe in 1946. Great Britain acted on Canada's behalf in carrying out six additional prosecutions involving twenty-eight suspects. In 1948, the British Commonwealth Relations Office sent a secret telegram to Australia, Canada, Ceylon, India, New Zealand, Pakistan, and South Africa suggesting that all existing war crimes cases should be disposed of by August 31, 1948. The British explained that war crimes trials already had achieved the desired degree of deterrence and that the Commonwealth's concern with exacting retribution should be subordinated to the interest in strengthening West Germany as a bulwark against communist expansionism. Over the course of the next thirty years, Canada devoted little effort to the detection and prosecution of war criminals.¹³⁶ The Deschenes Commission defended this on the grounds that Canadian policy had not markedly differed from that of other countries.¹³⁷

In 1962, an allegation that the infamous Nazi Doctor Josef Mengele was resident in Canada stimulated interest in the question whether other alleged Nazi war criminals had migrated to Canada. The Royal Canadian Mounted Police (RCMP) dismissed the inquiry by noting that war crimes inquiries were of limited interest. This policy of benign neglect remained in place until 1983 when the RCMP initiated an investigation that resulted in the extra-

132. *See id.* at 657-60.

133. *See id.* at 660-63.

134. *See* JULES DESCHENES ET AL., COMMISSION OF INQUIRY ON WAR CRIMINALS, REPORT PART I: PUBLIC 17 (1986) [hereinafter DESCHENES].

135. *See id.*

136. *See id.* at 25-27.

137. *See id.* at 31-32.

dition of Albert Helmut Rauca, who subsequently died in a German prison while awaiting trial.¹³⁸

The Deschenes Commission stated that it would restrict its recommendations to crimes related to the activities of Nazi Germany during World War II. The Commission further explained that it broadly interpreted the notion of war crimes to include the Nuremberg delicts of war crimes and crimes against humanity as well as crimes against peace, or the waging of an aggressive war.¹³⁹

The Commission surveyed the legal mechanisms that were available to bring accused war criminals resident within Canada before the bar of justice. Extradition, according to the Commission, had the advantage of providing a trial in a country that was intimately connected with the alleged offense. However, the availability of this remedy was dependent upon a request being lodged by a country with which Canada had an extradition treaty and which also was adjudged to be able and willing to afford the accused with a fair trial.¹⁴⁰

The Commission noted that since World War II, Canada received and rejected a number of extradition requests from States in Eastern Europe seeking to prosecute alleged Nazi war criminals. According to the Commission, the recent democratic reforms within these former communist States likely would result in such requests receiving a favorable response in the future. For example, additional requests from Germany, the logical country to carry out these prosecutions, should be particularly encouraged.¹⁴¹ On the other hand, the existing text of Canada's extradition treaty with Israel was limited to crimes committed on the territory of the Jewish State subsequent to the signature of the instrument in March 1967. Extradition of accused Nazi war criminals to Israel, thus, was not possible absent the amendment of the treaty.¹⁴² In order to overcome the prohibition on extradition to countries with which Canada had not entered into an extradition treaty, the Commission recommended domestic legislation providing for the extradition of all individuals accused of committing war crimes during World War II.¹⁴³

The most obvious alternative to extradition was criminal prosecution within Canada, but the Commission failed to find a statutory basis for the assertion of extra-territorial jurisdiction over war crimes by Canadian courts. Canada's genocide statute failed to provide for retroactive application.¹⁴⁴ The existing War Crimes Act also did not provide a viable option; it only

138. *See id.* at 27-30. The Commission's research indicated that Mengele neither entered nor attempted to enter Canada. *Id.* at 67, 76-77, 82.

139. *See id.* at 44. The Nuremberg Charter defined crimes against peace and war crimes. *See supra* note 66.

140. *See* DESCHENES ET AL., *supra* note 134, at 86-88.

141. *See id.* at 88-91.

142. *See id.* at 91-96.

143. *See id.* at 105-08.

144. *See id.* at 113-14.

authorized military trials in times of armed conflict in a theater of war and did not encompass crimes against humanity or crimes against peace. A defendant prosecuted before a military court also was denied due process protections, such as trial by jury, and was subject to the death penalty. There also was a question whether acts such as the deportation of civilians for purposes of slave labor, would fall within the purview of military law. In the final analysis, the Commission concluded that even the pursuit of war criminals could not justify subjecting citizens to the jurisdiction of military courts, thereby compromising the fundamental values of Canadian jurisprudence.¹⁴⁵

Customary international law, however, offered a remedy. The general principles of law recognized by the community of nations were recognized as part of the supreme law of the land under the Canadian Charter of Rights and Freedoms.¹⁴⁶ This incorporated acts, such as murder, rape, and plunder, which were prohibited in all civilized legal systems during periods of peace as well as war. The Commission determined that an individual could be subjected to trial for an act that was contrary to these general principles, notwithstanding the lack of a domestic statute. The Commission, however, determined that this constituted too unconventional a foundation upon which to base a prosecution.¹⁴⁷

The Commission thus determined that existing Canadian law failed to furnish a basis for domestic war crimes prosecutions. It advocated the amendment of the Canadian criminal code to provide for the retroactive punishment of war crimes committed during World War II. This would not, however, contravene the prohibition on *ex post facto* punishment. Canadian law, consistent with international documents, did not recognize this principle as a barrier to the prosecution of individuals who were accused of violating the general principles of law recognized by the community of nations.¹⁴⁸ The Commission had little fear that such a law would be abused. It noted that the Executive Branch retained the discretion to enforce the statute and likely would exercise caution in initiating prosecutions. A Canadian Court also might sustain a motion to stay the prosecution of an alleged war criminal on the grounds that a trial forty-five years following the termination of World War II constituted undue delay in contravention of the principles of fundamental justice.¹⁴⁹

The Commission advocated a clear, easily-administered amendment to the criminal code that would encompass war crimes as well as crimes against humanity. The latter would cover crimes committed in periods of peace as well as war. The proposed amendment would be premised on Canada's jurisdiction over acts that contravened the general principles of law common

145. *See id.* at 117-23.

146. *See* Canadian Charter of Rights and Freedoms, art. 11(g), *quoted in id.* at 131.

147. *See* DESCHENES ET AL., *supra* note 134, at 131-32.

148. *See id.* at 147-48.

149. *See id.* at 148-50.

to all legal systems. This jurisdiction would be triggered in those instances in which an offender was apprehended within Canada. The law would extend to all military conflicts, regardless of whether Canada was involved, in order to avoid singling out individuals aligned with the Nazi cause during World War II. Prosecution would be provided without regard to the nationality of the offender or victim, the situs of the crime, or whether the offender or the victim was a civilian or a member of the military. Trial by jury would be guaranteed.¹⁵⁰ The Commission stressed that the conventional criminal justice system should be utilized to prosecute war criminals in order to guarantee the same quality of justice that was provided to other defendants. However heinous the offenses of accused war criminals, the Commission stressed that the rule of law should not be compromised.¹⁵¹

The Commission favored defining war crimes and crimes against humanity in accordance with the Nuremberg precedent. Courts then could look to the Nuremberg judgment for assistance in interpreting the war crime statute. It also was desirable to vest the discretion to conduct prosecutions in the federal attorney general rather than in state officials. This would provide uniformity, experience, and expertise in conducting these high-profile and controversial cases that might impact upon Canada's foreign affairs. Citizens also would be prohibited from initiating private prosecutions in this complex and delicate area.¹⁵²

The Commission declined to address whether individuals who had received foreign pardons should be subject to prosecution within Canada. This only had arisen on a single occasion in the past and efforts should be devoted to more central concerns. The prohibition on the prosecution of individuals who had been acquitted or who had been convicted abroad already had been incorporated into Canadian constitutional doctrine.¹⁵³ The Commission also added that it had decided that it was unnecessary to provide for the punishment of crimes against peace. Most of those involved in planning Germany's aggressive wars already had been brought to the bar of justice and this offense raised issues of retroactive punishment. The prospective application of this crime in regards to future wars also presented political problems that required extensive analysis and discussion.¹⁵⁴

The Commission noted that its recommendation to adopt legislation that would authorize the civilian trial of alleged Nazi war criminals coincided with a proposal endorsed by the Canadian Bar Association in 1981. The bar association favored authorizing the prosecution of war crimes and crimes against humanity regardless of whether Canada was involved in the conflict. Jurisdiction under the bar association's draft would extend to crimes committed against civilian or military personnel by an individual apprehended

150. *See id.* at 150-51.

151. *See id.* at 154.

152. *See id.* at 164-65.

153. *See* Canadian Charter of Rights and Freedoms Art. 11(h), *quoted in id.* at 164.

154. *See* DESCHENES ET AL., *supra* note 134, at 165-66.

within Canadian territory.¹⁵⁵

The Commission viewed denaturalization and deportation as the least desirable alternatives to extradition. This cumbersome and time-consuming process involved revoking a naturalized citizen's status and transferring him or her to another country.¹⁵⁶ This procedure was not available against native-born citizens, but all the suspected war criminals resident within Canada had been born abroad, and thus were naturalized citizens. These individuals were subject to the loss of citizenship and deportation if it was established that they fraudulently concealed or misrepresented their wartime activities in their visa or naturalization applications.¹⁵⁷

The Commission noted that this alternative was impractical, and philosophically troubling. Most alleged war criminals within Canada ranged from sixty to eighty years of age. Many already had died and others likely would pass away prior to the completion of the denaturalization and deportation processes. The Commission recommended that the two procedures should be consolidated and streamlined.¹⁵⁸ This, however, would not overcome the time constraints involved in investigating each suspect's activities in various archival sources and comparing this information with his declarations to Canadian officials. Canada's incomplete archives of citizenship and immigration documents further complicated the process.¹⁵⁹ The Commission also noted that denaturalization and deportation may not lead to a satisfactory result. There may be little choice other than to deport an individual to a State in which he or she would likely find a safe haven or in which due process standards were deficient.¹⁶⁰

Estimates of the number of alleged Nazi war criminals resident within Canada varied from under one hundred to well over a thousand.¹⁶¹ According to the Deschenes Commission, the largest influx of potential criminals occurred when Canada was persuaded by the United Kingdom to approve the entrance of several thousand members of the Galicia Division. The Commission, however, stressed that mere membership in the Division was insufficient to justify either criminal prosecution or denaturalization and deportation.¹⁶²

The Deschenes Commission developed several lists that contained a total of over 774 potential war criminals.¹⁶³ It recommended closing 606 files, denominated ninety-seven cases in which additional investigations abroad

155. See Canadian Bar Association Resolution (Sept. 3, 1981), *quoted in id.* at 154.

156. See DESCHENES ET AL., *supra* note 134, at 86.

157. See *id.* at 169.

158. See *id.* at 173.

159. See *id.* at 207, 214, 224-25. For the Commission's recommended revisions in Canadian law, see *id.* at 226-27, 232.

160. See *id.* at 238.

161. See *id.* at 248.

162. See *id.* at 261.

163. See *id.*

were advisable,¹⁶⁴ and singled out twenty-nine cases in which the seriousness of the allegations and the availability of evidence warranted special consideration.¹⁶⁵ In twenty of the latter cases, the Commission recommended that either immediate criminal prosecution or revocation of citizenship and deportation should be pursued.¹⁶⁶

C. *The Finta Case*

In 1985, the Canadian Parliament incorporated the Deschenes Commission's recommendations into the criminal code.¹⁶⁷ These provisions provided for jurisdiction over individuals who committed an act or omission outside of Canada which constituted a war crime or crime against humanity that, had it been committed within Canada, would have constituted an offense against the then-existing laws of Canada. The accused was deemed to have committed the act within Canada when three additional conditions were satisfied. First, at the time of the act or omission: 1) the suspect was a Canadian citizen or employed by Canada in a civilian or military capacity; 2) the suspect was a citizen or was employed in a civilian or military capacity by a State engaged in an armed conflict against Canada; or 3) the victim of the act or omission was a Canadian citizen or was a citizen of a State which was allied with Canada in an armed conflict. Second, Canada was authorized under international law to exercise jurisdiction over the accused on the basis of his or her presence in Canada. Third, the individual was presently within Canada.¹⁶⁸ An individual was entitled to rely on any justification, excuse, or defense available under the laws of Canada or under international law.¹⁶⁹ Notwithstanding the latter provision, an accused might be convicted of an offense that was committed in obedience to, or in conformity with, the law in force at the time and place of its commission.¹⁷⁰

Crimes against humanity were defined in accordance with the Nuremberg Charter. These delicts included murder, extermination, enslavement, deportation, persecution, or any other inhumane act which was committed against "any civilian population" or "any identifiable group of persons" and which was in contravention of conventional or customary international law or which was criminal according to the general principles of law recognized by the community of nations.¹⁷¹ War crimes were defined as any act or omis-

164. *See id.* at 270, 272.

165. *See id.* at 262.

166. *See id.* at 827-28. The Commission did not recommend the creation of a special unit to prosecute alleged Nazi war criminals, fearing that this would become a flashpoint for ethnic competition and conflict. *See id.* at 828-29.

167. *See* Criminal Code, R.S.C., ch. C-30 (1985) (Can.) [hereinafter Canadian Act].

168. *See id.* § 7(3.71).

169. *See id.* § 7(3.73).

170. *See id.* § 7(3.74).

171. *Id.* § 7(3.76).

sion which was “committed during an international armed conflict,” whether or not in “contravention of the law in force at the time and place of its commission.”¹⁷²

In 1994, the Canadian Supreme Court, in *Regina v. Finta*,¹⁷³ upheld the constitutionality of these amendments to the criminal code in a plurality opinion written by Justice Peter deCarteret Cory.¹⁷⁴ Irma Finta served as a captain and commander of the Royal Hungarian Gendarmerie in Szegeed. The Gendarmerie were under the effective control of German occupation forces. The puppet Hungarian regime deferred to the dictates of the Reich and adopted a series of anti-Jewish measures that culminated in the Baky Order of April 7, 1944. The latter provided a master plan for the extermination of Hungarian Jewry, culminating in the ghettoization and deportation of Jews to concentration camps. Finta allegedly was responsible for directing the collection of the city’s 8,617 Jews in a brickyard where they were stripped of their valuables. The Jews then were packed into sealed boxcars and transported to their death. Most of the weak and elderly suffocated or died of starvation or illness during the journey to the concentration camps.¹⁷⁵

Finta fled Hungary and was prosecuted and convicted *in absentia*. In 1951, Finta immigrated to Canada and was naturalized as a Canadian citizen in 1956. The execution of his Hungarian sentence was later barred by the statute of limitations, and, in 1970, Hungary issued a general amnesty which encompassed Finta. In 1988, the Canadian government charged Finta with unlawful confinement, robbery, kidnapping, and manslaughter, which were separately charged as both war crimes and crimes against humanity. The Crown relied on nineteen eyewitnesses to support the allegation that Finta was the senior officer in charge of the Gendarmerie at Szegeed and exercised effective control over the brickyard. Finta admitted having been present, but denied that he was in a position of responsibility, instead contending that he was subject to the command of the German security forces. The trial judge exercised his discretion to call three witnesses who provided some corroboration of Finta’s claim and the jury adjudged that there was sufficient reasonable doubt to acquit the defendant of all charges.¹⁷⁶ The Crown appealed that the judge incorrectly instructed the jury and Finta filed a cross-appeal challenging the constitutionality of the recently enacted criminal code provisions.¹⁷⁷

The Crown contended that the judge improperly directed the jury to de-

172. Canadian Act, *supra* note 167, § 7(3.76).

173. *Regina v. Finta* [1994] S.C.R. 701.

174. *See id.* at 788. Justices Charles Doherty Gonthier and John Charles Major joined the plurality opinion. *See id.* Chief Justice Antonio Lamer concurred in this opinion. *See id.* at 723. Justices Gerard La Forest, Claire L’Heureux-Dube and Beverley McLachlin dissented, in part. *See id.* at 726.

175. *See id.* at 789-91.

176. *See id.* at 792-96.

177. *See id.* at 804-05.

termine whether the accused had committed a war crime or crime against humanity that would have been punishable in Canada. The prosecution argued that whether the accused's actions constituted a war crime or a crime against humanity was a threshold jurisdictional issue which should have been determined by the judge utilizing a balance of probability standard. The jury should have been limited to considering whether the defendant satisfied the act and intent standard required to be adjudged guilty of the underlying domestic offense under the Canadian criminal code. Justice Cory rejected the prosecution's contention. He pointed out that the jury might determine that the defendant was guilty of homicide and yet conclude that there was a reasonable doubt as to whether his actions and state of mind satisfied the standard for war crimes or crimes against humanity. The Crown's interpretation would deny the accused the right to have the essential elements of the charges against him proved beyond a reasonable doubt to the satisfaction of a jury of his peers.¹⁷⁸

Justice Cory stressed that these were grave international crimes that shocked the conscience of humanity and strongly stigmatized the perpetrators. They carried distinctive act and intent requirements that must be established in addition to the *actus reus* for the underlying common domestic crimes. The distinct act element of crimes against humanity was that the enumerated inhumane act discriminated against or persecuted an identifiable group. As for war crimes, the added component was that the defendant's act constituted a violation of the laws of armed conflict.¹⁷⁹

Justice Cory also upheld the trial court's jury instructions pertaining to the required mental state. He noted that the prosecution was required to establish the requisite moral culpability demanded for the underlying domestic offense as well as the level of moral blameworthiness required for a crime against humanity or war crime. The mental element required for a crime against humanity was that the accused was aware or willfully blind to the facts or circumstances that would bring his or her conduct within the definition of a crime against humanity. The jury, for example, must determine whether the defendant was cognizant that his or her actions constituted the deportation of an identifiable racial group. Justice Cory stressed that it would not be necessary to establish that the accused was aware that his or her actions were inhumane.¹⁸⁰ Therefore, it would have been sufficient for Finta to have been aware of the conditions within the boxcars, even if he did not realize that his actions in loading people into the train were inhumane.

A distinctive mental test also was to be applied for war crimes. The mental element was satisfied so long as the accused knew or was willfully blind to the facts that brought his or her actions within the definition of a war crime. It was unnecessary to establish that the defendant actually was aware

178. See *id.* at 810-11.

179. See *id.* at 812-13.

180. See *id.* at 819.

that his acts constituted war crimes. Thus, knowingly or recklessly executing civilians or prisoners of war was sufficient to establish the requisite *mens rea* for a war crime.¹⁸¹

The plurality also rejected the claim that the judge improperly submitted the superior orders defense to the jury. The legal provision was permissive and provided that an individual “may be convicted” of an offense notwithstanding the fact that the act or omission was “committed in obedience to or in conformity with the laws in force at the time and place of its commission.”¹⁸² The plurality opinion noted that absent this exception, even Adolf Hitler could claim that he was obeying the laws of his country and avoid criminal conviction.¹⁸³ This consideration was counter-balanced by the fact that military organizations depended upon obedience to command authority and that individuals could not be expected to examine the merits of every order or law.¹⁸⁴ The Supreme Court ruled that the trial court correctly balanced these concerns in instructing the jury that the superior orders defense was unavailable if the jury determined that a reasonable person would have found that the order was “manifestly illegal” and that the accused possessed the choice whether to obey the command.¹⁸⁵

Justice Cory also rejected Finta’s contention that given the uncertain and variable state of international law during World War II, he was not fairly informed of the consequences of his conduct; and that the war crimes and crimes against humanity provisions were so vague that they failed adequately to define the acts which were prohibited. Cory ruled that the Canadian legislation condemned grave, cruel, and heinous acts which any reasonable person would have realized contravened the basic human values of the laws of war. This conduct was so repulsive, reprehensible, and universally condemned that it was ingenuous to contend that the definitions of crimes against humanity and war crimes were vague and uncertain.¹⁸⁶

The plurality opinion also rejected the contention that the provisions constituted a retroactive enactment in violation of the Canadian Charter of Rights and Freedoms. In order to avoid creating new offenses, Cory noted that the Act was drafted so as to provide that accused war criminals were deemed to have contravened pre-existing crimes under the Canadian criminal code. However, Cory argued that the Act should be interpreted as creating two new offenses, war crimes and crimes against humanity. But, this, nevertheless, did not contravene the prohibition on *ex post facto* punishment.¹⁸⁷

Cory noted that some argued that the humanitarian law of war had

181. *See id.* at 820-21.

182. *Id.* at 843 (citing Canadian Act, *supra* note 167, § 7(3.74)).

183. *See Finta*, [1994] S.C.R. at 840.

184. *See id.* at 838-39.

185. *Id.* at 841. *See also id.* at 845-46.

186. *See id.* at 869.

187. *See id.* at 870.

evolved over 7,000 years and had been assimilated into conventional international law by 1907. According to this view, the war crimes and crimes against humanity provisions of the Canadian legislation merely incorporated pre-existing legal principles. Cory, however, adopted the unique position that individuals charged with having committed war crimes and crimes against humanity provisions must have been aware of the immoral character of their conduct. Justice required their punishment despite the fact that they were not subject to sanction under positive international law at the time that they committed their criminal acts. Under such circumstances, the prohibition on retroactive punishment must yield to the more significant value of punishing those who committed international crimes during World War II.¹⁸⁸

The plurality also failed to find merit in Finta's contention that he suffered prejudice as a result of the fact that forty-five years elapsed between his alleged criminal conduct and trial. Cory noted the delay likely was more prejudicial to the Crown than to the defense. Most of the relevant documentary and physical evidence was destroyed during the war and any prejudice resulting from the death of witnesses was cured by the trial judge's solicitation and admission of the statement of a Hungarian eyewitness who disputed the claim that Finta headed the Gendarmerie. Cory adjudged the one-year delay between the legislation and the formal charge reasonable in light of the amount of investigative work required.¹⁸⁹

The Canadian legislation also could not be considered to be impermissibly discriminatory for having singled out individuals who committed war crimes and crimes against humanity. Those subject to punishment were not a discrete and insular minority¹⁹⁰ that suffered historical disadvantage or prejudice.¹⁹¹

Justice Gerard V. La Forest, dissenting in part, noted that the Canadian legislation was premised on the impracticability of relying on territorial jurisdiction to enforce the international proscription against war crimes and crimes against humanity. Territorial jurisdiction customarily was considered to be the most efficient and effective mechanism for criminal prosecution. However, it was not realistic because a defendant's State of nationality may be implicated in war crimes and crimes against humanity and, as a consequence, might be reluctant to initiate a prosecution following the cessation of hostilities. In addition, perpetrators may flee to other countries in order to elude punishment. Justice La Forest noted that these practical problems motivated the Deschenes Commission to recommend the adoption of legislation which permitted the prosecution of crimes against humanity and war crimes within Canada. Parliament was uncertain concerning the permissibility of extra-territorial jurisdiction over these offenses and, as a result, it adopted

188. *See id.* at 870-74.

189. *See id.* at 875.

190. *See id.* at 875-76.

190. *See id.* at 726, 733.

191. *See id.* at 875-76.

legislation that permitted the trial of suspected war criminals for the violation of Canadian criminal law.¹⁹²

La Forest, in contrast to Justice Cory, argued that the trial judge was required to make a threshold determination whether the act or omission amounted to a war crime or a crime against humanity. The jury then was to determine whether the defendant's mental state and physical actions satisfied the requirements of the underlying domestic delict.¹⁹³ The complicated and intricate nature of the international law issues dictated that this threshold requirement should be assigned to the presiding judge. The judge was the appropriate person to determine international legal issues that were unrelated to the determination of culpability. These issues included whether the defendant's actions occurred during a state of war and whether the victims were enemy soldiers, illegal combatants, prisoners of war, or civilians.¹⁹⁴ Justice La Forest also contended that there was no specific mental state required for a war crime or a crime against humanity. It thus was unnecessary to demonstrate that an accused charged with crimes against humanity was aware that his or her actions were directed against a civilian population or an identifiable group. The forcible confinement or kidnapping of 8,617 Jews was blameworthy regardless of whether the accused was cognizant that his victims were members of an identifiable group.¹⁹⁵

In sum, in contrast to the English Act, the Canadian war crimes legislation punished war crimes as well as crimes against humanity.¹⁹⁶ Punishing crimes committed abroad as crimes under the Canadian criminal code complicated the application of the Canadian legislation to crimes which were carried out on Canadian territory.¹⁹⁷ This legal fiction reduced the discomfort of judges charged with enforcing an extra-territorial statute that seemingly violated the spirit of the prohibition on retroactive punishment.¹⁹⁸ As a result of this provision, jurors were encumbered with the responsibility of determining whether the accused's conduct contravened domestic as well as international law.¹⁹⁹

IV. A COMPARATIVE PERSPECTIVE: AUSTRALIA

A. The Menzies Report

In 1986, the Australian Special Minister of State requested Mr. A.C. Menzies to report on the entry, residence, and legal disposition of alleged

192. *See id.* at 726-73.

193. *See id.* at 746-48.

194. *See id.* at 774-75.

195. *See id.* at 756-57.

196. *See supra* notes 123 & 171-72 and accompanying text.

197. *See supra* note 170 and accompanying text.

198. *See Finta*, [1994] R.C.S. at 870-94.

199. *See id.* at 810-13, 820.

Nazi criminals in Australia.²⁰⁰

A series of radio programs produced by the Australian Broadcasting Corporation in 1986, alleged that a substantial number of war criminals had entered Australia. Many of these individuals purportedly were permitted to enter at the request of American and British intelligence agencies.²⁰¹ This was a shock to the Australian government who consistently claimed that the country's comprehensive screening system²⁰² limited the entry of suspected war criminals. The government also rationalized that the flow of migrants had enriched the country and that even if suspected war criminals managed to enter the country, they should be permitted to pursue their lives free of fear of prosecution. Australia further pointed out that it already had fulfilled its obligation to bring Axis criminals to justice by participating in the International Military Tribunal at Tokyo and by conducting roughly one thousand trials before military courts in the Pacific.²⁰³

The government had no settled post-war policy on the disposition of individuals resident within Australia who were suspected of having committed war crimes. This confusion was compounded by the fact that these crimes were committed outside Australia by individuals who, at the time, were nationals of a foreign State. Security agencies, upon receiving a complaint, typically confined their investigations to questioning the suspect concerning his wartime activities. In other instances, the allegations merely were noted or resulted in a cursory inquiry.²⁰⁴

Mr. Menzies considered the arguments in favor of refraining from action against alleged war criminals. Most of these individuals had lived respectable lives over a number of years and had acquired Australian citizenship. Their crimes were committed abroad against residents of foreign countries and Australia had little interest in bringing these former Nazi functionaries to justice. Menzies concluded that in the case of minor war criminals who were alleged to have been guilty of membership in criminal organizations, or who were accused of committing property crimes, that these considerations were persuasive. In contrast, he contended that those accused of severe atrocities or mass murder should be brought to the bar of justice. Prosecution was required in order to condemn and to deter such offenses. Moreover, the guilt of these individuals was not mitigated by the fact that they lived admirable lives over the last forty years. However, Menzies stressed that the interest in bringing such persons to justice did not justify the

200. See DEPARTMENT OF THE SPECIAL MINISTER OF STATE, REVIEW OF MATERIAL RELATING TO THE ENTRY OF SUSPECTED WAR CRIMINALS INTO AUSTRALIA 3, 5 (1987) [hereinafter MENZIES].

201. See *id.* at 10-11.

202. Individuals applying for immigration initially were screened by the International Refugee Organization. Australian Military Intelligence Officers further evaluated prospective immigrants. See *id.* at 47-49.

203. See *id.* at 10-11.

204. See *id.* at 117-20.

compromise of legal standards and procedures.²⁰⁵

Menzies noted that the government's policy of encouraging mass migration of individuals into Australia following World War II was based on the belief that the country's future security depended upon an increase in population. Roughly 1.2 million persons entered Australia. Approximately 250,000 of these individuals were refugees who were unable or unwilling to be repatriated to their country of origin. The largest resettlement program was the displaced person scheme administered by the International Refugee Organization (IRO).²⁰⁶ This was supplemented by various programs designed to attract skilled workers and to reunite families and friends.²⁰⁷

The IRO Constitution specifically denied assistance to war criminals, individuals involved in assisting the enemy in persecuting civil populations, and to persons who voluntarily assisted enemy forces in their operations against the Allied Powers. Individuals of German ethnic origin, whether German nationals or members of minorities in other countries, also were excluded. Residents of the Baltic States who were able to demonstrate that they were conscripted into the German military and who were able to satisfy IRO officers that they had not committed atrocities, or otherwise persecuted civilians, were eligible for admission. Despite these precautions, a number of press reports appeared in Australia in 1948 that Nazis loyalists entered under the displaced persons scheme. In reaction, Australia dispatched two military intelligence officers to assist the Department of Immigration in evaluating the background of individuals applying for entry visas.²⁰⁸

The Australian government still failed to take the entry of suspected war criminals into the country seriously. The Australian government did not specifically exclude suspected war criminals from entering the country until 1951. The government presumed that the criminal prosecutions of Nazis carried out in Europe, along with the IRO's detailed selection process, had eliminated the possibility of suspected war criminals being referred for immigration. However, the increasing number of Germans who were being admitted to Australia under the skilled worker scheme apparently alerted officials to the possibility that war criminals might seek to enter the country. At the same time that protections against major war criminals were being strengthened, the intelligence service determined that it was permissible to admit ordinary rank and file members of the Nazi Party as well as various low ranking officials. This modification in policy, which reflected a desire to integrate Germany into the Western Alliance, was withheld from the public in order to avoid offending and provoking Australia's ethnic and Jewish communities. The 1955 immigration protocol further relaxed entry requirements and limited the category of persons who were to be rejected automati-

205. *See id.* at 11-13.

206. *See id.* at 33-34.

207. *See id.* at 45-46.

208. *See id.* at 47-48.

cally to persons found guilty of crimes against humanity. Individuals listed by the UNWCC and CROWCASS merely were subject to a criminal investigation. As the Cold War became of increasing concern, the role of Australian intelligence agencies in investigating residents with alleged Nazi affiliations was further restricted; they were legislatively limited to reporting on war criminals and Nazi officials who posed a present threat to the security of the State.²⁰⁹

Mr. Menzies also noted that Australia's security apparatus in Europe for detecting war criminals had been inadequate. IRO screening was superficial and the standards established by Australia often were disregarded. Australian security officials reviewing migrants endorsed by the IRO typically lacked the required training and language skills and expressed misplaced confidence in the IRO. Immigration officials found themselves overwhelmed by the number of applicants and reportedly were pressured to act expeditiously in order to fill empty berths on ships departing for Australia. The problems confronting Australian officials were compounded by the difficulty of detecting forged documents and investigating the wartime activities of individuals who claimed that their documents were lost or destroyed.²¹⁰

These difficulties were exacerbated by the limited data on Eastern Europeans which was available from the Berlin Documents Center, the United States' central depository of Nazi documents. The lists of war criminals that were compiled by the Allies and the United Nations also were incomplete and poorly organized.²¹¹ An additional problem was that Australian security officials were not authorized to check the security background of refugees or applicants resident in various countries, including France, Italy, and the United Kingdom.²¹² Security officials also were assigned to other countries, such as the Netherlands, until the early 1950s and host governments often withheld information which they did not consider incriminating. At the same time, Australia continued to relax the limitations on immigration. For instance, by 1956, Australia began to admit Dutch collaborators on a case-by-case basis.²¹³

In addition, immigration officials were impatient with the slow security screening process and permitted a number of German migrants to enter Australia without having received security clearances. Several of these individuals later were determined to have been ineligible for admission. In one instance, a member of the notorious Totenkopf Unit of the SS, which staffed the concentration camps, was granted an immigration permit prior to the is-

209. *See id.* at 60-62.

210. *See id.* at 60-70. The third stage involved a review by the Combined Travel Board which was comprised of representatives of Britain, France, and the United States. *See id.* at 71.

211. *See id.* at 74-84.

212. *See id.* at 74-75.

213. *See id.* at 82-84.

suance of his security clearance.²¹⁴ The Australian government nevertheless failed to make use of the procedures in the displaced persons program for deporting individuals deemed to be undesirable within two years of their arrival. The government rationalized this inaction on the grounds that it was improbable that suspected war criminals violated the security screen.²¹⁵

Mr. Menzies reviewed a number of specific cases. One such case was that of Sprecko Rover, who entered Australia and was naturalized as a citizen in 1956. The evidence indicated that Rover was an active and decorated member of the fascist Yugoslav Ustashi, which engaged in mass atrocities against partisans and civilians. In 1941, he allegedly served in the so-called mobile court martial which carried out summary executions. Menzies concluded that this information was not available to IRO or to Australian officials at the time that Rover applied for an immigration visa. Rover and his family apparently made a strong impression on security officials and provided a false, but convincing, account of his wartime activities. Rover also migrated from Italy, a country in which Australian officials were not permitted to carry out independent security checks.²¹⁶ The Rover case, thus, pointed to the porous nature of the Australians' security screening of prospective migrants.

Another case reviewed by Mr. Menzies was that of Lazlo Megay, mayor of Ungvar in Hungary. Mr. Megay was allegedly involved in the persecution of Jews. He nevertheless was able to migrate to Australia in 1950.²¹⁷ Menzies could only echo the conclusion which he had reached in several other cases: "[h]ow Mr. Megay passed the security checking process for migration to Australia must remain a mystery."²¹⁸

In the end, Menzies examined allegations of war crimes against nearly 200 persons known to have migrated to Australia, most of whom were from Eastern or Southeastern Europe.²¹⁹ These individuals generally were alleged to have participated in deporting, ill-treating, or murdering persons on racial or political grounds, or were suspected of having participated as guards or administrators at German concentration camps, or had served as officials in pro-Nazi puppet regimes. Menzies did not pursue allegations concerning the production of propaganda or membership in various fascist organizations in Nazi-controlled Europe on the grounds that these delicts were not sufficiently serious to warrant legal action forty years following the termination of the war.²²⁰ However, based upon his preliminary inquiry, Menzies con-

214. *See id.* at 76-78.

215. *See id.* at 85.

216. *See id.* at 87-91.

217. *See id.* at 97-100.

218. *Id.* at 101. Menzies failed to find evidence that American or British intelligence agencies misled or conspired with Australian officials to provide for the entry of alleged Nazi war criminals who had cooperated with the Allied Powers following the war. *Id.* at 107-08.

219. *See id.* at 118, 122.

220. *See id.* at 121-23.

cluded that "it is more likely than not that a significant number of persons who committed serious war crimes in World War II entered Australia; certainly the likelihood of this is such that some action needs to be taken."²²¹ Menzies again stressed that these individuals generally had not gained entry as a result of a conscious policy of the Australian government.²²² Most were admitted as a result of "serious limitations . . . in numbers and [the] geographical spread of staff available to do the necessary checking and the equally serious gaps in the data against which Australian security officers would have made their checks"²²³

Mr. Menzies proceeded to review the legal remedies available to the Australian government. Requests had been made for the extradition of six alleged war criminals since World War II, all of which were rejected. These decisions were based on various rationales: an insufficiency of evidence;²²⁴ a reluctance to extradite offenders to communist States; and the lack of a bilateral extradition treaty. However, in each case, the fundamental rationale for the refusal to extradite was the belief that these types of cases no longer should be pursued.²²⁵

Menzies recognized that extradition had inherent limitations as a mechanism for bringing accused war criminals to justice. A request had to be lodged by a foreign government who had an extradition agreement with Australia. The offense for which extradition was sought must be encompassed within the terms of the treaty and there must be a substantial basis for believing that the accused committed the crime and would be accorded due process protections. Despite these obstacles, Menzies concluded that extradition could prove effective so long as the Australian government committed itself to cooperating in good faith with foreign States in bringing war criminals to justice. However, he recognized that extradition was not appropriate in every instance because some countries lacked an equitable and fair system of justice.²²⁶

On the other hand, Mr. Menzies argued that deportation did not provide a viable alternative. Deportation only was available in Australia against a non-citizen who obtained an entry permit by false representation. However, it was inapplicable in those instances in which an individual had proceeded to obtain citizenship and thus would be unavailable against virtually all of the alleged war criminals resident in Australia. Menzies also noted that under existing law, it was questionable whether deportation was available even following the revocation of an individual's citizenship. At any rate, an action to revoke citizenship which was obtained through false representation or the

221. *Id.* at 125.

222. *See id.*

223. *Id.*

224. *See id.* at 151-55.

225. *See id.* at 151-52.

226. *See id.* at 153-55.

concealment of a material fact was required to be commenced within ten years and thus would be inapplicable against most alleged war criminals resident within Australia. Menzies further noted that poorly preserved and incomplete immigration records would make it difficult to establish that a migrant made a false or misleading statement or concealed a material circumstance.²²⁷ Prior to deporting an individual, Australia also would need to locate a country prepared to accept the deportee. In addition, Australian courts likely would resist deporting a suspected war criminal to a country intending to initiate a prosecution, viewing such a procedure as a form of disguised extradition. This would effectively insulate the individual from legal accountability.²²⁸ Mr. Menzies concluded that deportation was both an impractical and unprecedented mechanism for bringing suspected war criminals to justice. Support for this lies in the fact that in the last thirty years, only two individuals had been deprived of citizenship in Australia, neither of whom had been deported.²²⁹

Criminal prosecution provided a third alternative. The existing Australian war crimes statutes were enacted immediately following World War II and authorized the prosecution of individuals before military courts. The tribunals' jurisdiction was limited to violations of the laws and usages of war committed during an armed conflict, regardless of the location of the crime. The Act extended to crimes committed against a person who was at any time resident in Australia, or against a British subject or a citizen of a power allied or associated with his Majesty. Mr. Menzies argued that it was unthinkable that civilians resident in Australia should be brought before a military court forty years following the close of World War II. He also was critical of the fact that the Act imposed the same penalties for all varieties of war crimes. In addition, there was some doubt whether the statute encompassed the vast number of war crimes that were committed by individuals currently living in Australia. These offenses generally were committed against the residents of the Baltic States during World War II. Because Australia had not recognized the Soviet's annexation of these territories, the defendant's criminal acts thus could not be considered to have met the statutory standard of having been directed against the citizens of an Allied Power.²³⁰

Menzies recommended investing civilian courts with jurisdiction over war crimes, limiting the statute to serious war crimes warranting harsh penalties or providing for a range of penalties which fit the seriousness of various crimes, and clarifying that war crimes against persons resident in the Baltic States were covered by the Act. These modifications would not constitute retroactive punishment since war crimes were established as a violation of international law at the beginning of the twentieth century. However,

227. *See id.* at 156-58.

228. *See id.* at 161-62.

229. *See id.* at 157-58.

230. *See id.* at 163-64.

Mr. Menzies cautioned that the relevant witnesses likely would be found in the territories in which the crimes were committed. As a result, these prosecutions likely would be complicated, time-consuming, and expensive. Mr. Menzies therefore concluded that trials in Australia only should be undertaken if it appeared that a major war criminal otherwise would not be brought to the bar of justice. Mr. Menzies adopted no position as to whether the existing War Crimes Act should be amended or whether entirely new legislation should be adopted.²³¹ Whatever course was pursued, he recommended the establishment of a special unit to enforce the legislation, carry out deportations, and to review extradition requests.²³²

Mr. Menzies conceded that the utilization of evidence obtained from the Soviet Union presented problems of reliability. He nevertheless noted that there was no reported instance of a falsified or fraudulent Soviet document and expressed confidence that Australian courts were fully capable of evaluating the integrity of evidence.²³³

In sum, Mr. Menzies concluded that it was likely that a significant number of persons who committed serious war crimes entered and currently were resident in Australia. They inadvertently were admitted into Australia as a result of the limitations in the number and geographical assignment of security personnel in Europe and the lack of pertinent security data. Mr. Menzies urged the Australian government to make a renewed commitment to bring these war criminals to justice.²³⁴ He recommended the adoption of a war crimes statute which would provide Australian courts with jurisdiction over acts abroad against Australian or Allied citizens or combatants in violation of the laws and customs of war committed.²³⁵ Menzies stressed that the prosecution of war criminals should be undertaken without compromising customary standards of justice and that legal investigations should avoid promoting prejudice against ethnic groups within the Australian community.²³⁶

B. Polyukhovich v. Australia

In 1989, the Parliament of the Commonwealth of Australia passed the War Crimes Amendment Act of 1988.²³⁷ The preamble proclaimed that concern had arisen that a number of persons who committed serious war crimes in Europe may have entered Australia and become Australian citizens or residents.²³⁸ The Statute went on to observe that it was appropriate that such

231. *See id.* at 164-66.

232. *See id.* at 168.

233. *See id.* at 145.

234. *See id.* at 177-80.

235. *See id.* at 164.

236. *See id.* at 180.

237. *See* War Crimes Amendment Act, 1988 (Austl.) [hereinafter Australian Act].

238. *See id.* pmb1.

individuals should be brought to trial in ordinary criminal courts and accorded a fair trial with all the requisite safeguards, "having particular regard to matters such as the gravity of the allegations and the lapse of time since the alleged crimes."²³⁹

The Act defined war crimes in relation to Australian domestic law. Article six stated that an act was a "serious crime" if it was "done in a part of Australia and was, under the law then in force in that part," either the offense of murder, manslaughter, causing grievous bodily harm, wounding, rape, indecent assault, or abduction.²⁴⁰ Article Seven provided that a "serious crime" was a "war crime" provided that it was committed in the course of hostilities; belligerent occupation; or in conjunction with a policy associated with such acts; or committed on behalf of a power conducting a war or engaged in an occupation.²⁴¹ A "serious crime" also was a "war crime" when committed

in the course of political, racial or religious persecution; or with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such; and . . . [was] committed in the territory of a country when the country was involved in a war or . . . was subject to an occupation.²⁴²

Article Nine further established that a war crime under the Act was limited to the period between September 1, 1939, and May 8, 1945.²⁴³

Only Australian citizens or residents were punishable under the Statute.²⁴⁴ Article Sixteen provided that the fact that an individual acted under the orders of his or her government or of a superior did not constitute a defense, but might be taken into account in sentencing.²⁴⁵ Article Seventeen added that it was a defense that the defendant's act was permitted by the laws, customs and usages of war and did not constitute a crime against humanity under international law.²⁴⁶ The Act clarified that the defendant's act was "permitted by the laws, customs and usages of war if it was reasonably justified by the exigencies and necessities of the conduct of war."²⁴⁷ The willful killing of an individual was punished by imprisonment for life while the punishment for any other offense was imprisonment for not more than twenty-five years.²⁴⁸

The Australian High Court upheld the constitutionality of the War

239. *Id.* pmbl., 135-36.

240. *Id.* art. 6. Accessoryship, attempt, or concern in such offenses also are punishable. *Id.* art. 6(k).

241. *Id.* art. 7(a)-(d).

242. *Id.* art. 7(3)(a).

243. *See id.* art. 9.

244. *See id.* art. 11.

245. *See id.* art. 16.

246. *See id.* art. 17(2)(a)(b).

247. *Id.* art. 17(2)(a)(b)-(3).

248. *See id.* art. 10.

Crimes Statute in *Polyukhovich v. The Commonwealth*.²⁴⁹ Ivan Polyukhovich immigrated to Australia from the Ukraine following World War II and subsequently was naturalized as an Australian citizen. He later was charged with having committed war crimes between September 1, 1942, and May 1943, during the period in which the Ukraine was under German occupation. There was no Australian criminal legislation at the time of Polyukhovich's acts which made it a criminal offense for an Australian citizen to have engaged in war crimes in the Ukraine. Polyukhovich brought an action seeking a declaration that the War Crimes Amendment Act of 1988 was unconstitutional.²⁵⁰

Chief Justice Anthony Mason directed the Court to address two issues. The first issue was whether the War Crimes Act was beyond parliament's legislative powers with respect to defense and external affairs. The second issue was whether the Act, by specifying that past conduct constituted a criminal offense, had made an invalid attempt to usurp the judicial power of the Commonwealth.²⁵¹

The Chief Justice noted that Parliament possessed plenary power to determine whether an Act concerned an area of extra-territorial concern to Australia. He observed that it was inconceivable that the Court should overrule a legislative determination that Australia possessed an interest in the subject matter of the War Crimes Act. Justice Mason thus found it of little concern whether the law fulfilled Australia's obligations under international law, implemented a resolution of an international body, or facilitated the exercise of international jurisdiction.²⁵²

Chief Justice Mason also ruled that parliament was empowered to create a retroactive criminal offense.²⁵³ The only limitation was that Parliament was not authorized to enact a bill of attainder which adjudged a specific person guilty for a past, legally permissible act. The latter would impinge on judicial prerogatives in contravention of the separation of powers. Mason thus dismissed Polyukhovich's claim, observing that

[I]t has never occurred to anyone to suggest that an *ex post facto* law . . . not being a bill of attainder, could amount to a usurpation of judicial power because such an *ex post facto* law simply does not amount to a trial by legislature.²⁵⁴ It leaves for determination by the court, the issues which would arise for determination under a prospective law.²⁵⁵

Justice Daryl Dawson, in his concurring opinion, argued that there was a strong presumption against interpreting a criminal statute so as to impose retroactive punishment. The *ex post facto* punishment of war crimes, how-

249. (1991) 172 C.L.R. 501.

250. *See id.* at 523 (Sir Anthony Mason, C.J.).

251. *See id.*

252. *See id.* at 531, 605.

253. *See id.* at 534-49.

254. *Id.* at 540.

255. *Id.*

ever, was singularly justifiable, particularly when such acts already were punishable when committed in Australia. At any rate, the wrongful nature of the war crimes made punishable under the Act should have been apparent to Polyukhovich.²⁵⁶ Justice John Toohey also dismissed the claim of retroactivity. Toohey observed that the plaintiff knowingly was involved in the murder of roughly 850 Jews in the village of Serniki. This certainly was a crime in the Ukraine and it was difficult to accept that Polyukhovich was unaware that he might be subject to criminal prosecution and punishment.²⁵⁷

Justice Toohey also noted that the Act did not constitute a bill of attainder as it did not punish particular individuals and provided that guilt should be determined at trial. Penal punishment was not vicariously imposed on all members of the government and military of the European Axis countries. Instead, criminal culpability under the Act only was imposed on those who were demonstrated at trial to have possessed the necessary state of mind, and whose conduct either constituted murder, manslaughter, wounding, or various sexual offenses.²⁵⁸

Justice Francis Brennan drafted a detailed and demonstrative dissent²⁵⁹ which was supported by the separate opinions of Justices William Deane²⁶⁰ and Mary Gaudron.²⁶¹ Brennan contended that the Act was retrospective in application in that it attached penalties under Australian municipal law to acts that were within Australia's criminal jurisdiction at the time they had been committed. Polyukhovich's alleged conduct constituted heinous offenses against the laws of the Ukraine and the laws and customs of war. Yet, he was charged under a retrospective statutory scheme with delicts under Australian municipal law.²⁶²

Justice Brennan argued that parliament only was entitled to legislate on extraterritorial matters in those instances in which there was a nexus between Australia and the subject of the statute. This was satisfied in those instances in which a law purported to protect or to control the extraterritorial conduct of Australian citizens or residents. However, the War Crimes Act did not require Australian involvement in an armed conflict as a condition for vesting jurisdiction in a domestic court. Brennan noted that he was "unable to see how an act by an individual in the course of any European armed conflict occurring between 1 September 1939 and 8 May 1945 could be regarded, without more, as an aspect of Australia's external affairs in 1989."²⁶³ Brennan added that an individual's subsequent acquisition of Australian citi-

256. *See id.* at 642, 643 (Dawson, J.).

257. *See id.* at 651, 690-91 (Toohey, J.).

258. *See id.* at 685. Justice Michael McHugh joined Mason, Dawson, and Toohey in upholding the constitutionality of the War Crimes Act. *See id.* at 708.

259. *See id.* at 540 (Brennan, J.).

260. *See id.* at 593 (Deane, J.).

261. *See id.* at 693 (Gaudron, J.).

262. *See id.* at 548 (Brennan, J.).

263. *Id.* at 553.

zenship or residence did not transform conduct that was not within Australia's external affairs power into a matter of constitutional concern.²⁶⁴ Justice Brennan also rejected the argument that Australia was fulfilling an international obligation to the community of nations by bringing Polyukhovich to trial. He failed to find a conventional or customary norm that stipulated that States were under a legal obligation to seek out Axis war criminals and to bring them to trial.²⁶⁵

In addition, Justice Brennan argued that the War Crimes Act was a retrospective statute. He argued that international law prohibited the *ex post facto* creation of international crimes and condemned retrospective municipal criminal punishment as contrary to human rights. The Nuremberg crimes were recognized by international law prior to the convening of the International Military Tribunal.²⁶⁶ The Australian statute, however, did not incorporate the Nuremberg standard. Instead, it subjected members of an enemy force to municipal law in respect to acts committed during wartime. The jury was authorized to acquit an individual in those cases in which his or her act was "reasonably justified by the exigencies and necessities of the conduct of war."²⁶⁷ The Statute thus made the laws and customs of war an excuse rather than a source of liability. A jury might determine that an act was not "reasonably justified" despite the fact that it was consistent with the code of armed conflict.²⁶⁸ The Australian statute, according to Justice Brennan, thus possessed the fatal flaw of creating a retrospective municipal offense that was in "disconformity" with war crimes as defined by the community of nations.²⁶⁹

Brennan next turned his attention to Article 7(3) of the Australian statute. That article described serious offenses as: 1) a war crime that was committed in the course of political, racial, or religious persecution; or 2) a war crime that was committed with the intent to destroy in whole or in part a national, ethnic, racial, or religious group, as such.²⁷⁰ These acts were required to have been committed in the territory of a country that was involved in World War II or which was subject to occupation. The "intent to destroy" standard was intended to punish the crime of genocide, which Brennan contended was not recognized as a crime during World War II under either international or Australian law. He also contended that the racial persecution language was aimed at punishing crimes against humanity, which also was considered a distinct offense, separate and apart from war crimes, until following World War II. Brennan thus determined that Australia lacked a claim

264. *See id.* at 555.

265. *See id.* at 560.

266. *See id.* at 572-73, 575.

267. *Id.* at 580.

268. *Id.* at 578.

269. *Id.* at 579.

270. *See id.* at 588, discussing War Crimes Act, 1988. *See supra* note 258 and accompanying text.

under international or municipal law to prosecute defendants for these offenses.²⁷¹

Justice Brennan concluded that the prerogative to punish war criminals was premised on the violation of international law. However, a retrospective municipal law, such as the Australian War Crimes Act,²⁷² which varied from the international standard, did not provide a basis for universal jurisdiction.²⁷³ Brennan also observed that the statute's abrogation of the "superior orders" defense was not clearly in accord with international law, which appeared to permit the defense in those instances in which an order was not manifestly illegal.²⁷⁴ He noted, in conclusion, that the law was fatally discriminatory in that it had singled out former combatants of the Axis Powers who were suspected of having committed war crimes.²⁷⁵

The majority thus upheld the Act as an expression of the plenary parliamentary power to legislate on matters of international relevance and to impose retroactive criminal liability,²⁷⁶ particularly over matters of central concern.²⁷⁷ The judges observed that the objection that the Act imposed retroactive punishment was weakened by the fact that Polyukhovich should have been aware of the international prohibition on war crimes at the time that he committed his alleged delicts.²⁷⁸ The dissenters objected that the extra-territorial conduct condemned in the War Crimes Act did not possess a sufficiently close connection with Australia and was not of constitutional concern.²⁷⁹ The dissent also pointed out that the Act defined war crimes in accordance with domestic standards of conduct rather than pre-existing international law.²⁸⁰ The acts condemned under the War Crimes Act were not punishable under Australian municipal law at the time that they were committed and, as a result, the dissent argued that the Australian statute constituted an *ex post facto* law.²⁸¹

V. SUMMARY: UNITED KINGDOM, CANADA, AND AUSTRALIA

The United Kingdom, Canada, and Australia all experienced an influx of migrants following World War II.²⁸² The inefficiency and disorganized nature of post-war immigration procedures and records resulted in a number

271. *See id.* at 588-89.

272. *See id.* at 590, discussing War Crimes Act, 1988. *See supra* notes 253-64 and accompanying text.

273. *See id.* at 589.

274. *Id.* at 583-85.

275. *Id.* at 593.

276. *See Polyukhovich*, 172 C.L.R. at 531, 540.

277. *See id.* at 540, 642-43 (Dawson, J.).

278. *See id.* at 642-43.

279. *See id.* at 553.

280. *See id.* at 578-80.

281. *See id.* at 579.

282. *See, e.g., supra* notes 105, 206-08 and accompanying text.

of alleged war criminals gaining entry into the three countries.²⁸³ Most of these individuals were anti-Russian nationalists who served under the German occupation forces in the Baltic States and the Soviet Union.²⁸⁴ The Allied Powers' determination to bring alleged war criminals to trial gradually gave way to a desire to rebuild the war-torn Western European states and to create a strong anti-Soviet liberal democratic coalition. There was little interest in conducting trials that might rekindle wartime animosities or undermine the stability of West Germany.²⁸⁵ Embarrassed by the disclosure that alleged war criminals had entered their countries following the war, the governments of the United Kingdom, Canada, and Australia each convened commissions to study the extent and solution of this problem. The consensus was that primary reliance should be placed upon domestic criminal prosecutions to bring alleged war criminals to justice.²⁸⁶

The three countries each adopted statutes which provided for the punishment before domestic courts²⁸⁷ of individuals accused of committing war crimes during World War II.²⁸⁸ Jurisdiction was limited to those who presently were citizens or residents, regardless of their status at the time they committed the crimes with which they were charged.²⁸⁹ The English Act was a straightforward application of international law and was limited to the punishment of murder, manslaughter, or culpable homicide committed during World War II in violation of the laws and customs of war.²⁹⁰ In contrast, the Canadian law punished the full range of war crimes and crimes against humanity,²⁹¹ while the Australian legislation encompassed serious domestic crimes that constituted war crimes or crimes against humanity.²⁹²

The latter two countries adopted complex statutory schemes which were intended to provide secure jurisdictional bases for the extra-territorial assertion of domestic criminal law and to rebut claims of retroactivity. The Canadian statute punished war crimes and crimes against humanity defined in general conformity with the Nuremberg standard. These acts were punishable under the Act providing that they would have constituted offenses against the laws of Canada in force at the time of their commission.²⁹³ The Act, thus, incorporated the legal fiction that war crimes and crimes against humanity were committed in Canadian territory and thus fell within Canada's territorial jurisdiction. The requirement that such acts constituted vio-

283. See, e.g., *supra* notes 103, 210-14 and accompanying text.

284. See, e.g., *supra* notes 101-02, 106 and accompanying text.

285. See, e.g., *supra* notes 136-37, 209 and accompanying text.

286. See, e.g., *supra* notes 120, 150-51 and accompanying text.

287. See, e.g., Australian Act, *supra* note 237 and accompanying text.

288. See, e.g., English Act, *supra* note 122 and accompanying text.

289. See, e.g., *id.* and accompanying text.

290. See *id.* and accompanying text.

291. See, e.g., Canadian Act, *supra* note 167 and accompanying text.

292. See *supra* notes 240-42, 247 and accompanying text.

293. See *supra* note 168 and accompanying text.

lations of Canadian law in force at the time appears to have been intended to anticipate and to rebut the claim that the amendments to the Canadian code constituted retroactive enactments.²⁹⁴

The Australian Act defined serious crimes in accordance with domestic law.²⁹⁵ These serious crimes were considered to be war crimes when committed during the course of wartime or belligerent occupation.²⁹⁶ The humanitarian law of war was conceived as a defense to criminal culpability rather than as a basis of penal liability.²⁹⁷ This scheme thus limited war crimes to severe acts and attempted to avoid the uncertainty of international law by casting the statutory definitions in terms of domestic doctrine.²⁹⁸

It remains to be seen whether criminal prosecutions of suspected war criminals conducted in the United Kingdom, Canada, and Australia will serve to vindicate the cause of justice. The prosecution will be forced to engage in the arduous task of gathering evidence from abroad. The passage of time and the desire of individuals to exact retribution may create questions concerning the reliability of documents, depositions, and eyewitness identifications. These concerns likely will be exacerbated by the potential problems involved in translating documents, transcribing interviews, and locating witnesses. The larger issue is the propriety of prosecuting naturalized citizens or residents for crimes committed abroad over forty years ago. Most alleged war criminals are elderly and infirm and nearing the end of their lives. They have made social and economic contributions to the countries in which they now live and, in return, these countries, until recently, have chosen to ignore their past transgressions.²⁹⁹

There also is a question concerning the philosophical rationale for prosecuting alleged war criminals in countries that are distant from the situs of the defendant's alleged crimes. An English, Canadian, or Australian judge and jury clearly will bring an objective and neutral stance and legal credibility to these prosecutions. But, these tribunals likely will lack an emotional investment in the outcome of the trials and their verdicts may carry limited moral weight. Trials conducted in England, Canada, or Australia will not serve to compel the States that were involved in the defendant's crimes to confront the past and will do little to educate the populace on the dangers of totalitarianism. On the other hand, most countries have little interest in bringing Nazi functionaries or collaborators to trial and in drawing public attention to the often embarrassing events which transpired during the Third Reich. Domestic criminal prosecutions within Canada, the United Kingdom, and Australia may be the only available mechanism for bringing these alleged war criminals to the bar of justice. However, the question remains

294. See generally *supra* note 187 and accompanying text.

295. See Australian Act, *supra* note 237 and accompanying text.

296. See *supra* notes 240-41 and accompanying text.

297. See *supra* note 249 and accompanying text.

298. See generally *supra* notes 239-41 and accompanying text.

299. See *supra* notes 117-20 and accompanying text.

whether these statutory schemes are serious or merely symbolic. Even if serious, will the procedural and evidentiary difficulties undermine the effectiveness of these efforts?³⁰⁰

VI. THE UNITED STATES AND NAZI WAR CRIMINALS

A. *The Ryan Report*

The United States had adopted a significantly different approach to the disposition of Nazi war criminals. In March 1983, the Justice Department directed Allan Ryan, head of the Office of Special Investigations, to examine the relationship between alleged Nazi war criminal Klaus Barbie and the United States government.³⁰¹ Klaus Barbie served as head of the Gestapo in Lyon, France, between November 1942 and the summer of 1944.³⁰² Barbie's primary concern was with combating the French resistance and he was infamous for abusively interrogating and torturing detainees.³⁰³ The most infamous episode involved his apprehension and execution of the partisan patriarch, Jean Moulin.³⁰⁴ Barbie also pursued, detained, and deported an incalculable number of Jews.³⁰⁵ His zealous pursuit of his semitic prey culminated in a raid on an isolated mountain orphanage in Izieu and the dispatch of forty-two Jewish children to their death.³⁰⁶ As the war drew to a close, Barbie ordered his retreating troops to engage in a spree of slaughter against the French populous.³⁰⁷

Following World War II, the French informed the United Nations War Crimes Commission that the fugitive Klaus Barbie was wanted for murder, massacre, systematic terrorism, and the execution of hostages.³⁰⁸ Barbie, however, managed to disappear into the disarray of post-War Europe and made his way to South America. It was not until the early 1970s that the French discovered that he had taken refuge in Bolivia. The Bolivian Supreme Court refused an extradition request in December of 1974 on the grounds that there was no treaty between France and Bolivia. In December 1982, Bolivia, embarrassed by Barbie's continued presence, expelled him. The French apprehended Barbie as his plane set down in French Guyana and

300. See generally Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463 (1995).

301. See ALLAN RYAN, U.S. DEP'T OF JUSTICE, *KLAUS BARBIE AND THE UNITED STATES GOVERNMENT, A REPORT TO THE ATTORNEY GENERAL OF THE UNITED STATES* (1983) [hereinafter *Ryan Report*].

302. See ERNA PARIS, *UNHEALED WOUNDS, FRANCE AND THE KLAUS BARBIE AFFAIR* 78, 99 (1985).

303. See *id.* at 94-95.

304. See *id.* at 106.

305. See *id.* at 96-97.

306. See *id.* at 210-12.

307. See *id.* at 99.

308. See *Ryan Report*, *supra* note 301, at 12.

spirited him to Lyon for trial.³⁰⁹ He was subjected to prosecution and, in July 1987, he was convicted of seventeen different counts of crimes against humanity.³¹⁰

The Ryan report determined that following the war, Region IV of the United States Counter-Intelligence Corps (CIC) in Germany deployed Barbie as an agent to report on French, Soviet, and Nazi intelligence activities.³¹¹ The Americans, according to Ryan, subordinated their concern over employing a former Gestapo officer to their interest in combating the communist threat. The report stressed that the United States had a firm policy against employing war criminals and that there was no clear and convincing evidence that the Americans initially were aware of Barbie's wartime activities in Lyon.³¹²

In 1949, French newspapers alleged that Klaus Barbie was residing in the American zone in Germany.³¹³ United States intelligence headquarters quietly directed that Barbie should be dropped as an informant pending an investigation, but were well aware that local agents continued to employ Barbie as an agent. Intelligence officials later accepted Barbie's denial of the French accusations and took no additional steps to investigate the matter.³¹⁴ They also refrained from revealing Barbie's whereabouts to civilian decision-makers in Washington who continually communicated to the French that they lacked knowledge of Barbie's activities and movements.³¹⁵

The CIC continued to employ Barbie while simultaneously denying knowledge of Barbie's presence and activities.³¹⁶ However, they were apprehensive that either the American military, German police, or French secret service would discover him. It was feared that this would lead to the disclosure of Barbie's involvement with the United States, strain Franco-American relations, and compromise American intelligence activities.³¹⁷ As a result, despite the fact that CIC agents and officials by late 1950 had learned of Barbie's activities in Lyon,³¹⁸ they arranged for him and his family to be smuggled into Bolivia through an underground network directed by a Croatian Catholic priest who remained sympathetic to the fascist cause.³¹⁹

Ryan concluded that the United States had little choice in its battle against Communism, other than to rely upon experienced, knowledgeable,

309. See *Federation Nationale des Deportés et Internes Résistants et Patriotes v. Barbie*, 78 I.L.R. 125 (Court of Cassation 1985).

310. See *Federation Nationale des Deportés et Internes Résistants et Patriotes v. Barbie*, 100 I.L.R. 331 (Court of Cassation 1988).

311. See Ryan Report, *supra* note 301, at 37-39.

312. See *id.* at 49-53.

313. See *id.* at 71-72.

314. See *id.* at 78-80.

315. See *id.* at 87-88, 91-92.

316. See *id.* at 116, 119-20.

317. See *id.* at 121-22.

318. See *id.* at 146-47.

319. See *id.* at 36-37.

and politically reliable former intelligence officials such as Barbie. The Americans found Barbie to be an effective and professional operative and initially, were unaware that the former Gestapo officer who was in their employ was a suspected war criminal. Ryan recognized that some objected to this pragmatic position and believed that the employment of a former Gestapo officer betrayed those who died in defense of the United States.³²⁰

Ryan noted that the former argument was based on a regard for the future interests of the United States while the latter was based on the legacy of the past. Those conscientious individuals who decided to utilize Barbie, in Ryan's view, had made a difficult and defensible decision to defend the interests of the United States against the communist threat. This was indistinguishable from the policies pursued by the other Allied Powers.³²¹ Ryan stressed that he considered it illegitimate to employ former war criminals, but that United States officials only learned of Barbie's depredations after he worked for the Allied Powers for several years.³²² However, he criticized the CIC's decision to secretly smuggle Barbie to South America as having constituted an effort to impede Barbie's extradition to the French. It clearly was unacceptable to frustrate the prosecution of a war criminal in order to avoid the possible divulgence of embarrassing revelations.³²³ This cover-up continued until 1972, when the French government discovered that Barbie was living in Bolivia under the assumed name of "Altmann."³²⁴

The revelations concerning United States involvement with Klaus Barbie were followed by the disclosure that the United States had admitted a number of former Nazi scientists following the war. These individuals helped to fuel the American space program and to augment the United States' military might.³²⁵ However this group also included doctors who had been involved in compelling concentration camp inmates to participate in human aviation experiments³²⁶ as well as Nazi sympathizers, such as scientist Arthur Rudolf, who had been involved in utilizing slave labor at the Nordhausen bomb factory.³²⁷ A total of roughly 1,558 scientists ultimately entered the United States.³²⁸

Of course, the vast number of Nazi war criminals resident in America were admitted as part of the influx of over 400,000 European immigrants following the war. The United States established generous quotas for refu-

320. *See id.* at 191-93.

321. *See id.* at 192-95.

322. *See id.* at 195-97.

323. *See id.* at 204-05, 208.

324. *Id.* at 214.

325. *See* TOM BOWER, *THE PAPER CLIP CONSPIRACY AND THE HUNT FOR NAZI WAR CRIMINALS* 272 (1989).

326. *See* Ryan Report, *supra* note 301, at 214, 231-32, 255.

327. *See id.* at 111, 275-77.

328. *See* ROCHELLE G. SADDLE, *THE OUTRAGED CONSCIENCE: SEEKERS OF JUSTICE FOR NAZI WAR CRIMINALS IN AMERICA* 5 (1984).

gees from the Baltic States and for Germans who resettled in the occupied territories. These preferences, along with the policy of admitting any individual who professed to having worked as an agricultural worker and the problems associated with conducting accurate background checks,³²⁹ led to the inadvertent admission of between 1,000-10,000 Nazi war criminals.³³⁰

B. The Holtzman Amendment

The United States government has filed a number of denaturalization actions seeking to deprive alleged Nazi war criminals of their American citizenship. Typically then, these denaturalized aliens have been subjected to deportation proceedings. The actions have been based on various statutory provisions that are sketched below.³³¹

The United States, as a first step towards resettling European refugees following the war, joined the other Allied Powers in adopting the Constitution of the IRO.³³² This provided international standards for policies towards refugees and displaced persons.³³³ Congress subsequently implemented the IRO Constitution by adopting the Displaced Persons Act of 1948 (DPA).³³⁴ The IRO Constitution excluded from the category of displaced persons eligible for resettlement, war criminals, quislings, traitors, and individuals who assisted in the persecution of civil populations.³³⁵ The DPA broadly implemented this provision by excluding from entry any person who is or has been a member of, or has participated in, any movement which is, or has been, hostile to the United States or the form of government of the United States.³³⁶ Section 2(b) of the DPA also incorporated, by reference, the definitions of a refugee and of a displaced person contained within the IRO Constitution.³³⁷ In 1950, the DPA was amended to more closely reflect the IRO standard and specifically excluded from displaced person status "any person who advocated or assisted in the persecution of any person because of race, religion, or national origin or . . . who has voluntarily borne arms against the

329. See ALLAN A. RYAN, JR., QUIET NEIGHBORS PROSECUTING NAZI WAR CRIMINALS IN AMERICA 325-27 (1984).

330. See CHARLES R. ALLEN, JR., NAZI WAR CRIMINALS IN AMERICA: FACTS . . . ACTION THE BASIC HANDBOOK 1 (1985). See generally HOWARD BLUM, WANTED! THE SEARCH FOR NAZIS IN AMERICA (1977); CHARLES HIGHAM, AMERICAN SWASTIKA (1985).

331. See generally K. Lesli Ligorner, *Nazi Concentration Camp Guard Service Equals "Good Moral Character?"* United States v. Lindert, 12 AM. U.J. INT'L L. & POL'Y 145 (1997).

332. See Constitution of the International Refugee Organization, 62 Stat. 3037 (1948) [hereinafter IRO Constitution].

333. See *id.* art. 1, 62 Stat. at 3038.

334. See Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 [hereinafter Displaced Persons Act I], as amended by Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219 (expired 1952) [hereinafter Displaced Persons Act II].

335. See IRO Constitution, *supra* note 332, annex I, pt. 2, 62 Stat. at 3051-52.

336. See Displaced Persons Act I, *supra* note 334, § 13, 62 Stat. at 1014.

337. See *id.* § 2(b), 62 Stat. at 1009.

United States during World War II.”³³⁸ Section 10 of the DPA provided that any individual was inadmissible who willfully made a misrepresentation in order to gain entrance into the United States.³³⁹

The Refugee Relief Act of 1953 (RRA) was intended to assist post-World War II refugees fleeing communist-controlled Europe.³⁴⁰ The Refugee Relief Act, while not specifically excluding the perpetrators of war crimes, provided in section 14(a) that entry visas were not to be issued to individuals who “advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin.”³⁴¹

The Immigration and Nationality Act of June 27, 1952 (INA) established the structure of contemporary United States immigration and nationality law.³⁴² The INA sets forth various classes of aliens who are subject to deportation from the United States. This includes individuals who procured a visa or other documentation, or who entered the United States by fraud or by willful misrepresentation of a material fact,³⁴³ individuals who, before entering the United States, were convicted of a crime involving moral turpitude or who admitted to having committed such a crime;³⁴⁴ individuals with past or current membership in, or affiliation with, any totalitarian party, its affiliates, or predecessor or successor organizations;³⁴⁵ and individuals who, upon their entry into the United States, were excludable under existing laws, such as the Displaced Persons or the Refugee Relief Acts.³⁴⁶

The Act of October 30, 1978, sponsored by Congresswoman Elizabeth Holtzman of New York, modified the INA specifically to exclude Nazi war criminals from eligibility to receive entry visas³⁴⁷ and made such individuals deportable if found within the United States.³⁴⁸ The Act applies to any alien who, between March 23, 1933, and May 8, 1945, in conjunction with the Nazi government or an associated government, “ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.”³⁴⁹ Individuals who engaged in genocide also were excludable.³⁵⁰ In addition, the Amendment limited the Attorney General’s discretion to stay the deportation of an individual to any country in which the individual’s life or freedom would be threatened on ac-

338. Displaced Persons Act II, *supra* note 334, § 11, 64 Stat. at 227.

339. See Displaced Persons Act I, *supra* note 334, § 10, 62 Stat. at 1013.

340. See H.R. REP. NO. 974-83 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2103, 2104.

341. Refugee Relief Act, § 14(a), Pub. L. No. 83-203, § 14(a), 67 Stat. 400, 406 (1953).

342. See Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).

343. See 8 U.S.C. § 1182(A)(19) (1952) (codified as 8 U.S.C. § 1182(a)(6)(C) (1997)).

344. See 8 U.S.C. § 1182(A)(9) (1952) (codified as 8 U.S.C. § 1182(a)(2)(A)(I) (1997)).

345. See 8 U.S.C. § 1182(A)(28)(c) (1952) (codified as 8 U.S.C. § 1182(a)(3)(D) (1997)).

346. See 8 U.S.C. § 1251(a)(1)(1952) (codified as 8 U.S.C. § 1227(a)(1)(A) (1997)).

347. See Holtzman Amendment, *supra* note 2.

348. See 8 U.S.C. § 1227(a)(4)(D) (1997).

349. 8 U.S.C. § 1182(a)(3)(E)(i) (1997).

350. See 8 U.S.C. § 1182(a)(3)(E)(ii) (1997).

count of race, religion, nationality, or membership in a social group.³⁵¹ The Holtzman amendment also prohibited the Attorney General from granting Nazi war criminals temporary admission into the United States.³⁵² The primary purpose of the text was to close a loophole in the law by permitting the deportation of alleged Nazi criminals who entered the United States under the INA. Prior to the Holtzman Amendment, deportation was limited to those who entered under either the DPA or the RRA.³⁵³

Five Republican members appended a dissenting statement to the Judiciary Committee Report on the Holtzman Amendment.³⁵⁴ Their views echoed various points propounded by critics of war crimes legislation in Great Britain, Canada, and Australia.³⁵⁵ The dissenters pointed out that the term "persecution" was vague and imprecise and might be extended to encompass situations in which America's friends and allies were alleged to have repressed enemies of the United States. The Act also was criticized for unduly limiting the discretion of the Attorney General to temporarily admit alleged war criminals. A decision to admit such individuals might be justified in the interests of science, culture, or business. According to the five dissenters, the preclusion of the power to grant a visa to Nazi war criminals made little sense in light of the fact that the attorney general retained the authority to admit other classes of excludable individuals, including common criminals and socially dangerous individuals.³⁵⁶ The Congressmen also objected to limiting the attorney general's authority to stay the deportation of an accused war criminal, pointing out that the persecution confronting such individuals may be far more severe than the repressive acts in which they allegedly had been involved.³⁵⁷

The dissenters also criticized the Holtzman Amendment as unconstitutional, retroactive legislation. Deportation was a civil action, but forcible removal from the United States to face penal prosecution abroad certainly constituted a severe sanction. They pointed out that under the Holtzman Amendment, an individual legally admitted and present in the United States could be deported for actions committed prior to his arrival based on a law enacted subsequent to his admission. The dissenters also claimed that an argument might be made that the amendment constituted a bill of attainder which singled out certain individuals for punishment.³⁵⁸

The United States, in contrast to England, Canada, and Australia, thus made a decision to rely upon denaturalization and deportation rather than

351. See 8 U.S.C. § 1231(b)(3)(A)(i) (1997).

352. See 8 U.S.C. § 1182 (d)(3) (1997).

353. See H.R. REP. NO. 95-1452 (1978), reprinted in 1978 U.S.C.C.A.N. 4700, 4702.

354. See *id.* at 4714 (dissenting Views of Mr. Wiggins, Mr. Kastnmeir, Mr. Butler, Mr. Hyde, and Mr. Ertel).

355. See *supra* note 117 and accompanying text.

356. See H.R. REP. NO. 95-1452, *supra* note 353, at 4715-16.

357. See *id.* at 4716.

358. See *id.*

criminal prosecution.³⁵⁹ This reflected the belief that alleged Nazi criminals illegally entered the United States and fraudulently obtained their citizenship and possessed little equitable claim to continued residence. In addition, the activities of these accused offenders during World War II were contrary to democratic values and dictated that they should be expelled from the American community. Reliance on deportation and denaturalization possessed the practical advantage of requiring the prosecution to satisfy a civil statutory standard rather than a criminal burden of proof. This also shifted the responsibility for criminal prosecution to other States. However, denaturalization and deportation have proven to be complex and cumbersome processes that have led to the expulsion of relatively few alleged war criminals.³⁶⁰

C. The Fedorenko Case

In 1980, the United States Supreme Court in *United States v. Fedorenko*³⁶¹ established the legal standard governing denaturalization actions. Fedorenko, a Ukrainian, was conscripted into the Soviet army in June 1941, as part of the mobilization against the invading German forces. He immediately was captured by the Germans and was interned in a series of prisoner-of-war camps where, along with the other internees, he reportedly was subjected to depraved and destitute conditions and was exposed to random beatings. Fedorenko testified that he involuntarily was selected by the German authorities to serve as a concentration camp guard and stated that he was deployed in two camps before being assigned to Treblinka in September 1943.³⁶²

The District Court described Treblinka as a "human abattoir"³⁶³ and six survivors of the camp testified that Fedorenko played a prominent part in this system of terror. These witnesses allegedly witnessed Fedorenko shoot and beat prisoners and separate new arrivals into those who were to be directed to the gas chambers and those who were to be worked to death. Fedorenko protested that he was forced to work involuntarily as a guard and denied that he committed any atrocities.³⁶⁴

In August 1943, following his service in Treblinka, Fedorenko was assigned to a series of German camps and installations. At the completion of the war, he worked for the British and lived in a displaced persons camp in Hamburg. In October 1949, Fedorenko applied for an American visa under the DPA. His application, which concealed his wartime activities, was approved and he arrived in the United States in November 1949 and went to

359. See *supra* notes 348-53 and accompanying text.

360. See generally Ryan Report, *supra* note 301, at 342-44.

361. 455 F. Supp. 893 (S.D. Fla. 1978), *rev'd*, 597 F.2d 946 (5th Cir. 1979), *aff'd*, 449 U.S. 490 (1981).

362. See *Fedorenko*, 455 F. Supp. at 900-01.

363. *Id.* at 901 n.12.

364. See *id.* at 902.

work on a farm in Litchfield, Connecticut.³⁶⁵ In 1969, Fedorenko applied for naturalization. He failed to disclose his service as a concentration camp guard in his application as well as in his sworn testimony to INS examiners. The Superior Court of New Haven County, pursuant to the recommendation of the INS examiner, granted Fedorenko's application.³⁶⁶

The District Court found that during the three decades in which Fedorenko was resident in the United States, he was a diligent and devoted worker and husband. He retired after working in a factory for twenty years and presently subsisted on a meager monthly social security check.³⁶⁷ In 1970, the government filed a denaturalization action to revoke Fedorenko's citizenship. The seven-count complaint alleged that Fedorenko was ineligible for a DPA visa due to the fact that he served as an armed guard at Treblinka and, while at Treblinka, that he committed crimes against Jewish inmates which were animated by an anti-semitic animus. The indictment also charged that Fedorenko willfully concealed this information in both his DPA visa and citizenship applications and that Fedorenko procured his citizenship illegally through the misrepresentation of material facts.³⁶⁸

The District Court entered a judgment in favor of Fedorenko. The court affirmed the standard established in *Chaunt v. United States*³⁶⁹ for adjudging the materiality of a misrepresentation in naturalization hearings.³⁷⁰ *Chaunt* held that the government possessed the burden of proving that if suppressed facts were disclosed, it would have warranted the denial of citizenship, or that the disclosure of these facts "might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship."³⁷¹ The District Court ruled that the true facts regarding the defendant's birthplace and nationality neither would have justified the denial of citizenship, nor would have led to further investigation.³⁷²

The District Court questioned the accuracy of expert testimony that concentration camp guards were ineligible for DPA visas.³⁷³ According to the court, camp guards served under the threat of execution.³⁷⁴ Thus, Fedorenko had not assisted voluntarily in the persecution of civilian populations, and the failure to disclose his activity as a concentration camp guard did not constitute a material misrepresentation under *Chaunt* that would disqualify him from entry into the United States. The District Court pointed out that a con-

365. *See id.* at 910-11.

366. *See Fedorenko*, 449 U.S. at 497.

367. *See Fedorenko*, 455 F. Supp. at 896.

368. *See Fedorenko*, 449 U.S. at 497-98.

369. 364 U.S. 350 (1960).

370. *See Fedorenko*, 455 F. Supp. at 915 (citing *Chaunt v. United States*, 364 U.S. 350 (1960)).

371. *Id.* (citing *Chaunt*, 364 U.S. at 355).

372. *See id.*

373. *See id.* at 912.

374. *See id.* at 914.

trary interpretation would result in the denaturalization of Jews (Kapos) who were compelled to work for camp authorities.³⁷⁵

The court elaborated that the second prong of the *Chaunt* materiality standard required a demonstration by clear and convincing proof that concealed facts would have led to an investigation which would have resulted in the denial of citizenship or a visa. The court noted that Fedorenko falsely claimed on his visa application that he served as a factory worker at Poelitz in Poland rather than as a prison-guard. The court speculated that this information very well may have triggered an investigation which could have uncovered Fedorenko's service as a guard. Yet, he was permitted to enter the United States. This persuaded the District Court to resolve in favor of the defendant its doubts as to whether an investigation, which would have resulted in Fedorenko's denaturalization, may have been undertaken.³⁷⁶

The District Court also held that even if the court determined that the defendant willfully concealed material facts in applying for citizenship, that federal courts properly could consider equitable and mitigating considerations.³⁷⁷ In this case, the inconclusive nature of the evidence that Fedorenko committed war crimes at Treblinka, as well as the uncontroverted evidence that Fedorenko had been a law-abiding and responsible individual since his arrival in the United States, dictated that Fedorenko should be permitted to retain his citizenship.³⁷⁸

The Fifth Circuit Court of Appeals reversed and remanded *Fedorenko* with instructions to enter a judgment for the government and to cancel the petitioner's certificate of citizenship.³⁷⁹ The Appellate panel agreed with the District Court that *Chaunt* was controlling on the question of the materiality of Fedorenko's misrepresentations on his visa application concerning his service as a prison camp guard.³⁸⁰ However, in contrast to the District Court, the Court of Appeals endorsed the view that the second prong of the *Chaunt* test merely required that the government prove by clear and convincing evidence that the disclosure of the true facts would have led the government to make an inquiry that might have uncovered other facts warranting the denial of citizenship.³⁸¹ The Court of Appeals further ruled that the District Court lacked the equitable authority to vary the statutory standard and to enter a judgment in Fedorenko's favor.³⁸²

The Appellate Court explained that the District Court's interpretation of *Chaunt* would encourage visa applicants to misrepresent their background in

375. *See id.* at 913. The term voluntary was not included in the relevant standard, but was read into the provision by the Court as a matter of statutory interpretation. *Id.*

376. *See id.* at 916.

377. *See id.* at 918-19.

378. *See id.* at 918-21.

379. *See Fedorenko*, 597 F.2d at 946.

380. *See id.* at 950.

381. *See id.* at 951.

382. *See id.* at 954.

order to discourage investigations into their past activities. In the event that the misrepresentation was discovered, the government then would be forced to revisit the historical record in order to establish facts which would have warranted the individual's exclusion.³⁸³ The Appellate Court, in overturning the District Court decision, ruled that had the defendant disclosed his guard service, the American authorities would have conducted an inquiry that might have resulted in the denial of his visa. The defendant thus was guilty of misrepresenting and concealing a material fact within the meaning of *Chaunt*. The court accordingly found it unnecessary to address the defendant's alleged war crimes.³⁸⁴

The United States Supreme Court upheld the judgment of the Court of Appeals.³⁸⁵ Justice Thurgood Marshall, writing for the majority, stressed that the precious nature of American citizenship dictated that a denaturalization action should be supported by clear, unequivocal, and convincing evidence that did not leave the issues in doubt.³⁸⁶ At the same time, Justice Marshall recognized that Congress possessed the constitutional authority to prescribe rules for naturalization. As a result, the Courts were charged with the responsibility of insisting that the government meet its evidentiary burden while also insuring that those seeking citizenship strictly complied with the congressionally-imposed procedural prerequisites.³⁸⁷

Marshall noted that a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa. Marshall, however, did not address whether the *Chaunt* standard governed false statements in the visa and in the citizenship application. He merely ruled that disclosure of the true facts concerning Fedorenko's service as an armed guard at Treblinka, as a matter of law, would have made him ineligible for a visa under the DPA.³⁸⁸

The DPA provided that individuals who "assisted the enemy in persecuting" civilians were ineligible for visas under the Act.³⁸⁹ The Supreme Court ruled that the statutory text did not provide for an "involuntary assistance" exception and concluded that Fedorenko's service as a concentration camp armed guard made him ineligible for a visa.³⁹⁰ There was little doubt in the mind of the Court that, had Fedorenko disclosed that he served as an armed guard at Treblinka, he would have been found ineligible for a visa under the DPA. Fedorenko's statements about his wartime activities thus contravened the DPA in that they constituted willful and material misrepresentations that were made for the purpose of gaining admission into the

383. *See id.* at 951.

384. *See id.* at 954.

385. *See United States v. Fedorenko*, 449 U.S. 490 (1981).

386. *See Fedorenko*, 449 U.S. at 505-06.

387. *See id.* at 506-07.

388. *See id.* at 509.

389. *Id.* at 510.

390. *Id.* at 512.

United States.³⁹¹

Justice Marshall noted that the conclusion that Fedorenko, as a matter of law, was ineligible for a visa under the DPA made the resolution of the case relatively easy. At the time of Fedorenko's entry into the United States, a naturalized citizen's failure to comply with the statutory prerequisites for naturalization rendered his or her certificate of citizenship revocable on the grounds of illegal procurement. In 1970, when Fedorenko filed his application and was admitted to citizenship, the INA required that an applicant for citizenship must have been legally admitted into the United States. Lawful admission for permanent residence, in turn, required that the individual possess a valid, unexpired immigrant visa. A visa obtained through material misrepresentation was not valid. Accordingly, the Court majority ruled that Fedorenko failed to satisfy a statutory requirement which Congress had imposed as a prerequisite to the acquisition of citizenship, and that his citizenship should be revoked.³⁹²

As for the District Court's exercise of its equitable discretion, the Supreme Court agreed with the Court of Appeals that federal judges lacked the authority to refrain from entering a judgment of denaturalization against a citizen whose citizenship was procured illegally or by a willful misrepresentation of material facts.³⁹³

Three separately authored opinions in *Fedorenko* proved to be influential in subsequent lower court decisions. Justice Harry Blackmun, in his concurring opinion, noted that there was no substantial difference between the first prong of the test articulated under *Chaunt* and the standard established in *Fedorenko*.³⁹⁴ Blackmun contended that the privilege of citizenship in the national community only may be revoked based on clear and convincing proof of disqualifying facts.³⁹⁵ The adoption of the standard articulated by the Court of Appeals, which merely required the government to establish that disclosure of the facts which were concealed would have triggered an inquiry that might have uncovered disqualifying facts, would weaken the status of naturalized citizens. Blackmun argued that the government's burden under both tests articulated in *Chaunt* was the same; it must prove the existence of a disqualifying fact, not simply a fact which might have led to the discovery of a disqualifying fact.³⁹⁶

Justice White, in his dissent, stated that he would have decided the case under the Appellate Court's interpretation of the second prong of the *Chaunt* standard. Under the latter test, the government must establish that a truthful response would have triggered an investigation that might have uncovered facts justifying the denial of citizenship. The defendant may rebut the gov-

391. See *id.* at 513-14.

392. See *id.* at 515.

393. See *id.* at 517.

394. See *id.* at 519-20.

395. See *id.* at 524.

396. See *id.* at 524-26.

ernment's case by demonstrating that the underlying facts would not have justified the denial of citizenship. According to Justice White, this approach was preferable to the District Court's test, which required that the government bear the heavy burden of establishing disqualifying facts. Adoption of this stricter standard would encourage applicants to withhold information and limit the ability of the government to bring successful denaturalization and deportation actions. White concluded that he would have remanded the case to the Court of Appeals to determine whether Fedorenko's service as a armed guard for the Germans constituted a material misrepresentation.³⁹⁷

Justice Stevens, in his dissent, argued that citizens' past involuntary conduct may not provide a basis for depriving them of their citizenship.³⁹⁸ Stevens would have held that a willful misstatement was material if it was more probable than not that a truthful answer would have prompted an inquiry which would have uncovered a disqualifying fact.³⁹⁹

In sum, *Fedorenko* established that service as a concentration guard constituted persecution of civilians under the DPA.⁴⁰⁰ The fact that an individual's actions were involuntary was not recognized as a defense.⁴⁰¹ The Court also ruled that the judiciary did not possess the equitable prerogative to vary the statutory standard.⁴⁰² *Fedorenko* easily was disposed of on the grounds that the defendant concealed facts which would have otherwise resulted in his exclusion from the United States. However, ambiguity remained as to the applicability and interpretation of the second, or investigation, prong of the *Chaunt* test.⁴⁰³ This was the next issue addressed by the Supreme Court.

D. The Kungys Case

In 1983, the Office of Special Investigations brought an action to revoke the citizenship of Juozas Kungys.⁴⁰⁴ The defendant was charged with failing to reveal his role in organizing and leading an armed group of civilians called the Riflemen. The Riflemen assisted the occupying German forces in the arrest and execution of Lithuanians who served as government and Communist Party officials in the District of Kedainiai during the Soviet occupation. The Riflemen also were accused of assisting in the confinement and subsequent mass execution and burial of 2,500 Jews. The defendant subsequently moved to Kaunas where he worked in a German industrial con-

397. *See id.* at 528-30.

398. *See id.* at 533.

399. *See id.* at 537.

400. *See id.* at 505-06.

401. *See id.*

402. *See id.* at 509.

403. *See id.* at 505, 506.

404. *See United States v. Kungys*, 571 F. Supp. 1104 (N.J. 1983), *rev'd and remanded*, 793 F.2d 516 (3d Cir. 1986), *rev'd and remanded*, 485 U.S. 759 (1988).

cern. In 1944, Kungys fled the invading Soviet armies and settled in Germany where he resided until immigrating to the United States in 1948.⁴⁰⁵

The government charged, and the defendant conceded, that in both his 1948 visa and 1953 citizenship applications, he misrepresented the date and place of his birth and concealed his employment as a bookkeeper in a German factory. The government also charged that he falsely swore that he left Kedainiai prior to the Jewish pogroms and never committed a crime involving moral turpitude.⁴⁰⁶

The District Court questioned the reliability of three depositions taken under the supervision of Soviet officials attesting to Kungys's role in the Kedainiai killings. The depositions were admitted by the court for the limited purpose of establishing that killings occurred in Kedainiai in July and August 1941. Judge Dickinson R. Debevoise explained that the Soviet Union had made the witnesses available and possessed a strong interest in establishing the defendant's role in the killings. In the past, the Soviets distorted or fabricated evidence and the depositions in *Kungys* were conducted in such a fashion that it was impossible to determine whether the witnesses were improperly pressured. The prosecution must share some of the blame since it had been unable to persuade the Soviets to reveal transcripts and protocols which would have assisted the court in evaluating the reliability of the deponents.⁴⁰⁷ As a result, the court ruled that the prosecution failed to establish by clear, convincing, and unequivocal evidence that Kungys was involved in the July and August killings in Kedainiai.⁴⁰⁸

Absent the deposition testimony, the District Court held that the most the prosecution was able to establish was that the defendant was resident in Kedainiai in July and August 1941, that he was a member of a para-military group, and that he misrepresented the date and place of his birth in various immigration and naturalization papers.⁴⁰⁹ The District Court ruled that the evidence neither supported the allegation that the defendant failed to procure a valid immigration visa, nor established that he lacked a good moral character.⁴¹⁰ The court further rejected the government's contention that false testimony, regardless of proof of materiality, was sufficient to constitute a lack of good moral character.⁴¹¹

The prosecution thus was unable to satisfy the first prong of the *Chaunt* test as none of the suppressed facts pertaining to his date and place of birth and wartime activities warranted a denial of citizenship.⁴¹² There also was no clear, unequivocal, and convincing evidence that truthful representations

405. See *id.* at 1105.

406. See *id.* at 1106-07.

407. See *id.* at 1132.

408. See *id.* at 1133.

409. See *id.*

410. See *id.* at 1139.

411. See *id.*

412. See *id.* at 1144.

would have resulted in an investigation, or that any such investigation would have uncovered a disqualifying fact.⁴¹³

The District Court decision was reversed by the Third Circuit Court of Appeals which determined that the defendant's misrepresentation or concealment of facts on his visa and naturalization applications were material within the meaning of *Chaunt*.⁴¹⁴ The Appellate Court noted that the government possessed the burden of demonstrating that Kungys' citizenship was "illegally procured" or was "procured by concealment of a material fact or by willful misrepresentation."⁴¹⁵

The Third Circuit agreed that the prosecution failed to establish the requisite materiality under the first prong of the *Chaunt* test. The court proceeded to apply the second prong of *Chaunt*. It adopted a compromise version of the test, ruling that "citizenship may be . . . subject to revocation if the government is able to prove by clear, convincing and unequivocal evidence that the concealments or misrepresentation would have triggered an investigation which probably would have revealed disqualifying facts."⁴¹⁶ In applying this standard, the court utilized an innovative analysis and held that the defendant's misrepresentations of his date and place of birth were material under the second prong of the *Chaunt* test. The Appellate Court reasoned that, had Kungys been truthful at the time of his applications, the discrepancies between his applications and the falsified documents submitted by the defendant would have led to investigations which would have revealed that Kungys was warmly welcomed in Germany and received a residency permit without conditions. This would have undercut Kungys' claim in the documents that he had been subject to persecution by the Germans and would have resulted in his being disqualified for a visa under the DPA.⁴¹⁷

The United States Supreme Court reversed and remanded *Kungys* to the Third Circuit for further proceedings consistent with its opinion.⁴¹⁸ The Court noted that the INA provided for the denaturalization of citizens whose citizenship was procured by "concealment of a material fact" or by "willful misrepresentation."⁴¹⁹ This required misrepresentations or concealments that both were willful and material.⁴²⁰ Justice Scalia, writing for the majority, observed that efforts to establish a single *Chaunt* materiality standard "have not met with notable success" and that courts "have failed to arrive at a single interpretation."⁴²¹ Scalia noted that the disagreement between the District

413. *See id.*

414. *See Chaunt*, 793 F.2d at 530.

415. *Id.* at 521 (quoting and citing section 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1451(a) (1982)).

416. *Id.* at 526.

417. *See id.* at 530-31.

418. *See Kungys*, 485 U.S. at 782-83.

419. *Id.* at 767 (citing 8 U.S.C. § 1451(a)).

420. *See id.*

421. *Id.* at 769.

Court and the Court of Appeals in *Kungys* turned on whether the *Chaunt* test required that, had the truth been revealed, an investigation would have resulted which would have disclosed disqualifying facts, or whether an investigation would have resulted which merely might have disclosed disqualifying facts. Scalia, however, argued that the established legal meaning of “material” required courts to focus on “whether the misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision . . . the test more specifically is whether the misrepresentation or concealment had a natural tendency to produce the conclusion that the applicant was qualified.”⁴²²

Scalia held that the scope of the misrepresentation and concealment provision was limited to naturalization proceedings and ruled that *Kungys*’ misrepresentations of the date and place of his birth were immaterial in that there was no suggestion that these facts were relevant to *Kungys*’ qualifications for citizenship.⁴²³ The disclosure of the true date and place of birth also would not necessarily have led to the disclosure of other facts relevant to his qualifications.⁴²⁴ Scalia went on to modify the Appellate Court’s analysis and ruled that what was of concern was the consequences, which would have ensued from official knowledge of a misrepresented fact, not what would have resulted from an awareness of an inconsistency between present and past representations.⁴²⁵

Scalia also held that, in determining whether an individual procured his citizenship by means of a misrepresentation or concealment of a material fact, the Court should not apply a causality test.⁴²⁶ He, instead, stressed that it was the misrepresentation which was central; an individual who procured his or her citizenship in a proceeding in which he made material representations should be considered to be presumptively unqualified. The naturalized citizen then should be afforded the opportunity to refute this presumption and to avoid denaturalization by demonstrating, by a preponderance of the evidence, that the misrepresentation did not possess a natural tendency to produce a favorable decision.⁴²⁷

Justice Scalia reversed the rulings below that Section 1101(f)(6), which imposed a good character provision, contained a materiality requirement.⁴²⁸ He explained that the primary purpose of this section was to identify the lack of good moral character rather than to prevent false pertinent data from being introduced into the denaturalization process. At the same time, Scalia recognized that it would be unusual for the government to bring a prosecution for a misrepresentation which did not possess the natural tendency, and

422. *Id.* at 771-72.

423. *See id.* at 772-74.

424. *See id.* at 774.

425. *See id.* at 775-76.

426. *See id.* at 776-77.

427. *See id.* at 777-79.

428. *See id.* at 779.

which was not intended, to influence a decision regarding immigration or naturalization benefits.⁴²⁹ Justice Scalia accordingly remanded the case in order to determine whether Kungys' misrepresentations constituted "testimony" under section 1101(f)(6) and whether he possessed the requisite intent to obtain immigration or naturalization benefits.⁴³⁰

Justice Brennan, in his concurring opinion, criticized the relaxed protection accorded to naturalized citizens under the majority opinion. He objected that

[e]vidence that simply raises the possibility that a disqualifying fact might have existed does not entitle the Government to the benefit of a presumption that the citizen was ineligible, for as we have repeatedly emphasized, citizenship is a most precious right . . . [a]nd as such should never be forfeited on the basis of mere speculation or suspicion.⁴³¹

As a result, Brennan advocated that a presumption of ineligibility should not arise unless the Government produces evidence "sufficient to raise a fair inference that a statutory disqualifying fact actually existed."⁴³²

Justice Stevens, in a concurring opinion joined by Justices Blackmun and Marshall, criticized the Court's dilution of the protections afforded to naturalized citizens.⁴³³ He argued that *Chaunt* required that the government prove by clear, unequivocal, and convincing evidence the existence of a disqualifying fact which resulted in the defendant having improperly procured his citizenship. The Congressional intent was to ensure that an individual's citizenship was neither easily nor lightly revoked.⁴³⁴ Yet, the Court's decision shifted the burden of proof in those instances in which a misrepresentation or concealment concerned a fact which was relevant to the naturalization decision or in which the true facts predictably would have disclosed other facts relevant to the citizen's qualifications. Stevens noted that, under this standard, the government was not required to identify or establish a specific disqualifying fact which might have been revealed. The burden nevertheless was shifted to the citizen to rebut every possible disqualifying fact.⁴³⁵ The employment of a burden-shifting presumption to lessen the government's obligation was inconsistent with the Court's view that the government must prove its charges in denaturalization cases by clear, unequivocal, and convincing evidence which did not leave the issue in doubt.⁴³⁶ Stevens also contended that the failure to require a materiality ele-

429. See *id.* at 780-82.

430. See *id.* at 782-83.

431. *Id.* at 783-84.

432. *Id.* at 783.

433. See *id.* at 783-84.

434. See *id.* at 786-89.

435. See *id.* at 793.

436. See *id.* at 795.

ment as part of the good moral character provision undermined the protection of citizenship.⁴³⁷ Under Justice Scalia's formulation, even a minor misrepresentation that was made with the requisite intent might result in the revocation of citizenship.⁴³⁸

The Court thus retreated from a standard that required the prosecution to prove the existence of a disqualifying fact by clear, unequivocal and convincing evidence.⁴³⁹ Instead, the government only must establish evidence that a concealment or misrepresentation possessed a tendency to influence the citizenship application process.⁴⁴⁰ This results in the burden of proof being shifted to the accused to rebut the existence of a disqualifying fact by a preponderance of the evidence.⁴⁴¹ In addition, *Kungys* established that the moral character requirement did not require a material misrepresentation.⁴⁴²

VII. THE ASSISTANCE IN PERSECUTION STANDARD

A. *The Assistance in Persecution Standard*

The United States Office of Special Investigations typically charged suspected Nazi war criminals with having illegally procured their entry visa and citizenship through the misrepresentation or concealment of their assistance in the persecution of individuals during World War II. Denaturalization and deportation actions thus typically depend upon the government's ability to document the defendant's wartime activities. The burden on the government was eased considerably by the federal judiciary's broad interpretation of the "assistance in persecution" standard.⁴⁴³

Justice Marshall, in *Fedorenko*, addressed the scope of the exclusionary provisions of the IRO Constitution, as incorporated in the DPA.⁴⁴⁴ The IRO Constitution's definition of displaced persons eligible for migration excluded individuals who "assisted the enemy in persecuting civil populations" or who "voluntarily assisted the enemy forces . . . in their operations against the United Nations."⁴⁴⁵ Justice Marshall ruled that the DPA's incorporation by reference of these IRO provisions meant that those who assisted the enemy in persecuting civilians were ineligible for visas.⁴⁴⁶

Marshall went on to hold that the plain language of the IRO, as well as

437. See *id.* at 796 n.8.

438. See *id.* at 796-97.

439. See *Fedorenko*, 449 U.S. at 505-06.

440. See *Kungys*, 485 U.S. at 759.

441. See *Demjanjuk v. Petrovsky*, 10 F.3d 338, 367 (6th Cir. 1994).

442. See *id.* at 369.

443. James W. Moeller, *United States Treatment of Alleged Nazi War Criminals: International Law, Immigration Law and the Need for International Cooperation*, 25 VA. J. INT'L L. 793 (1985).

444. See *Fedorenko*, 449 U.S. at 495.

445. IRO Constitution, *supra* note 332, § 2(a)-(b), 62 Stat. at 3051-52.

446. See *Fedorenko*, 449 U.S. at 509-10.

the testimony of immigration officials, indicated that individuals who, either voluntarily or involuntarily, served as concentration camp guards during World War II were ineligible for a visa.⁴⁴⁷ In a footnote which would prove to be the subject of intense judicial scrutiny, Marshall noted that the District Court feared that absent a voluntariness standard, Kapos (Jewish camp guards) would be subject to denaturalization.⁴⁴⁸ Justice Marshall, however, wrote that a fair and equitable result could be achieved in a particular case through a close analysis of the facts which were alleged to constitute assistance in the persecution of civilians. He noted that an individual who cut the hair of inmates awaiting execution should not be considered to have assisted in persecution. However, a guard, such as Fedorenko, who was issued a uniform, armed with a firearm, paid a stipend, permitted to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the camp commandant, would fall fully within the statutory standard. Marshall recognized that “[o]ther cases may present more difficult line-drawing problems but we need decide only this case.”⁴⁴⁹ Justice Stevens’ dissent disputed whether those who served involuntarily should be subject to denaturalization and warned of the “hydraulic pressure” of the gruesome events of the past which possessed a tendency to distort the Court’s judgment.⁴⁵⁰ He cautioned that “human suffering will be a consequence of today’s venture is certainly predictable; that any suffering will be allayed or avoided is at best doubtful.”⁴⁵¹

A number of federal courts applied Marshall’s analysis in denaturalizing or deporting former Nazi functionaries.⁴⁵² In *United States v. Kairys*,⁴⁵³ an Illinois District Court followed *Fedorenko* and ruled that a former armed guard at the Treblinka concentration camp was not eligible for a visa under the DPA.⁴⁵⁴ The Seventh Circuit, in affirming the District Court decision, held that there was no requirement that an armed guard was personally involved in persecutions and the fact that Kairys served at a labor rather than concentration camp was legally irrelevant.⁴⁵⁵ The guards performed similar functions in both institutions and the inmates were subjected to the same inhumane conditions and treatment.⁴⁵⁶ The Seventh Circuit Court parenthetically observed that in cases involving unarmed guards, it might be necessary

447. *See id.* at 512.

448. *See id.* at 511 n.33.

449. *Id.* at 512-13 n.34.

450. *Id.* at 538.

451. *Id.*

452. *See generally* Jeffrey N. Mausner, *Apprehending and Prosecuting Nazi War Criminals in the United States*, 15 NOVA L. REV. 747 (1991).

453. 600 F. Supp. 1254 (N.D. Ill. 1984), *aff’d*, 782 F.2d 1374 (7th Cir. 1986), *cert. denied*, 476 U.S. 1153 (1986).

454. *See United States v. Kairys*, 600 F. Supp. 1254, 1271 (N.D. Ill. 1984), *aff’d*, 782 F.2d 1374 (7th Cir. 1986), *cert. denied*, 476 U.S. 1153 (1986).

455. *See Kairys*, 782 F.2d at 1378.

456. *See id.* at 1377 n.3.

to demonstrate that a defendant personally was involved in persecuting inmates.⁴⁵⁷ Judge Richard Posner, in ordering Kairys' deportation under the Holtzman Amendment, conceptualized the Nazi concentration camps as criminal conspiracies in which the armed guards, like lookouts for a gang of robbers, acted as co-conspirators or as aiders and abettors.⁴⁵⁸ He thus failed to find injustice in deporting guards, such as Kairys, who were not personally involved in an act of persecution. Posner also noted the Kairys' three promotions were inconsistent with his claim of involuntary involvement.⁴⁵⁹

In *United States v. Schellong*,⁴⁶⁰ the Seventh Circuit Court of Appeals affirmed the judgment of a district court which cancelled the naturalization certificate of Conrad Schellong.⁴⁶¹ Schellong joined the Nazi Party in 1932 and was assigned to the Waffen SS Death Head Unit at Sachsenburg Concentration Camp in Saxony, Germany. His responsibilities included training and supervising guards and serving as the rotating chief security officer for the entire camp. As part of Schellong's duties, he instructed guards to shoot escaping prisoners. The guards under Schellong's command accompanied prisoners on work details and witnessed the inmates' harsh treatment and working conditions. They presumably shared this information with Schellong who subsequently was transferred to Dachau.⁴⁶²

The Seventh Circuit Court of Appeals in 1986 ordered Schellong's deportation under the Holtzman Amendment.⁴⁶³ The court ruled that his service as a concentration camp guard constituted persecution of civilians under both the DPA and Holtzman Amendment.⁴⁶⁴ The court further held that personal involvement in atrocities was not required under either statute because both were intended to exclude persons who assisted the Nazis in inflicting the type of sectarian persecution that occurred in the concentration camps.⁴⁶⁵ The Tribunal refrained from ruling on whether knowledge of racial, religious, or national persecution was required. It merely noted that Schellong must have observed that prisoners wore different colored arm bands to represent their ethnic and racial backgrounds and that he presumably noticed that the prison population was becoming increasingly dominated by the Jewish victims of Nazi persecution. The Appellate Court noted that Schellong's service in the camps, prior to their having been transformed into factories of death, did not immunize him from deportation. It explained that the inhu-

457. *See id.* at 1378. *See also id.* at 1377 n.3.

458. *See Kairys v. I.N.S.*, 981 F.2d 937, 943 (7th Cir. 1992).

459. *See id.*

460. 547 F. Supp. 569 (N.D. Ill. 1982), *aff'd*, 717 F.2d 329 (7th Cir. 1983), *reh'g and reh'g en banc denied, cert. denied*, 464 U.S. 1007 (1987).

461. *Id.*

462. *See id.* at 331, 334. *See also United States v. Tittijung*, 753 F. Supp. 251 (E.D. Wis. 1990), *aff'd*, 948 F.2d 1292, *cert. denied*, 505 U.S. 1222 (1991).

463. *See Schellong v. I.N.S.*, 805 F.2d 655 (7th Cir. 1986), *reh'g denied, cert. denied*, 481 U.S. 1004 (1987).

464. *See id.* at 661.

465. *See id.*

mane conditions in the camps during these early years were sufficient to constitute persecution.⁴⁶⁶ Finally, the *Schellong* court rejected the contention that the persecution standard was unconstitutionally vague, citing the House Judiciary Committee's reference to a substantial body of precedent which held that persecution constituted "the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive . . . in a manner condemned by civilized governments."⁴⁶⁷

The following year, the Seventh Circuit ordered the deportation of Reinhold Kulle who served as a guard at Gross-Rosen, a slave labor camp in Silesia.⁴⁶⁸ The court determined that Gross-Rosen was a site for the incarceration of members of repressed racial and religious groups.⁴⁶⁹ Kulle contended that his responsibilities were limited to guarding the perimeter of the camp and escorting work groups. He claimed that he lacked the authority to shoot escaping prisoners and that he never observed a prisoner being beaten or shot. On two occasions, he noted that he provided prisoners with food and water.⁴⁷⁰ The Seventh Circuit pointed out that deportation was a civil rather than a criminal proceeding and that the prosecution was neither required to establish personal involvement nor knowledge. The statutory standard merely required proof that the accused was present at a place of persecution. This was considered to be sufficient under the Holtzman Amendment to presume that the defendant assisted in these acts. The fact that common criminals were among those incarcerated in the camp did not rebut the presumption that individuals were persecuted based on race, nationality, or religion.⁴⁷¹

In 1991, the Seventh Circuit cancelled the naturalization certificate of Michael Schmidt.⁴⁷² Schmidt, a member of the Death Head's Battalion, served as an armed perimeter camp guard stationed outside the camp wall at Sachsenhausen.⁴⁷³ There was no evidence that he shot at escaping inmates, but the Appellate Court noted that at least fifteen prisoners were executed for attempting to flee during Schmidt's tenure. In addition, thousands died as a result of starvation, exhaustion, beatings, exposure, disease, and medical experimentation.⁴⁷⁴ The court ruled that Schmidt's concealment of his service at Sachsenhausen resulted in the illegal procurement of his visa and in his failure to fulfill a prerequisite to citizenship.⁴⁷⁵

466. *See id.*

467. *Id.* at 662.

468. *See Kulle v. I.N.S.*, 825 F.2d 1188 (7th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988).

469. *See id.* at 1191-92.

470. *See id.* at 1192.

471. *See id.* at 1192-93.

472. *See United States v. Schmidt*, 923 F.2d 1253 (7th Cir. 1991).

473. *See id.* at 1255.

474. *See id.*

475. *See id.* at 1259-60.

The Seventh Circuit reaffirmed that Schmidt's claim of involuntary service as a guard was irrelevant in determining the legality of his entry into the United States. The court also conceded that, in some instances, it might be difficult to determine whether an individual's conduct constituted assistance in persecution, but that service as an armed and uniformed concentration camp guard on behalf of an occupying power clearly satisfied the statutory standard. The fact that some guards may have assisted in transporting prisoners while others, such as Schmidt, only may have guarded work parties was not controlling. All of these individuals contributed to the systematic destruction of inmates.⁴⁷⁶ The court also noted that it was unnecessary to determine whether Schmidt was aware of events inside the camp as such knowledge could be presumed from his having viewed the identification insignia prominently displayed by the starving and exhausted inmates.⁴⁷⁷

In summary, federal courts, in determining whether a defendant assisted in the persecution of individuals on the basis of race, religion, and nationality, examined the nature of the accused's involvement in the Nazi's persecutorial activities.⁴⁷⁸ Armed guards at Nazi concentration and labor camps were regarded as having aided in the confinement of inmates and were deemed to have assisted in the persecution of Jews, gypsies, and Slavs, regardless of whether they directly abused, disciplined, or supervised internees.⁴⁷⁹ In fact, most of the former guards who were denaturalized served on the perimeter.⁴⁸⁰

The defendants were deemed to have possessed constructive knowledge of events within the camps.⁴⁸¹ But courts avoided ruling directly on whether the prosecution was required to establish that a defendant was aware of the discriminatory nature of his activities or harbored a persecutorial intent. The Second Circuit in 1985 ruled that the government was not required to demonstrate in a deportation action under the Holtzman amendment that a Latvian police officer who burned and arrested the inhabitants of a village under the claim of a lawful reprisal shared the anti-communist motivation of the occupying German forces.⁴⁸² In addition, federal courts held that the prosecution was not compelled to establish that an accused voluntarily assumed and continued in his position; the key was the nature, rather than the voluntariness, of the defendant's actions.⁴⁸³

Fedorenko provided a rather loosely sketched continuum of conduct

476. *See id.* at 1258-59.

477. *See id.* at 1258 n.8. *But see id.* at 1260-61 (Pell J., dissenting on court's ruling that the prosecution was not required to establish knowledge as an element of persecution).

478. *See Fedorenko*, 449 U.S. at 512-13, 538.

479. *See id.* at 512.

480. *See, e.g., Schmidt*, 923 F.2d at 1255, 1258-60.

481. *See Schellong*, 805 F.2d at 661.

482. *See Maikovskis v. I.N.S.*, 773 F.2d 435, 445-46 (2d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986).

483. *See Schmidt*, 923 F.2d at 1258-59 (7th Cir. 1991).

ranging from cutting inmates' hair to serving as an armed guard. This provided few guiding principles and left courts with the unenviable task of balancing a range of facts in determining on a case-by-case basis whether individuals assisted in persecution.⁴⁸⁴ Nevertheless, courts experienced little difficulty in upholding the denaturalization of individuals who served as police officers in the territories occupied by Nazi Germany.

Michale Dercacz was a uniformed and armed member of the Ukrainian police in the town of Novy Yarychev during the Nazi occupation. In 1942, the Jews in the town were ghettoized and were required to wear identifying armbands. They also were restricted in movement, food, commerce, and employment and were deployed as slave laborers. In January 1943, the German forces rounded up and exterminated the Jews.⁴⁸⁵ When his denaturalization was upheld, Dercacz testified that his duties included arresting and detaining Jews who refused to wear identifying armbands, and informing on civilians suspected of having sold food to ghettoized Jews.⁴⁸⁶ The court found that Dercacz concealed these material facts and made willful misrepresentations in his application for naturalization.⁴⁸⁷

Two years later, in 1984, the Third Circuit affirmed the denaturalization of Serge Kowalchuk, who occupied a central clerical position with the Lithuanian police during German occupation.⁴⁸⁸ The District Court concluded that the Lithuanian auxiliary force routinely enforced the martial law restrictions imposed by the Germans against Jews. There was no clear and convincing evidence that Kowalchuk personally and directly was involved, but the court concluded that the defendant must have been aware that he was assisting the Nazi's persecutorial activities.⁴⁸⁹ The Third Circuit affirmed Kowalchuk's denaturalization, ruling that the defendant's membership in the Ukrainian police constituted voluntary assistance to the enemy. The court determined that it was unnecessary to address the District Court's conclusion that Kowalchuk actively assisted the enemy in persecuting civilian populations.⁴⁹⁰

Denaturalization and deportation actions also were brought against civilians who were deemed to have assisted in persecution. For instance, Kazys Palciauskas, the mayor of Kaunas, Lithuania, was denaturalized for concealing his activities during the war.⁴⁹¹ The evidence indicated that Palciauskas helped to ghettoize the Jews and to confiscate their property. Following the liquidation of the Jewish population, he distributed their houses

484. See *supra* note 449 and accompanying text.

485. See *United States v. Dercacz*, 530 F. Supp. 1348, 1349 (E.D.N.Y. 1982).

486. See *id.* at 1351.

487. See *id.* at 1353.

488. See *United States v. Kowalchuk*, 571 F. Supp. 72 (E.D. Pa. 1983), *aff'd on other grounds*, 773 F.2d 488 (3d Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1012 (1986).

489. See *id.* at 81.

490. See *Kowalchuk*, 773 F.2d at 494.

491. See *United States v. Palciauskas*, 559 F. Supp. 1294 (M.D. Fla. 1983).

to the town's inhabitants.⁴⁹²

B. Augmenting the Assistance in Persecution Standard

A series of cases broadly interpreted Section Thirteen of the DPA. This provision prohibits the issuance of a visa to any individual who has been a member or participant in any movement which is, or has been, hostile to the United States or the form of government of the United States.⁴⁹³ Section thirteen also provides that any person who has advocated or assisted in the persecution of any person because of race, religion, or national origin, or who has voluntarily borne arms against the United States during World War II is ineligible for a visa.⁴⁹⁴

*United States v. Osidach*⁴⁹⁵ was the first prosecution brought under this provision.⁴⁹⁶ Defendant Wolodymir Osidach was a member of an anti-Soviet Ukrainian national group and served as a police officer in the town of Rawa Ruska during the German occupation. In 1942, the town's entire Jewish population of between ten and twelve thousand was deported and exterminated. The Jewish quarter then was burned, dynamited, and destroyed.⁴⁹⁷

The District Court ruled that under Section Thirteen, mere willing membership in a movement that persecuted civilians was sufficient to warrant a finding that an individual was ineligible for a visa under the DPA.⁴⁹⁸ A review of documentary evidence, eyewitness testimony, and circumstantial proof persuaded the court that the Ukrainian police constituted a movement which assisted the Germans in the persecution of civilians in Rawa Ruska between 1942 and 1945.⁴⁹⁹ Osidach conceded that he acted as an interpreter for the German gendarmes as well as a street patrol officer, both of which the court concluded constituted assistance in persecution.⁵⁰⁰ The District Court determined that Osidach's involvement as an interpreter provided vital assistance to the Germans in their repression of Jews. As an armed and uniformed officer on patrol, Osidach also was found to have mentally persecuted innocent civilians who feared the infliction of armed force at the hands of German authorities.⁵⁰¹ The court concluded that Osidach had misrepre-

492. See *id.* at 1297-98. See also *United States v. Karl Linnas*, 527 F. Supp. 426 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2d Cir. 1982) (mem.), *cert. denied*, 459 U.S. 883 (1982) (denaturalization of chief of Tartu concentration camp in Estonia).

493. See Displaced Persons Act I, *supra* note 334 § 13.

494. See Displaced Persons Act I, *supra* note 334 and accompanying text.

495. 513 F. Supp. 51 (E.D. Pa. 1981).

496. See *id.*

497. See *id.* at 60-62.

498. See *id.* at 72. See also *United States v. Breyer*, 829 F. Supp. 773 (E.D. Pa. 1993), *aff'd in part, vacated in part*, 41 F.3d 884 (3d Cir. 1994); *United States v. Breyer*, 841 F. Supp. 679 (E.D. Pa. 1994), *aff'd*, 41 F.3d 884 (3d Cir. 1994).

499. See *Osidach*, 513 F. Supp. at 95.

500. See *id.* at 96-100.

501. See *id.* at 98-99.

sented his wartime service and illegally procured his citizenship.⁵⁰²

In a related case, a Florida District Court determined that Bohdan Kozy had been a member of the Ukrainian Police and the Organization of Ukrainian Nationalists.⁵⁰³ As a result, he had been a member and a participant in movements hostile to the United States. The court ruled that, as a member of the police, Kozy assisted and personally engaged in acts of persecution.⁵⁰⁴

In *United States v. Sokolov*,⁵⁰⁵ the Second Circuit Court of Appeals ruled that Vladimir Sokolov illegally procured his visa and his subsequent citizenship through the misrepresentation of his wartime activities.⁵⁰⁶ Sokolov served as a German army propagandist in the occupied portion of the Soviet Union. The court found that he advocated the persecution of Jews in various articles in a Nazi-sponsored Russian language newspaper. In 1944, Sokolov fled with the retreating German army and, until the end of the war, worked in Berlin for Russian language newspapers. These publications fomented anti-Semitism and called upon the Russian people to resist the Allied Powers.⁵⁰⁷ In his visa application, Sokolov denied having advocated fascism and, as a result, the court found that he had procured his visa illegally.⁵⁰⁸ He also was considered to have unlawfully concealed the fact that he assisted enemy forces at war with the Allies and that he participated in a movement which was hostile to the Allied Powers. The court further determined that Sokolov voluntarily advocated or assisted in the persecution of Jews. Although there was no demonstration that the Jews in the area actually were persecuted, the court concluded that the advocacy of persecution rendered an individual ineligible for a visa on the grounds that the incitement assisted in creating a climate of opinion which facilitated persecution.⁵⁰⁹

In *United States v. Koreh*,⁵¹⁰ the Third Circuit Court of Appeals affirmed a District Court's denaturalization of Hungarian, Ferenc Koreh.⁵¹¹ In September 1940, Koreh obtained a license to publish a private newspaper, *Szekely Nep*. He served as editor between 1941 and 1944, and coordinated articles and editorials with the fascist Hungarian government. The prosecution accepted, for purposes of summary judgment, that Koreh had not written any of the fifty-five concededly anti-semitic and anti-Allied articles introduced at trial.⁵¹² The Third Circuit held that his publication of anti-

502. *See id.* at 100-07.

503. *See United States v. Kozy*, 540 F. Supp. 25 (S.D. Fla. 1982), *aff'd*, 728 F.2d 1314 (11th Cir. 1984), *cert. denied*, 469 U.S. 835 (1984).

504. *See id.* at 34-35.

505. 814 F.2d 864 (2d Cir. 1987).

506. *See id.* at 866.

507. *See id.* at 867.

508. *See id.* at 871-73.

509. *See id.* at 873-74.

510. 856 F. Supp. 891 (N.J. 1994), *aff'd*, 59 F.3d 431 (3d Cir. 1995).

511. *See id.*

512. *See Koreh*, 59 F.3d at 435.

semitic articles in a private newspaper constituted assistance in persecution under the *Fedorenko* standard. According to the court, the articles published in Koreh's newspaper helped to inject the populous of Northern Transylvania with the virus of racial bigotry which helped to create a foundation for Hungary's anti-semitic policies.⁵¹³ The court affirmed that the prosecution was not required to demonstrate that persecutions resulted from the publication of articles in the defendant's newspaper.⁵¹⁴ Koreh argued in his defense that in non-death camp cases, the government was required to establish that a defendant personally was involved in acts of persecution. The court dismissed this contention, but nevertheless pointed out that Koreh had taken the initiative in obtaining and maintaining a newspaper license which permitted him to continue to disseminate his hate-filled publication.⁵¹⁵ The Third Circuit also convicted Koreh of membership in a movement which was hostile to the form of the United States government.⁵¹⁶

In sum, under Section Thirteen, the government only was required to demonstrate knowing membership in a movement which was deemed to be hostile to the United States or which engaged in persecutorial activities. The courts concluded that the defendants possessed actual or constructive knowledge of the aims and activities of the organizations in which they had been involved.⁵¹⁷ The tribunals expansively interpreted the notion of a "movement" to encompass members of Eastern European police in German occupied territories⁵¹⁸ and editors of fascistic and anti-semitic newspapers.⁵¹⁹ Writing, editing, or tolerating the publication of anti-semitic articles also was considered advocacy of the persecution of individuals on the basis of race, nationality, or religion.⁵²⁰ There was no requirement that the government demonstrate that such advocacy had a discriminatory impact.⁵²¹ In virtually every case under Section thirteen there was sufficient evidence for the courts to have convicted the defendants of having assisted or engaged in acts of persecution.⁵²²

C. Narrowing the Assistance in Persecution Standard

Some judges resisted their brethren's broad interpretation of the grounds for denaturalization and deportation. Federal courts narrowed these standards

513. *See id.* at 439-40.

514. *See id.* at 441.

515. *See id.* at 443.

516. *See id.* at 443-44.

517. *See Sokolov*, 814 F.2d at 871-73.

518. *Koizy*, 540 F. Supp. at 34-35.

519. *See Sokolov*, 814 F.2d at 871-73.

520. *See id.* *See also Koreh*, 59 F.3d at 441.

521. *See Sokolov*, 814 F.2d at 873-74.

522. *See Osidach*, 513 F. Supp. at 95.

in three cases. In *Laipeniaks v. I.N.S.*,⁵²³ in 1985, the Ninth Circuit Court of Appeals ruled that the prosecution failed to establish Laipeniaks' deportability under the Holtzman Amendment by clear, convincing, and unequivocal evidence.⁵²⁴ Edgar Laipeniaks joined the Latvian Political Police (LPP) following the German invasion and occupation of Latvia in 1941. The LPP worked with the Nazis to apprehend communists and other suspected Soviet sympathizers.⁵²⁵ The Appellate Court noted that the court in *Osidach* had held that Section Thirteen of the DPA was satisfied by mere willing membership in a movement that persecuted civilians and that it was unnecessary to demonstrate that the defendant personally engaged in acts of persecution.⁵²⁶ However, the court argued that under the Holtzman Amendment, a higher standard was required to establish deportability. It relied on Justice Marshall's discussion in *Fedorenko* and concluded that a deportation order only may be sustained when the evidence established that the accused personally ordered, incited, assisted, or otherwise participated in persecution.⁵²⁷

The Appellate Court recounted that the Soviet occupation forces plundered, pillaged, and ravaged Latvia. Latvia subsequently aligned itself with Germany and had good reason to be concerned about the presence and activities of Soviet spies, saboteurs, and loyalists. Laipeniaks and the LPP thus possessed a legitimate basis for investigating individuals who were identified as communists. The court concluded that the government was unable to establish that these individuals were singled out based on their political affiliations or opinions. More importantly, there was no evidence that Laipeniaks personally assisted or engaged in acts of persecution.⁵²⁸ The court concluded that "[w]ithout proof of at least one instance in which Laipeniaks' investigations resulted in the ultimate persecution of an individual because of his political beliefs, we are unable to infer that such occurred."⁵²⁹

Judge James Boochever, in dissent, adopted a more traditional analysis which focused on Laipeniaks' membership in the Latvian police, who, Boochever argued, were involved in persecuting communists. Judge Boochever contended that the court, in centering its analysis on whether Laipeniaks committed an act of persecution, overlooked that Laipeniaks voluntarily joined and assisted a Nazi-run police force whose sole purpose was to eradicate communists.⁵³⁰ Laipeniaks' actions, which the defendant con-

523. 750 F.2d 1427 (9th Cir. 1985).

524. *See id.*

525. *See id.* at 1429.

526. *See id.* at 1431 (citing and discussing *United States v. Osidach*, 513 F. Supp. 51 (E.D. Pa. 1981)). For a discussion of *Osidach*, see *supra* notes 495-502 and accompanying text.

527. *See id.* at 1431-32 (citing and discussing *Fedorenko v. U.S.*, 449 U.S. 490 (1981)). For a discussion of *Fedorenko*, see *supra* notes 444-51 and accompanying text.

528. *See Laipeniaks*, 750 F.2d at 1435-37.

529. *Id.* at 1437.

530. *See id.* at 1441.

ceded included hitting uncooperative internees,⁵³¹ all were undertaken in furtherance of the Nazi's persecutorial policies and plan.⁵³² Judge Boochever reminded his brethren that "[r]egardless of the unpopularity of communism in our society, the persecution of a person because of communist beliefs is proscribed."⁵³³

In summary, the Ninth Circuit concluded that the historical evidence indicated that suspected communists were arrested and interrogated based on a belief that they constituted a threat to the internal stability of Latvia.⁵³⁴ The court further held that even if the LPP engaged in persecution, the prosecution was unable to establish by clear and convincing evidence that Laipeniaks possessed the intent to persecute, and had persecuted, detainees based on their political beliefs.⁵³⁵ This legal standard constituted a clear deviation from prevailing precedents.⁵³⁶

In *United States v. Sprogis*,⁵³⁷ the Second Circuit Court of Appeals rejected a petition to denaturalize Elmars Sprogis, a police officer during the German occupation of Latvia.⁵³⁸ Sprogis conceded that at the time that he joined the local police in the town of Gulbene in 1941, he was aware that the force was under the effective control of the Nazi authorities. However, he explained that the Jewish population was arrested prior to his having joined the police and that they were being held in a facility under German control. He conceded that at one point during his tenure, the Germans arrested nine Jews and that they were detained for several hours under police custody at a jail that was under his command. The Jews subsequently were transferred to a German prison where Sprogis testified that they likely were executed. Sprogis also admitted that he compensated the four farmers who transported the Jews to the jail with funds which the Germans confiscated from the prisoners. In addition, he acknowledged that he witnessed over one hundred Jews being led to their execution in August 1941.⁵³⁹

The Appellate Court observed that Sprogis neither was as innocent as the proverbial prison barber, nor as venal as the stereotypical armed and uniformed prison guard. His activities were limited to the performance of ministerial acts, and the only evidence connecting Sprogis with persecutorial conduct was his participation in the detention of the nine Jewish prisoners. However, he neither ordered nor participated in their arrest, transport, or in the confiscation of their property. On the other hand, the court recognized that Sprogis was present during the Jews' incarceration, paid the farmers for

531. *See id.* at 1439, 1441.

532. *See id.* at 1441.

533. *Id.* at 1438.

534. *See Laipeniaks*, 750 F.2d at 1435-37.

535. *See id.*

536. *See Fedorenko*, 449 U.S. at 490.

537. 763 F.2d 115 (2d Cir. 1985).

538. *Id.*

539. *See id.* at 118-19.

transporting the prisoners, and signed papers recording the disposition of their property. The court, after weighing this evidence, concluded that Sprogis "passively accommodated the Nazis while performing occasional ministerial tasks."⁵⁴⁰ However, this did not constitute the type of personal and active assistance in persecution which the prosecution was required to demonstrate under *Laipenieks*.⁵⁴¹

The Second Circuit observed that Sprogis joined the police to fulfill his career ambitions rather than to further the Nazi's policies. It viewed Sprogis' passive accommodation of the Reich's policies as similar to that of other civil servants who confronted the German invasion.⁵⁴² Excluding these individuals from citizenship would require the condemnation of those who seemingly possessed no alternative other than to perform routine law enforcement functions during the Nazi occupation.⁵⁴³

In summary, the Second Circuit in *Sprogis* adopted the *Laipenieks* requirement that the prosecution demonstrate by clear and convincing evidence that a defendant intentionally, voluntarily, and actively persecuted individuals based on their race, religion, nationality, or political opinion. The court determined that Sprogis was not involved in the persecution of Jews. However, the court's opinion overlooks the fact that Sprogis' involvement in the detention of the nine Jews was similar to the role performed by concentration camp guards and that he must have been cognizant that his processing of the paper work pertaining to the nine Jewish prisoners contributed to the confiscation of their property and to the victims' rapid execution and demise.⁵⁴⁴ The court's argument that it would be unfair to denaturalize individuals in the occupied territories who involuntarily served the German cause was contrary to *Fedorenko's* rejection of the duress defense.⁵⁴⁵ At the time that Sprogis joined the Latvian police, he certainly was aware that the police were assisting the Nazi occupation forces and that he likely would be requested to engage in persecutorial acts.⁵⁴⁶ Sprogis' eventual promotion to the assistant chief of police in a larger city indicates that he must have been viewed favorably by German authorities.⁵⁴⁷

In *Petkiewytch v. I.N.S.*,⁵⁴⁸ the Sixth Circuit reversed the decision of the Board of Immigration Appeals that ordered the deportation of Leonid Pet-

540. *Id.* at 122.

541. *See id.* at 122 (citing and discussing *Laipenieks v. I.N.S.*, 750 F.2d 1427 (9th Cir. 1985)). For a discussion of *Laipenieks*, see *supra* notes 523-36 and accompanying text.

542. *See Sprogis*, 763 F.2d at 122-23.

543. *See id.* at 123.

544. The Court distinguished Sprogis' conduct from that of former concentration camp guards and police officials. *See Sprogis*, 763 F.2d at 122.

545. *See Fedorenko*, 449 U.S. at 505-06.

546. *See Sprogis*, 763 F.2d at 117 (summarizing expert testimony of Dr. Raul Hilberg). *See also id.* at 123.

547. *See id.* at 117-18.

548. 945 F.2d 871 (6th Cir. 1991).

kiewytsch.⁵⁴⁹ Petkiewytsch and his brother were Polish nationals who were conscripted by the Germans to serve as armed and uniformed civilian perimeter guards at Kiel-Hasse labor education camp. Petkiewytsch was required to escort prisoners to work sites, to shoot escapees, and to stand guard outside a bunker where prisoners were interrogated and often mistreated. He was allowed unescorted liberty outside the camp, but was warned that he would be imprisoned or shot if he disobeyed orders or attempted to flee.⁵⁵⁰ The court noted that forced labor camps primarily were used to punish laborers accused of work regulations. A fence did not surround Kiel-Hasse and the normal period of incarceration only was fifty-six days.

Although German workers were subject to internment, a disproportionate number of the internees were Jews and Eastern European involuntary workers who had committed offenses such as refusing to display their assigned insignias. As a general rule, punishment was carried out by the German Security Police rather than by civilian guards such as Petkiewytsch. Petkiewytsch claimed that during his eight months of service, he never deployed his rifle or abused or struck a prisoner. However, the court noted that he must have been aware of the overcrowding, malnutrition, starvation, torture, and execution of prisoners.⁵⁵¹

Petkiewytsch attempted to distinguish his case by pointing out that he involuntarily served as a civilian guard in the least restrictive type of detention camp. He reluctantly performed this task to avoid imprisonment or death and never personally committed an act of abuse. The court noted that *Schellong* held that the scope of the Holtzman Amendment was the same as the DPA and that service in a concentration camp was sufficient to constitute assistance in persecution under both statutes.⁵⁵² The Sixth Circuit also noted that *Maikovskis* recognized that the personal motivation of a defendant accused of assisting in Nazi persecutions was immaterial.⁵⁵³ On the other hand, *Laipenieks* held that deportability under the Holtzman Amendment only may be sustained when the evidence established that the defendant "personally ordered, incited, assisted or otherwise participated in the persecution of individuals."⁵⁵⁴

The Sixth Circuit followed the *Laipenieks* precedent and ruled that the Holtzman Amendment required active participation in persecution which

549. *Id.* at 881.

550. *See id.* at 872-73.

551. *See id.* at 872-75.

552. *See id.* at 878 (citing and discussing *Schellong v. I.N.S.*, 805 F.2d 655 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987)). For a discussion of *Schellong*, see *supra* notes 460-67 and accompanying text.

553. *See Petkiewytsch*, 945 F.2d at 878-79 (citing and discussing *Markovskis v. I.N.S.*, 773 F.2d 435 (2d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986)). For a discussion of *Markovskis*, see *supra* note 482 and accompanying text.

554. *Petkiewytsch*, 945 F.2d at 878 (citing and discussing *Laipenieks v. I.N.S.*, 750 F.2d 1427 (7th Cir. 1987)). For a discussion of *Laipenieks*, see *supra* notes 523-35 and accompanying text.

went beyond "assistance."⁵⁵⁵ It held that the Holtzman Amendment specifically was intended to exclude war criminals and did not encompass reluctant civilian guards who served under duress in the least punitive of camps and who had not engaged in personal acts of persecution.⁵⁵⁶ The court concluded that deporting Petkiewytch would neither serve the purposes of the Holtzman Amendment nor advance a discernable policy of the United States.⁵⁵⁷

These three cases deviated from the prevailing precedents in requiring a personal and active involvement in war crimes, which went beyond mere membership in, or assistance to, a criminal enterprise. This involvement required an intent to persecute individuals on the basis of race, religion, nationality, or political opinion.⁵⁵⁸ Lastly, the courts recognized the duress defense for defendants who involuntarily had been involved in assisting acts of persecution.⁵⁵⁹

D. Summary

In summary, three separate standards have been articulated by federal courts in adjudicating the denaturalization and deportation of those formerly affiliated with Nazi Germany. *Fedorenko* and its progeny established an objective test which scrutinized whether an accused's particular conduct could be considered assistance in persecution. The threshold test was whether the defendant's activities rose to the level of a uniformed and armed concentration or labor camp guard. The difficulty was to determine whether the individual's conduct satisfied this standard and whether this was the appropriate demarcation between innocent and invidious conduct.⁵⁶⁰

The *Osidach* line of cases created an organizational test which examined whether an individual was a knowing and voluntary member of an organization which was deemed hostile to the United States or which engaged in persecution on the basis of race, religion, nationality, or political opinion.⁵⁶¹ These cases formally were decided under an organizational analysis, but the defendants also satisfied the *Fedorenko* standard for assistance in persecution. The question remains whether mere membership or service as an obscure functionary constitutes proper grounds for denaturalization or deportation.⁵⁶²

The third analytical framework relied upon a subjective test which examined the defendant's intent, the nature of his personal involvement, and whether the defendant acted in a free and voluntary fashion. The *Laipeniaks*

555. *Laipeniaks*, 945 F.2d at 880.

556. *See id.* at 880-81.

557. *See id.* at 881.

558. *See Fedorenko*, 449 U.S. at 505-06.

559. *See Petkiewytch*, 945 F.2d at 880.

560. *See supra* notes 444-92 and accompanying text.

561. *See supra* notes 493-522 and accompanying text.

562. *See Fedorenko*, 513 F. Supp. at 97.

line of cases established a high threshold that limited denaturalization and deportation to individuals who actively and directly were involved in war crimes. The concern is whether the subjective approach is based on a model of legal responsibility which is too narrowly conceived to serve the public policy rationales animating the denaturalization and deportation of individuals affiliated with the Nazi cause.⁵⁶³

The contrasting visions of the objective and organizational tests on the one hand, and the subjective approach on the other, partially are based upon differing interpretations of the relevant legislative history and intent.⁵⁶⁴ These differing analyses also reflect divergent philosophical premises. The objective and organizational tests elevate the interests of the victims and human rights over the equitable claims of the defendant. These tests are sufficiently broad to encompass those who contributed, both directly and indirectly, to the persecution of civilians. This protects the integrity of the immigration process by preventing a wide-range of individuals who concealed their involvement in the Nazi cause from continuing to enjoy the benefits of citizenship and residency. The objective and organizational tests also provide an efficient solution which permits judges to limit the degree to which they are required to engage in a case-by-case investigation, forty years after the fact, of individuals' intent, action, and motivation. The criminal prosecution of many of these relatively minor contributors to the Holocaust likely would prove difficult to sustain and the broadly conceived objective and organizational approaches to denaturalization and deportation ensures that Nazi collaborators and conspirators will be compelled to confront their culpability.⁵⁶⁵

The subjective test is based upon the view that the deprivation of an individual's citizenship and residency should be based upon a strict standard which requires a demonstration by clear and convincing evidence that the defendant personally and actively engaged in the persecution of individuals on the basis of race, religion, nationality, or political opinion. This approach also posits that equitable considerations dictate that individuals should not be held accountable for actions that were the product of duress or necessity. The subjective standard reflects the view that the interest in excluding those affiliated with the Third Reich has diminished over the course of forty years. Most of the accused have proven to be contributing members to the United States and it would be inequitable to bring a prosecution at this late date. Prosecutorial resources, accordingly, should be devoted to more pressing concerns.⁵⁶⁶ There are significant problems under all of these standards in reliably establishing the nature and scope of an individual's involvement in the Third Reich.

563. See *supra* notes 423-43 and accompanying text.

564. See *Petkiewytch*, 945 F.2d at 879-80.

565. See generally Stephen J. Massey, *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 MINN. L. REV. 97, 117-19 (1986).

566. See generally *id.*

VIII. PROCEDURAL PROBLEMS

A. *Witness Reliability*

In a number of denaturalization and deportation cases, the United States relied upon witnesses residing in the former Soviet Union.⁵⁶⁷ Defendants typically challenged the reliability of these witnesses by pointing out that the Soviet justice system failed to provide due process protections during the deposition process, and that Soviet intelligence sources were known to have targeted and forged evidence against members of the anti-Soviet e'migré community.⁵⁶⁸ On the other hand, the prosecution argued that evidence obtained from Russia and its former constituent Republics and satellites was not invariably unreliable and its automatic exclusion would effectively immunize most alleged Nazi collaborators from legal liability.⁵⁶⁹

Federal courts declined to adopt a per se rule of exclusion of material evidence and testimony obtained from the former Soviet Union.⁵⁷⁰ Courts, instead, weighed and balanced various factors in an effort to determine the reliability of witnesses and the weight which should be accorded to their videotaped testimony. These factors included the age of the witnesses at the time that they purportedly observed the events, the witness' opportunity to observe the defendant's alleged activities, the availability of corroborating evidence, the ease and accuracy of translation, the degree to which Soviet authorities attempted to influence the testimony, and the witnesses' demeanor and credibility.⁵⁷¹

In *Kowalchuk*, as previously noted, defendant Serhij Kowalchuk was charged with having served as deputy commandant of a unit of the Ukrainian militia in Lubomyl between 1941 and 1944. The militia allegedly engaged in atrocities and repression against Jews.⁵⁷² The District Court observed that its ability to reconstruct events which occurred nearly forty years ago was complicated by the fact that the witnesses' accounts were uncorroborated by documentary evidence and were unrefreshed by any contemporaneous recollection of their recollections.⁵⁷³ The witnesses also were not fluent in English and most relied on interpreters in memorializing their testimony on videotape. This made it difficult to evaluate the accuracy and reliability of the testimony.⁵⁷⁴

The first accusations against defendant Kowalchuk and his brother ap-

567. See generally *Kairys*, 981 F.2d at 941.

568. See *Kungys*, 571 F. Supp. at 1123.

569. See *id.* at 1124.

570. See *Linnus*, 527 F. Supp. at 433-34.

571. See *Fedorenko*, 513 F. Supp. at 86 n.16.

572. See *Kowalchuk*, 571 F. Supp. at 74.

573. See *id.* at 75.

573. See *id.* at 79-80.

574. See *id.* at 75.

peared in a Soviet publication and then were picked up by the wire services and pursued by the United States. The District Court noted that the Russian witnesses were selected, controlled, and made available by the Soviet Union and that they predictably supported the charges which appeared in the Soviet-controlled press. In addition, neither the prosecution nor the defense was permitted to interview other witnesses in Soviet-controlled territory or even to visit Lubomyl to search for additional information.⁵⁷⁵ The court ruled that the witnesses lacked credibility and noted that limiting the testimony to witnesses selected by the Soviets could not be "easily squared with accepted concepts of due process of law."⁵⁷⁶

The District Court also noted that it considered the delay in initiating the proceedings against Kowalchuk in evaluating the weight to be accorded to the witnesses' testimony. There was no applicable statute of limitations and the proceedings were not subject to the defense of laches. However, the court stated that it could not ignore that a substantial number of persons familiar with the events at Lubomyl, whose testimony may have been favorable to the defendant, had died over the past forty years.⁵⁷⁷ As a result, the court ruled that it would disregard the government's witnesses and that its factual conclusions would be based upon the testimony of the defendant Kowalchuk and his witnesses and other evidence which was not inconsistent with these accounts.⁵⁷⁸

In *Kungys*, the District Court noted that the Soviet judicial system was structured to produce evidence in political cases to justify the desired result. The prosecution of war criminals resident in the West was a matter of high priority. These trials furthered the Soviet interests in tainting the Baltic nationalist movement and in identifying capitalist democracies with Nazi war criminals. Witnesses who failed to testify in the desired fashion could expect to suffer the loss of housing and employment, or be charged with perjury.⁵⁷⁹

The depositions of Russian witnesses were presided over by a Soviet procurator who, according to the District Court, intimidated witnesses, posed broad sweeping questions, and permitted the American prosecutors to pose leading questions while limiting the cross-examination of defense attorneys.⁵⁸⁰ This was compounded by the Russians' use of interpreters who skewed the testimony to implicate the defendant.⁵⁸¹ During the depositions, Soviet authorities also had influenced the response of witnesses by refreshing their memory through suspiciously-worded protocols which the witnesses purportedly drafted some years ago. Other protocols which allegedly were executed contemporaneously with the events at issue, and prior to the

575. *See id.* at 80.

576. *Id.*

577. *See id.*

578. *See id.*

579. *See Kungys*, 571 F. Supp. at 1123-26.

580. *See id.* at 1127-29.

581. *See id.* at 1129.

initiation of Kungys' prosecution, were not turned over by the Soviet authorities.⁵⁸²

The District Court concluded that the Soviets denied the defense the opportunity to investigate the issues in the case and that there was a grave risk that the Soviet government unduly influenced the testimony of the deposition witnesses. The court was particularly critical of the United States for having collaborated with the Russian Totalitarian State and for having neglected to ensure that the witnesses were insulated from improper pressures. The Americans also failed to ensure that the protocols and transcripts were turned over to the defense prior to the depositions. In fact, Judge Dickinson R. Debevoise noted that the Soviets continued to withhold various documents from the defense.⁵⁸³ The District Court, in light of these procedural defects, ruled that the depositions of the Soviet witnesses would be admitted for the limited purpose of establishing that killings had been committed by Lithuanian and German detachments in Kedainiai in July and August of 1941. However, the testimony of these witnesses was not admitted as evidence that the defendant participated in the killings.⁵⁸⁴

The reliability of evidence in denaturalization and deportation cases also is threatened by the fact that there is a natural tendency for witnesses who were victimized in the Holocaust to attribute responsibility to the defendant in the dock.⁵⁸⁵ In *Kowalchuk*,⁵⁸⁶ three Jewish survivors identified photographs of Kowalchuk and testified that he personally committed various atrocities.⁵⁸⁷ District Court Judge John F. Fullam cautioned against the understandable human instinct to translate feelings of outrage and compassion into uncritical acceptance of the victim-witnesses' testimony.⁵⁸⁸ The judge pointed out that these three witnesses admitted to having discussed the events at Lubomyl among themselves and all had testified in other war crimes trials. Yet, none had ever mentioned the defendant.⁵⁸⁹ Judge Fullam noted that the credibility of one of the witnesses was tainted by the fact that he was active in efforts to establish a memorial to the Lubomyl victims and that it was difficult to discern the extent to which his testimony may have been based on various hearsay accounts which he had heard over the years. The court noted that the witness "demonstrated [a] willingness to ascribe to the defendant personal responsibility for virtually every one of the long list of atrocities catalogued by the witness . . . [which] demonstrates a tendency toward exaggeration and

582. *See id.* at 1130-31.

583. *See id.* at 1131-32.

584. *See id.* at 1132.

585. *See* Debra H. Nesselson & Steven Lubet, *Eyewitness Identification in War Crimes Trials*, 2 *CARDOZO L. REV.* 71 (1980).

586. 571 F. Supp. 72 (E.D. Pa. 1983).

587. *See Kowalchuk*, 571 F. Supp. at 74, 79.

588. *See id.* at 79.

589. *See id.* at 77.

embellishment.”⁵⁹⁰ Judge Fullam concluded that there was “substantial reason for questioning the reliability” of the testimony of the prosecution’s three survivor-witnesses.⁵⁹¹

B. Eyewitness Identification

The issue of bias also arose in considering the reliability of eyewitness identification. Eyewitness identification is central in convicting defendants of assisting in acts of persecution. However, the lapse of time, witness bias, and the susceptibility of witnesses to suggestive influences makes eyewitness identification in the Nazi denaturalization cases particularly problematic.⁵⁹² Federal courts have applied the standards developed in criminal proceedings in considering the admissibility and weight to be accorded to this evidence.⁵⁹³ The general rule is that an identification which has resulted from a suggestive pretrial photo identification process is not per se excluded from evidence. Instead, the reliability and weight to be accorded to the identification must be judged in light of the totality of the circumstances.⁵⁹⁴

In *Koizy*, seven witnesses identified Koizy as a member of the Ukrainian police.⁵⁹⁵ The evidence was presented through videotaped depositions that were taken in Poland and in the Soviet Union. The witnesses testified that they selected Koizy’s picture from a photo spread containing eight pictures. The court concluded that the reliability of the identifications was bolstered by the fact that the witnesses had a close and lengthy exposure to the defendant during his service in the Ukraine. The witnesses also offered physical descriptions of the defendant which were consistent with his photograph, thus further adding to their individual and collective credibility. In addition, there was no evidence that the photographic spreads were suggestive or that those who had directed the process attempted to influence the witnesses’ selection.⁵⁹⁶

Other cases have proven more problematic. In *United States v. Walus*,⁵⁹⁷ the United States government received information that Walus, a naturalized citizen, had served as a member of the Gestapo during the German occupation of Kielce and Czestochowa in Poland. The prosecution alleged that

590. *Id.* at 79.

591. *Id.*

592. See generally Nesselson & Lubet, *supra* note 585.

593. See *Fedorenko*, 455 F. Supp. at 905-06; *United States v. Walus*, 453 F. Supp. 699, 712 (N.D. Ill. 1978), *rev’d and remanded*, 616 F.2d 283, 292 n.15 (7th Cir. 1980).

594. See *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). See also *Neil v. Biggers*, 409 U.S. 188, 199-200 (1977).

595. See *United States v. Koizy*, 540 F. Supp. 25 (S.D. Fla. 1982), *aff’d*, 728 F.2d 1314 (11th Cir. 1984), *cert. denied*, 469 U.S. 835 (1984).

596. See *id.* at 31 n.13.

597. 453 F. Supp. 699, 712 (N.D. Ill. 1978), *rev’d and remanded*, 616 F.2d 283, 292 n.15 (7th Cir. 1980).

Walus committed various acts of persecution.⁵⁹⁸ Walus denied these allegations and claimed that he was a forced laborer in Germany during World War II.⁵⁹⁹ The District Court, in revoking Walus' citizenship, emphasized that twelve former Jewish inmates of the Czestochowa and Kielce ghettos provided "positive recognition of him [Walus] in photographic displays, recollection his name and certain physical characteristics (primarily his general build and height), and in-court identifications. Their testimony was powerful and convincing; it was also, to a high degree, consistent among the witnesses."⁶⁰⁰

The Seventh Circuit Court of Appeals granted Walus a new trial based on newly-discovered evidence.⁶⁰¹ The Court of Appeals also concluded that although the eyewitness testimony was admissible, the identifications were "questionable"⁶⁰² and "suggestive."⁶⁰³ Eight of the twelve eyewitnesses identified a photograph of Walus taken when he was thirty-seven, almost twenty years after the alleged atrocities had taken place. The reliability of their identification was further cast into doubt by the fact that the left outline of Walus' face was barely visible.⁶⁰⁴ The witnesses were contacted through advertisements in Israeli newspapers that solicited individuals who had viewed the war crimes committed by Frank Walus in Czestochowa or Kielce. An Israeli police inspector who inquired whether the individuals knew about the activities of Frank Walus in Czestochowa or Kielce contacted other potential witnesses.⁶⁰⁵ The court criticized the District Court for having given "little separate consideration to the possible effects of these procedures on each witness' identification of the defendant. . . . We are . . . troubled by the rather superficial consideration below of the potential effect of the questionable photographic identification of the defendant and its effect on the in-court identifications."⁶⁰⁶

In *Fedorenko*, the defendant claimed that he was a perimeter guard and had not committed any atrocities at Treblinka.⁶⁰⁷ The prosecution countered this claim by presenting six survivor-witnesses who identified Fedorenko in a photo array and testified that he was responsible for the perpetration of atrocities. The District Court stressed that every effort should have been taken to ensure that the photo spread was as clinically impartial as possible in light of the interval of thirty-five years that elapsed between the defen-

598. *See Walus*, 616 F.2d at 285.

599. *See id.* at 285-86.

600. *Walus*, 453 F. Supp. at 704.

601. *See Walus*, 616 F.2d. at 302-04.

602. *Id.* at 294.

603. *Id.* at 289 n.10.

604. *See id.* at 292-93.

605. *See id.* at 293-94.

606. *Id.* at 294.

607. *See Fedorenko*, 449 U.S. at 490.

dant's alleged acts and the government's denaturalization action.⁶⁰⁸ The court, however, determined that the photo spread, which was shown to witnesses residing in Israel, was "impermissibly suggestive" and had "led to a substantial act of misidentification for the three witnesses who attempted courtroom identification. It also tainted the testimonial identification of the defendant which was critical because of the serious question whether the survivor-witnesses were describing the defendant or another Russian at Treblinka."⁶⁰⁹

The District Court stressed that although each witness was shown a minimum of eight photos, only two of these pictured former guards at Treblinka, one of whom was Fedorenko. The two photos of the prison guards were larger and clearer than the others in the array and had a black border approximately one-half inch in length. The court also observed that several of the witnesses encountered difficulties and took from one to five minutes to identify the defendant.⁶¹⁰

In *Walus*, the Seventh Circuit noted that the witnesses explained that they were able to identify the defendant after so many years due to the barbarity and enormity of his crimes.⁶¹¹ Courts confronting a tainted photo array must balance the indelible impact of the Holocaust on the witnesses and the witnesses' opportunity to have viewed their persecutors for an extended period against the lengthy time which has elapsed and the fact that individuals are likely to respond positively to any suggestion that a given photo pictures an individual who was involved in atrocities against the witnesses and their friends and family. The substantial dangers of misidentification, of course, may be combated on cross-examination. But, even a free and full cross-examination may not be able to neutralize the impact at trial of a courtroom identification.⁶¹²

C. Documents

Service records, military orders, employment histories, and other documents have proven to be central in connecting defendants with persecutorial activities. *Kairys*⁶¹³ outlined the requirements of Rule 901(b)(8) of the Federal Rules of Evidence, which governs the admissibility of so-called ancient documents. This rule states that a document is admissible if it "is in such condition as to create no suspicion concerning its authenticity . . . was in a place where it, if authentic, would likely be, and . . . has been in existence 20

608. See *Fedorenko*, 455 F. Supp. at 905-06.

609. *Id.* at 906.

610. See *id.* The District Court rejected the in-court identification of the defendant based on the fact that the witnesses had discussed the trial among themselves in violation of a court order. See *id.* at 907.

611. See *Walus*, 616 F.2d at 289.

612. See generally *id.* at 289-92.

613. *Kairys*, 782 F.2d 1374.

years or more at the time it is offered.”⁶¹⁴ The question whether a document is free of suspicion and therefore admissible is within the discretion of the trial court. This involves a decision that the document “is what it purports to be.”⁶¹⁵ It is unnecessary to demonstrate a chain of custody for ancient documents. Rule 901(b)(8) merely requires that a document is located in a place in which it logically should be found.⁶¹⁶

In a number of cases, defendants have challenged the authenticity and weight to be accorded to documents obtained from Soviet and German archives. In *Kairys*, the defendant challenged the authenticity of a *Personalbogen*, or thirty-year-old Security Police identification card, bearing the name Liudvikas Kairys. The threshold issue of admissibility required the court to determine whether the document was a valid identification card. The issue whether the card correctly identified the defendant went to weight and was a matter for the trier of fact.⁶¹⁷ The Appellate Court concluded that there was a sufficient basis to support the District Court’s admission of the German SS *Personalbogen*. The identification card was found in the Soviet archives, the depository for German SS documents, the paper fiber was consistent with a document which was more than twenty years old, and the card’s design and type matched that of other authenticated SS identification forms. The District Court also determined that there was sufficient evidence to conclude that the card belonged to Kairys based on the fact that his thumbprint and signature appeared on the document. In addition, other camp guards placed Kairys at Treblinka and identified the photo on the identification as Kairys.⁶¹⁸

In 1993, Konrad Kalejs requested the Seventh Circuit to review a deportation order issued by the Board of Immigration Appeals.⁶¹⁹ Kalejs was determined to have concealed his service as a company commander with the infamous Arajs Kommando of the pro-Nazi Latvian Security Service. The Kommando was involved in the extermination of seventy thousand Jews and had been deployed as guards at the Salaspile Labor Camp.⁶²⁰ The defendant claimed that most of the documents introduced against him should have been excluded based on the fact that they were obtained from Soviet-controlled archives. The court recognized that the Soviets may have manufactured evidence in some cases involving Nazi collaborators, but refused to adopt a per se exclusionary rule, particularly when the evidence was corroborated by Western documentation and eyewitness testimony. It noted that other courts relied upon such evidence and that Kalejs failed to articulate a reason why

614. FED. R. EVID. 901(b)(8), *quoted in Kairys*, 782 F.2d at 1379.

615. *Id.*

616. *See id.*

617. *See Kairys*, 782 F. Supp. at 1378-79.

618. *See id.* at 1380.

619. *See Kalejs v. I.N.S.*, 10 F.3d 441 (7th Cir. 1993), *reh’g denied, cert. denied*, 114 S. Ct. 1305 (1994).

620. *See id.* at 442-43.

the Soviets would target him.⁶²¹

Other defendants also claimed that the Soviet Union tampered with documents introduced at trial. In 1996, a Massachusetts District Court affirmed the revocation of the citizenship of Aleksandras Lileikis, former head of the Lithuanian internal security service in Vilnius, Lithuania, during the Nazi occupation.⁶²² The government submitted over one thousand pages of material that was obtained from the Lithuanian Central State Archives. The District Court dismissed Lileikis' claim that the documents were a Soviet forgery. The court queried why the Soviet Union would "go to the trouble of forging documents implicating Lileikis in war crimes and then bar all access to its handiwork for some fifty years, while awaiting the collapse of the government whose evil intentions towards Lileikis it presumably sought to serve?"⁶²³

Jonas Stelmokas, a platoon commander with the pro-Nazi Lithuanian police battalion, also challenged the trustworthiness of documents implicating him, which were obtained from archives in the former Soviet Union.⁶²⁴ The Appellate Court noted that acceptance of the defendant's contention required a belief that "the fabricator most peculiarly placed the bulk of the documents in a location where they were not accessible to the public and from which, in fact, they were not released for decades. . . . Stelmokas was hardly a prominent figure in the war and it is difficult to conceive why someone would go to the lengths he suggests in order to frame him."⁶²⁵

In *Walus*, District Court Judge Julius Hoffman ruled that limited weight should be accorded to documents which were obtained from German archives.⁶²⁶ Walus contended that he worked as an involuntary farm worker in Germany during the war and had not served in the Gestapo.⁶²⁷ He argued that the fact that there was no documentary record linking him to the Gestapo indicated that he was not a member of the Nazi intelligence service. Judge Hoffman, however, noted that expert testimony established that most of the Gestapo records were destroyed and he concluded that the incompleteness of the records diminished the weight which should be accorded to the absence of this evidence.⁶²⁸ There also were documents indicating that payments were made by German farmers to the General Health Insurance Agency (AOK) on Walus' behalf. Judge Hoffman observed that these documents were under Nazi control during the war and that "one who had been involved in Nazi activities would certainly have had the strongest desire to create a false

621. *See id.* at 447.

622. *See* United States v. Lileikis, 929 F. Supp. 31, 34 (Mass. 1996).

623. *Id.* at 38.

624. *See* United States v. Stelmokas, 100 F.3d 302, 307 (3d Cir. 1996), *reh'g denied, cert. denied*, 117 S. Ct. 1847 (1997).

625. *Id.* at 313.

626. *See Walus*, 453 F. Supp. at 708-09.

627. *See id.* at 704-07.

628. *See id.* at 708.

identity.⁶²⁹ The Appellate Court criticized Judge Hoffman for having failed to articulate a basis for suspecting that the documents that were introduced at trial were altered or forged by Nazi sympathizers. The Seventh Circuit conceded that Walus may have possessed a motive to manufacture various documents, but questioned whether a low-ranking officer possessed the resources to accomplish such a task.⁶³⁰

In summary, documents obtained from German or Soviet archives were admitted under the ancient documents provision of the Federal Rules of Evidence.⁶³¹ Federal courts have conceded that documents obtained from these sources may have been modified or forged.⁶³² However, the judiciary refused to adopt a *per se* rule of exclusion.⁶³³ Courts also rejected the contention of relatively low-level defendants that they were the victims of Soviet or Nazi plots to target nationalists through the modification or forgery of documents.⁶³⁴ The questioning of the authenticity of documents, nevertheless, has tainted the perceived fairness of denaturalization and deportation proceedings.⁶³⁵

D. Equitable Considerations

The denaturalization and deportation of a Nazi war criminal requires the reconstruction of events that occurred over forty years ago. The integrity and accuracy of this process has been limited by the government's reliance on witnesses⁶³⁶ and documents which were under the control of Russia and its former satellite States.⁶³⁷ Fact-finding also has been complicated by the possibility that survivor-witnesses incorrectly may have attributed various criminal acts to the defendant in the dock.⁶³⁸ In addition, these witnesses may have been dangerously susceptible to suggestive influences in making identifications in photo arrays.⁶³⁹

The Seventh Circuit Court of Appeals noted these threats to the judicial process and warned their brethren against permitting the desire to obtain retribution for the Holocaust to dull concern for due process protections.⁶⁴⁰ Public pressure to issue denaturalization or deportation orders, and the tendency to project forty years of pent-up emotions onto the accused also may

629. *Id.* at 710.

630. *See Walus*, 616 F.2d at 301.

631. *See Kairys*, 782 F. Supp. at 1378-79.

632. *See Kalejs*, 10 F.3d at 442-43.

633. *See id.*

634. *See Lileikis*, 929 F. Supp. at 34; *Stelmokas*, 100 F.3d at 307.

635. *See id.*

636. *See Kungys*, 571 F. Supp. at 1123; *Linnus*, 527 F. Supp. at 433-34; *Osidach*, 513 F. Supp. at 86.

637. *See supra* notes 617-30 and accompanying text.

638. *See Kowalchuk*, 571 F. Supp. at 74, 79.

639. *See supra* notes 598-634 and accompanying text.

640. *See Kalejs*, 10 F.3d at 452.

distort judicial judgments. In addition, the Appellate Court warned against permitting these relatively minor defendants to serve as vehicles for the vindication of the totality of wrongs perpetrated by Nazi Germany.⁶⁴¹ As the Third Circuit noted in *Stelmokas*, the role of judges “is not to proclaim our visceral reactions to the horrors of history. Rather we must confine ourselves to the trial record . . . and decide, as a dispassionate reviewing court.”⁶⁴²

The American government has spent millions of dollars in pursuit of Nazi functionaries who illegally entered and resided in the United States. This process is intended to vindicate the rule of law, deny safe-haven to former Nazi war criminals, and exact retribution for the crimes of World War II.⁶⁴³ The District Court, in *Fedorenko*, observed that more government funds were expended in pursuing and overwhelming the defendant than were spent in prosecuting the leaders of organized crime.⁶⁴⁴ The question arises whether this allocation of resources is justified, particularly when only a small percentage of Nazi war criminals resident within the United States are likely to be detected, and those who are denaturalized may not be accepted, let alone prosecuted, in a third party State.⁶⁴⁵

Denaturalization and deportation actions have been tainted by the fact that these proceedings have been brought over three decades following the defendants’ entrance into the United States. Defendants nevertheless have failed in attempts to invoke the defense of laches.⁶⁴⁶ Some courts have recognized that this affirmative defense should be available in those instances in which a defendant is able to establish prejudice stemming from the government’s alleged lack of diligence.⁶⁴⁷ Judge Ruggero Aldisert, dissenting in *Stelmokas*, noted that there was no analogue in American jurisprudence to permitting a trial on events that occurred a half-century ago. He argued that, with the exception of murder cases, all civil and criminal proceedings are limited by a statute of limitations. This reflects the understanding that, with the passage of time, witnesses die, memories fade, and documents disappear. These developments conspire to irremediably impede the exploration for truth.⁶⁴⁸ Judge Aldisert pointed out that, given contemporary notions of due process, it was doubtful whether an individual could be tried in 1996 for a murder that had taken place in 1941. He noted that the judiciary, nevertheless, inexplicably continued to elevate the interest in prosecuting stale de-

641. See *Fedorenko*, 455 F. Supp. at 899 (noting the emotional intensity surrounding the *Fedorenko* trial).

642. *Stelmokas*, 100 F.3d at 328.

643. See *Schellong*, 805 F.2d at 662 (purpose of Holtzman Amendment is to ensure that the United States did not serve as a safe haven for individuals who assisted the Nazis).

644. See *Fedorenko*, 455 F. Supp. at 899.

645. See *United States v. Trifa*, 662 F.2d 447 (6th Cir. 1981), *cert. denied*, 456 U.S. 975 (1982) (Trifa voluntarily surrendered his certificate of denaturalization, but was not deported due to failure to find an accepting State).

646. See *Costello v. United States*, 365 U.S. 265 (1961).

647. See *Koreh*, 59 F.2d at 445-46.

648. See *Stelmokas*, 100 F.3d at 342-43.

naturalization cases over the fundamental legal principles which Americans fought to protect during World War II.⁶⁴⁹

The denaturalization and deportation of Nazi war criminals seems particularly questionable given that a substantial number of those subject to prosecution are octogenarians and nonagenarians.⁶⁵⁰ Virtually all of these defendants have proven to be responsible and contributing citizens. They range from Michael Schmidt, who worked as a janitor and lived a quiet life in a Chicago suburb,⁶⁵¹ to Konrad Kalejs, who became a millionaire with four homes.⁶⁵² Defendant Serhij Kowalchuk worked as a tailor ever since arriving in the United States. His Jewish employer, along with other witnesses, testified that they never detected any trace of anti-semitism or racial animus in the defendant.⁶⁵³

Several of those accused of assistance in persecution involuntarily served the Nazi occupation forces. Defendant Feodor Fedorenko was a truck driver in the Ukraine. In 1941, the Red Army mobilized his truck and the invading German forces quickly captured him. He then was subjected to inhumane conditions in prisoner of war camps before being selected to serve as a guard at Treblinka.⁶⁵⁴ Fedorenko claimed that he was involuntarily assigned to guard duty: "they (the Germans) didn't ask; if you didn't go they'd shoot you down like a dog."⁶⁵⁵ The District Court noted that it was Fedorenko's lack of education, sophistication, and willingness to conform which likely motivated the Germans to conscript him for guard duty.⁶⁵⁶

The court observed that Fedorenko had proven to be a responsible citizen and resident of the United States for over twenty-nine years and that the evidence concerning his criminal conduct at Treblinka was inconclusive. Under these circumstances, the court concluded that the equities should be weighed in the defendant's favor. In addition, Fedorenko's misrepresentations and concealment of his past were perfectly understandable given his fear of being repatriated to the Soviet Union.⁶⁵⁷ The Third Circuit Court of Appeals queried in *Kowalchuk* whether those who cooperated with the Germans under the threat of arrest, imprisonment, and torture and who committed no cognizable crimes should forever be denied the possibility of American citizenship. The question arises whether we are holding these individuals to a higher standard than we would be willing to impose upon ourselves.⁶⁵⁸

649. *See id.* at 342.

650. *See id.* at 343.

651. *See Schmidt*, 923 F.2d at 1257.

652. *See Kalejs*, 10 F.3d at 442.

653. *See Kowalchuk*, 571 F. Supp. at 77.

654. *See Fedorenko*, 455 F. Supp. at 900-02.

655. *Id.* at 900.

656. *See id.* at 920.

657. *See id.* at 920-21.

658. *See Kowalchuk*, 773 F.2d at 513.

The evidentiary, procedural, and philosophical problems associated with the denaturalization and deportation of those who assisted in the persecution of civilians during World War II are illustrated in the pursuit of John Demjanjuk.⁶⁵⁹ Demjanjuk's prosecution may have sounded the death-knell for the effort to bring those affiliated with the Nazis to the bar of justice.⁶⁶⁰

IX. THE PROSECUTION OF JOHN DEMJANJUK

A. Denaturalization

In 1981, United States District Court Judge Frank J. Battisti affirmed the government's motion to revoke the Certificate of Naturalization of John Demjanjuk on the grounds that Demjanjuk concealed and misrepresented his service with the German Security Police at the training camp at Trawniki and at the extermination camp at Treblinka, Poland.⁶⁶¹

Demjanjuk was a collective farmer in the Ukraine. In 1940, he was conscripted into the Russian army and was captured two years later by the German invaders at the Battle of Kerch in the Crimea. After having been transferred to various prisoner of war camps, the prosecution charged that Demjanjuk was sent to the SS training facility at Trawiniki, Poland. He thereafter allegedly was assigned to the Treblinka concentration camp. Demjanjuk denied that he was present at either location,⁶⁶² and, on his visa application, he claimed to have worked as a farmer in Poland and as a long-shoreman in Danzig.⁶⁶³ He subsequently modified this story at trial and testified that the Germans placed him in a unit of the Ukrainian National Army but that he never engaged in military combat.⁶⁶⁴

The prosecution's accusation that the defendant had been at Trawiniki was based on an identification card obtained from Soviet archives which was

659. See *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982). See also *In re Extradition of John Demjanjuk*, 612 F. Supp. 544 (N.D. Ohio 1985); *Demjanjuk v. Petrovsky*, 612 F. Supp. 571 (N.D. Ohio 1985), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). See also *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), *reh'g denied*, *cert. denied*, 513 U.S. 914 (1994) (vacating extradition order); *Demjanjuk v. Meese*, 784 F.2d 1114 (D.C. Cir. 1986); *In re Extradition of John Demjanjuk*, 603 F. Supp. 1463 (N.D. Ohio 1984); *In re Extradition of John Demjanjuk*, 603 F. Supp. 1468 (N.D. Ohio 1984), *dismissed*, 762 F.2d 1012 (6th Cir. 1985).

660. See generally Lisa J. Del Pizzo, *Not Guilty-but Not Innocent; An Analysis of the Acquittal of John Demjanjuk and its Impact on the Future of Nazi War Crimes Trials*, 18 B.C. INT'L & COMP. L. REV. 137 (1995); Andrew David Wolfberg, *Israel v. Ivan (John) Demjanjuk; Wachmann Demjanjuk Allowed to Go Free*, 17 LOY. L.A. INT'L & COMP. L.J. 474 (1995); Jay L. Chavkin, *The Man Without a Country: The Just Deserts of John Demjanjuk*, 28 LOY. L.A. L. REV. 769 (1995); Cheryl Karz, *Injustice Revisited: Did Ivan the Terrible Get Away Again?*, 16 LOY. L.A. INT'L & COMP. L.J. 953 (1994).

661. See *Demjanjuk*, 518 F. Supp. at 1363.

662. See *id.* at 1364.

663. See *id.* at 1379.

664. See *id.* at 1377.

authenticated by expert testimony. The card stated that "Iwan Demjanjuk is employed as a guard in the guard Units of the Reich Leader of the SS" and carried the boldface heading "Headquarters Lublin, Training Camp Trawniki."⁶⁶⁵ The reverse side of the card accurately recited Demjanjuk's personal history, described a scar on his back, and bore the defendant's photo and signature.⁶⁶⁶ The claim that Demjanjuk served at Trawniki and Treblinka also was supported by the distinctive Security Police blood group tattoo on the inside of the defendant's left arm.⁶⁶⁷

Five Jewish survivors from Treblinka, as well as Otto Horn, a former German concentration camp guard, identified Demjanjuk as having been at Treblinka. Each identified Demjanjuk's photograph as picturing a Ukrainian named "Ivan" who abused and beat Jews. Ivan also was alleged to have herded inmates into the gas chambers and to have activated the motors which propelled the fatal poison into the compartments. This savage cruelty earned Ivan the nickname of "Ivan Grozny" or "Ivan the Terrible."⁶⁶⁸

Five of the identifications were conducted in Israel while Otto Horn was examined in Germany. Each witness was shown a photo album containing a picture of the defendant at the age of thirty-one, which was taken from his 1951 immigration application. They all selected the defendant's visa photograph as the man known as Ivan. Four of the five witnesses who were shown a second photo spread containing the defendant's picture from the Trawniki card also identified the defendant as Ivan. The fifth witness failed to identify the defendant's Trawniki photo, but later made a successful identification at trial.⁶⁶⁹ The Israeli photo album containing the visa picture was deemed impermissibly suggestive in *Fedorenko*.⁶⁷⁰ However, the *Demjanjuk* court concluded that, despite the passage of thirty-four years, the identifications were reliable.⁶⁷¹

One witness viewed all forty-three photos contained in the Israeli photo book. The others examined between eight and seventeen. Demjanjuk's photo was placed next to that of Fedor Fedorenko, the only other individual in the photo spread who was suspected of having been at Treblinka. These two photos were larger than the others on the page and the visual images were clearer. The court, however, noted that over half the photographs in the album were of comparable size and visual quality.⁶⁷² The District Court also concluded that the two witnesses who only examined eight pictures scrutinized a number of photographs which were similar in size and quality to that of Demjanjuk and, yet, were able to quickly and unequivocally identify the

665. *Id.* at 1366.

666. *See id.* at 1366-68.

667. *See id.* at 1377-78.

668. *Id.* at 1370.

669. *See id.* at 1372.

670. *Id.* at 1375 n.27. *See Fedorenko*, 455 F. Supp. at 905-06.

671. *See Demjanjuk*, 518 F. Supp. at 1375.

672. *See id.*

defendant.⁶⁷³

The reliability of the identifications was bolstered by the fact that each of the witnesses worked adjacent to the gas chambers and regularly observed the activities of the individual known as Ivan the Terrible. Three of the witnesses testified that they personally witnessed Ivan commit atrocities and one alleged that Ivan had beaten him. There was no indication that the identification procedures were prejudicial or that the widespread media coverage prejudiced the process.⁶⁷⁴ The court also noted that following the witnesses' viewing of the photographs, they offered physical descriptions which corroborated their identifications of the defendant.⁶⁷⁵

Judge Battisti, based on an examination of the factual circumstances, concluded that none of the pretrial photographs were so impermissibly suggestive as to give rise to a likelihood of misidentification and to deny the defendant due process of law.⁶⁷⁶ He went on to rule that the defendant's failure to have disclosed his service at Trawiniki, as well as his later service as an armed guard at Treblinka, were material misrepresentations under the DPA. Testimony indicated that United States officials would have denied Demjanjuk a visa had he disclosed his wartime activities.⁶⁷⁷ As a result, the court determined that Demjanjuk was ineligible for a visa under the DPA and that his citizenship should be revoked.⁶⁷⁸ This was affirmed by the Sixth Circuit Court of Appeals.⁶⁷⁹ Judge Battisti subsequently rejected Demjanjuk's motion to vacate the judgment on the grounds that the Soviet Union and the Office of Special Investigations conspired to conceal the falsification of the Trawiniki document as well as the perjury of two witnesses.⁶⁸⁰

B. Extradition

On November 18, 1983, the United States Attorney for the Northern District of Ohio, acting on behalf of the government of Israel, requested the District Court to conduct a hearing to determine whether John Demjanjuk should be extradited to Israel.⁶⁸¹ Judge Battisti denied Demjanjuk's recusal motion, which alleged that the judge harbored personal animus towards Demjanjuk and conspired with the Office of Special Investigations and the Soviet Union to deny the defendant a full and fair hearing.⁶⁸²

673. *See id.*

674. *See id.* at 1375-76.

675. *See id.* at 1376.

676. *See id.*

677. *See id.* at 1381.

678. *See id.* at 1381-82.

679. *See Demjanjuk*, 680 F.2d at 32.

680. *See United States v. Demjanjuk*, 103 F.R.D. 1, 5-8 (N.D. Ohio 1983).

681. *See Demjanjuk*, 603 F. Supp. at 1469 (holding that District Court had subject-matter jurisdiction and that the matter was not required to be heard by a military tribunal).

682. *See Demjanjuk*, 584 F. Supp. at 1331-32.

The District Court subsequently ruled that there was probable cause to believe that Demjanjuk was Ivan the Terrible, the individual who was alleged to have committed crimes by the State of Israel.⁶⁸³ This conclusion was based on affidavits that were sworn by the eyewitnesses in the denaturalization case.⁶⁸⁴ The court further noted that there was a striking resemblance between the individual depicted in the photographs submitted by the State of Israel and the defendant in the dock.⁶⁸⁵ Judge Battisti ruled that, although Demjanjuk continued to dispute the authenticity of the Trawiniki identification card, there was sufficient evidence to identify the defendant as Ivan the Terrible without reference to the document.⁶⁸⁶

The District Court ruled that Israel's assertion of extraterritorial jurisdiction was in conformity with the international law principle of universal jurisdiction. Judge Battisti observed that international law recognized the extension of jurisdiction over universally condemned offenses that were the subject of widely accepted international agreements. He noted that Israel charged Demjanjuk with murder and claimed jurisdiction under a statute which punished war crimes and crimes against humanity, both of which fell within the accepted scope of States' universal jurisdiction.⁶⁸⁷

The United States-Israeli extradition treaty provided for the mandatory extradition of offenders charged with an extraterritorial crime in those instances in which the laws of the requested State provided for the punishment of the offense under "similar circumstances."⁶⁸⁸ The District Court noted that United States law did not currently punish the murder of civilians in Nazi concentration camps in Europe during World War II. The Treaty provided that in such cases, the decision to extradite was vested in the discretion of the Executive Branch. Judge Battisti further ruled that the charges of manslaughter, malicious wounding, and the infliction of grievous harm were barred by the statute of limitations in the United States and that Demjanjuk would not be subject to extradition for these offenses.⁶⁸⁹

This left the murder charge. Demjanjuk, however, contended that the Treaty did not encompass the acts of large-scale murder with which he was charged. He pointed out that the instrument made no reference to war crimes, genocide, or to crimes against persecuted nationalities. The court noted that extradition treaties were to be interpreted broadly in order to facilitate the surrender of offenders. There was no reason to presume that the drafters of the Treaty intended to extradite for murder, but not for mass murder, or to exclude murders motivated by racial, religious, or national animus. Judge Battisti noted that it would be illogical to hold that an individual who

683. *See id.* at 552.

684. *See id.* at 550-51.

685. *See id.* at 554.

686. *See id.* at 553.

687. *See id.* at 558.

688. *Id.* at 560.

689. *See id.* at 560-61.

killed a single individual was extraditable, but that an individual who committed multiple murders was immune from extradition.⁶⁹⁰ The judge further found that, based on the testimony of three eyewitnesses, there was probable cause to conclude that Demjanjuk committed multiple acts of murder at Treblinka and that he may be extradited to Israel for such offenses.⁶⁹¹

The District Court rejected Demjanjuk's claim that the Israeli statute constituted an *ex post facto* law. It noted that the acts in the statute previously had been declared unlawful. The extermination of individuals in gas chambers and the torturing and killing of unarmed prisoners were offenses under the laws of every civilized State. Demjanjuk could have been brought to trial following the war under the laws of Poland or Germany or before Allied military tribunals. Israel merely was enforcing the prohibition on homicide which was contained in a 1936 criminal statute which had been enacted by the United Kingdom, the Mandatory Power for Palestine. The United Kingdom certainly possessed the power to enact a law providing for the extraterritorial punishment of murder. Israel, as the successor State to England, in turn, was authorized to prosecute individuals for murders committed during the period of the British mandate. At any rate, the treaty did not preclude extradition for delicts which occurred prior to Israeli statehood.⁶⁹²

The court also dismissed Demjanjuk's claim that his killing of defenseless civilians at Treblinka was part of the Nazi war effort and therefore constituted political crimes. The District Court ruled that the fact that the alleged murders occurred at Treblinka was insufficient to render these offenses political crimes within the meaning of the treaty. There was no indication that those Jews and non-Jews who were killed were part of an active attempt to change the political structure or to overthrow the Nazi regime.⁶⁹³ Judge Battisti subsequently rejected Demjanjuk's habeas corpus petition on the grounds that he failed to meet the burden of demonstrating that he was in custody in violation of the Constitution or the laws or treaties of the United States.⁶⁹⁴ This was affirmed by the Sixth Circuit Court of Appeals.⁶⁹⁵ In 1986, Judge Robert Bork, of the District of Columbia Court of Appeals, refused to stay the execution of Demjanjuk's extradition warrant.⁶⁹⁶

C. The Israeli Prosecution

The District Court of Jerusalem convicted Demjanjuk of causing the death of Jews and other civilians in the German occupied territories. He was

690. *See id.* at 561-62.

691. *See id.* at 564-66.

692. *See id.* at 567-68.

693. *See id.* at 570-71.

694. *See Demjanjuk*, 612 F. Supp. at 578.

695. *See Demjanjuk*, 776 F.2d at 571.

696. *See Demjanjuk*, 784 F.2d at 1118.

adjudged guilty of crimes against the Jewish people, crimes against humanity, war crimes, and crimes against persecuted peoples.⁶⁹⁷ The court determined that Demjanjuk was a central figure in the exterminations at the Treblinka concentration camp and “participated with his own hands in the mass murder of human beings, and . . . did so willingly, displaying initiative beyond that required by his superiors.”⁶⁹⁸ This verdict was based on the testimony and statements of witnesses who identified Demjanjuk’s photo as portraying Ivan Grozny. The testimonial evidence was bolstered by the Trawiniki document and by the defendant’s unpersuasive testimony and demeanor.⁶⁹⁹

The Trawiniki certificate, however, recorded that Demjanjuk served at Sobibor, but failed to mention Treblinka. The defendant’s service at Sobibor also was corroborated by a fellow Ukrainian, Tarantevich Danilchenko, who testified that Demjanjuk earned the German’s praise and respect for his energetic and enthusiastic persecution of Jews. The court resolved the apparent conflict over the site of Demjanjuk’s wartime activities by concluding that the similarities between the accounts of Danilchenko and the prosecution witnesses suggested that Demjanjuk served at both Sobibor and Treblinka.⁷⁰⁰

The Israeli Supreme Court, sitting as a Court of Criminal Appeals, unanimously reversed Demjanjuk’s conviction.⁷⁰¹ The Court upheld the District Court’s finding that the Trawiniki document and the eyewitness testimony constituted credible, clear and convincing evidence of the defendant’s wartime activities.⁷⁰² However, Demjanjuk submitted summaries of statements which were sworn by former concentration camp guards following the war. This evidence inculpated Ivan Marchenko as the operator of the gas chambers. The Supreme Court cautioned that the authenticity and reliability of these Russian transcripts was in doubt and that the witnesses were not subjected to cross-examination. The Supreme Court nevertheless determined that this evidence prevented the Court from reaching a conclusion that was close to certain concerning whether the defendant was Ivan the Terrible, operator of the gas chambers at Treblinka.⁷⁰³

The Supreme Court, however, determined that Demjanjuk served in the Trawiniki unit and in the Sobibor Extermination Camp. The Trawiniki unit, according to the Court, was the human conveyor belt that removed detainees from the trains and transported them to the crematorium. The testimony also

697. *The State of Israel v. Ivan (John) Demjanjuk* (D.C. Jm. 1988), reprinted in ASHER FELIX LANDAU & HEVER POOL, *THE DEMJANJUK TRIAL* 1, 385 (1991) [hereinafter *District Court Judgment*].

698. *Id.* at 386.

699. *See id.* at 384.

700. *See id.* at 243-44.

701. *See Fania Domb, Judicial Decision the Demjanjuk Trial*, 24 *ISR. Y.B. HUM. RTS.* 323, 324 (1994).

702. *See id.* at 335-36.

703. *See id.* at 337.

indicated that Demjanjuk directly killed a number of internees. But, the Court noted that Israel failed expressly and separately to charge Demjanjuk with participation in murder stemming from his involvement with the Trawiniki unit at Sobibor. Demjanjuk, according to the judges, could not be convicted of such offenses absent a reasonable opportunity to introduce evidence in his own defense. An additional trial on these charges seemed inequitable given that the proceedings against him already consumed seven years and that the defendant's extradition was based on his activities at Treblinka.⁷⁰⁴

The Supreme Court acquitted Demjanjuk on the Treblinka charge and the proceedings on the alternative indictment were discontinued.⁷⁰⁵ This curious decision may well have reflected a court which found itself buffeted by political pressures and unable to cope with such a complicated and conflicting evidentiary record.⁷⁰⁶ The Court's judgment also raised substantial questions concerning the reliability of the eyewitness testimony which placed Demjanjuk at Treblinka and the unconscious desire of these witnesses to gain retribution for the crimes of the Nazi regime.⁷⁰⁷

D. Prosecutorial Misconduct

The Sixth Circuit Court of Appeals issued an order in 1993 reopening Demjanjuk's extradition case.⁷⁰⁸ The Appellate Court also issued a writ of habeas corpus enabling Demjanjuk to return to the United States.⁷⁰⁹

In 1992, the Appellate Court appointed Judge Thomas A. Wiseman, Jr. as a Special Master to determine whether the failure of government attorneys to disclose exculpatory information in their possession constituted prosecutorial misconduct or a fraud which misled the court into approving Demjanjuk's extradition.⁷¹⁰ The Special Master absolved the government attorneys of deliberately and intentionally failing to disclose information that they considered exculpatory. Judge Wiseman also determined that the various proceedings against Demjanjuk were not influenced by political pressure from congressional sources and various Jewish groups.⁷¹¹ The Special Master found that some of the government's failures were "excusable," others "inadvertent" and that a third group resulted from a "mistaken understanding" of prosecutors' "duty of production" under the rules of discovery.⁷¹²

704. *See id.* at 339-41.

705. *See id.* at 341.

706. *See* Mordechai Kremnitzer, *The Demjanjuk Case*, in *WAR CRIMES IN INT'L LAW* 321 (Yoram Dinstein & Mala Tabory eds., 1996).

707. *See generally* District Court Judgment, *supra* note 697, at 10-11. *See generally* WILLIAM A. WAGER, *IDENTIFYING IVAN, A CASE STUDY IN LEGAL PSYCHOLOGY* (1988).

708. *See Demjanjuk*, 10 F.3d at 356.

709. *See id.*

710. *See id.* at 357.

711. *See id.* at 339-40.

712. *Id.* at 341.

Demjanjuk's contention that the OSI attorneys engaged in misconduct primarily was based on the claim that although the OSI had not had access to all of the statements relied upon by the Israeli Supreme Court, they obtained documents from official sources in the Soviet Union and in Poland which identified Ivan Marchenko as the operator of the Treblinka crematorium. Demjanjuk argued that this material should have raised doubts concerning his identity as Ivan the Terrible. The court listed five documents that were particularly problematic.⁷¹³ At least three were in the government's possession prior to the initiation of denaturalization proceedings against Fedorenko and were singled out by the court as evidencing a "reckless disregard" by the government of its discovery obligation to provide potentially exculpatory material to the District Court and to Demjanjuk's counsel.⁷¹⁴

The so-called Fedorenko Protocols had come into the government's possession in 1978. These papers included statements from two former Treblinka guards who stated that the operator of the crematorium at Treblinka was named Ivan Marchenko. The protocol also contained the transcription of a 1978 Soviet interview with Fedorenko which raised doubt as to whether Demjanjuk served at Treblinka. The court also noted a document provided by the Polish government in 1979 which enumerated the guards transferred from Trawniki to Treblinka. The list included Ivan Marchenko, but not Demjanjuk. The third document consisted of two reports, written in 1980, recounting an interview between OSI investigators and former German Treblinka camp guard Otto Horn. The reports revealed that Horn failed to identify Demjanjuk in the initial photo-spread. He only singled out Demjanjuk in a second photo-spread after having observed that the accused's picture also appeared in the first photo spread, which was visible during the examination.⁷¹⁵

The Appellate Court stressed that the defense attorneys and the District Court considering Demjanjuk's case should have been given access to those documents which indicated that Ivan Marchenko was Ivan the Terrible.⁷¹⁶ Demjanjuk's legal team also should have been provided with the reports which incriminated the reliability of Horn's photo identification. This would have permitted the defense to cross-examine the former concentration camp guard during his deposition and would have provided the District Court with the information required to rule on the admissibility and weight of Horn's statements. The reports on Horn's deposition were sent to Arthur Sinai, the Deputy Director of OSI, who testified that he failed to read them. Sinai, in turn, sent them to Norman Moscowitz, the lead government attorney in the Demjanjuk denaturalization case. Moscowitz testified that he neglected to review these contemporaneous accounts of Horn's deposition. He also stated

713. *See id.* at 342.

714. *Id.* at 350.

715. *See id.* at 350-51. *See also id.* at 342-43.

716. *See id.* at 346.

that he attended the interrogation session with Horn, three months prior to Horn's deposition, at which the suggestive identification had taken place. Moscovitz stated that he deliberately glanced away during the photo identification in order to avoid being called as a witness in the denaturalization case. The Appellate Court condemned and failed to find any excuse for the government's seemingly casual approach to evidence, which cast doubt on the prosecution's case against Demjanjuk.⁷¹⁷

The Sixth Circuit observed that Demjanjuk's attorney submitted discovery requests which covered virtually every document that the government neglected to produce.⁷¹⁸ The OSI claimed to have a policy and practice of turning over all exculpatory information, even if it had not been requested. Yet, the court noted that the OSI denied Demjanjuk access to the complete file of the Polish Commission on the grounds that "all relevant and discoverable documents . . . have been provided to you."⁷¹⁹ The court concluded that the Special Master "cannot find them clearly erroneous" in concluding that the failure of the OSI attorneys to turn over exculpatory material was a result of a misunderstanding rather than a deliberate and willful failure to fulfill their ethical obligations.⁷²⁰ However, the Appellate Court observed that the certitude of the OSI attorneys that they located Ivan the Terrible led them recklessly to disregard evidence that suggested that the infamous Ivan Grozny was Ivan Marchenko. The conviction of OSI lawyers that they apprehended Ivan the Terrible also did not excuse their reckless disregard of the obligation to provide the information requested by Demjanjuk. This failure "misled" Demjanjuk's counsel and "endangered" Demjanjuk's ability to present a defense.⁷²¹

The Appellate Court noted that the OSI leadership was informed of the evidentiary difficulties in the Demjanjuk case. Attorney George Parker, the initial lead attorney in the prosecution, wrote a memorandum, in February 1980, questioning Demjanjuk's guilt which he sent to Walter Rockler, Director, and Allan Ryan, Deputy Director, of the OSI. Parker noted that the testimony of Danilchenko and two other Ukrainian guards, as well as the list of guards compiled by Polish authorities, strongly suggested that Ivan Marchenko, rather than Ivan Demjanjuk, was the infamous Ivan the Terrible. Parker wrote that the OSI confronted a dilemma: there was "little admissible evidence" that the defendant was at Sobibor and "serious doubts" that he was at Treblinka.⁷²² Parker concluded that "[a] reading of the Canons of Ethics persuades me that I cannot pursue this case simply as a Treblinka matter on the premise that it is tactically shrewd and morally acceptable be-

717. *See id.* at 351-52.

718. *Id.* at 341.

719. *Id.* at 349.

720. *Id.*

721. *Id.* at 350.

722. *Id.* at 346.

cause we think he was a guard elsewhere.”⁷²³

Parker’s superiors eventually decided to indict Demjanjuk for activities at Sobibor as well as Treblinka, but to center the trial on establishing that Demjanjuk was Ivan the Terrible.⁷²⁴ Parker’s ethical qualms led to his resignation from the Justice Department prior to the denaturalization trial.⁷²⁵ Rockler and Ryan testified that they could not recall Parker’s memorandum and attorney Moscowitz testified that he resolved the apparent conflict in the evidence by concluding that Demjanjuk served at Sobibor as well as at Treblinka, where he used the name Marchenko.⁷²⁶ In his memorandum, Parker termed this position as “simply a ruse” to avoid “ethical problems” raised by the evidence.⁷²⁷ The Sixth Circuit noted that while Parker’s memo did not establish that the OSI had committed a fraud on the judicial system, it “raised a clear warning that there were ethical perils in continuing to prosecute Demjanjuk as Ivan the Terrible. When his superiors and colleagues at OSI refused to heed his warning, Parker resigned.”⁷²⁸

The court concluded that the OSI attorneys acted with a “reckless disregard for the truth” which prevented Demjanjuk from “fully and fairly” presenting a defense.⁷²⁹ This constituted a “fraud on the court in the circumstances of this case where, by recklessly assuming Demjanjuk’s guilt, they [the government attorneys] failed to observe their obligation to produce exculpatory materials requested by Demjanjuk.”⁷³⁰ The court attributed this passionate pursuit of Demjanjuk to the OSI’s “win at any cost” attitude which was fueled by political pressures from lobbying groups and the Congress.⁷³¹

The *Demjanjuk* prosecution may mark the death-knell for denaturalization and deportation actions against alleged Nazi war criminals. The perils of faulty memories,⁷³² inaccurate eyewitness identifications,⁷³³ doubts concerning the authenticity of documents,⁷³⁴ political pressure,⁷³⁵ and overly-zealous prosecutors,⁷³⁶ all have combined to undermine the legitimacy of the United

723. *Id.* at 369, 373.

724. *See id.* at 346-48.

725. *See id.* at 347.

726. *See id.*

727. *Id.* at 348.

728. *Id.*

729. *Id.* at 354.

730. *Id.*

731. *Id.* at 355. *See generally* Steven Lubet, *That’s Funny, You Don’t Look Like You Control the Government: The Sixth Circuit’s Narrative on Jewish Power*, 45 HASTINGS L.J. 1527 (1994).

732. *See Demjanjuk*, 518 F. Supp. at 1375.

733. *See Kalejs*, 10 F.3d at 339-40.

734. *See Demjanjuk*, 518 F. Supp. at 1363.

735. *See supra* note 731 and accompanying text.

736. *See Kalejs*, 10 F.3d at 339-40.

States government's laudatory aspiration of disassociating itself from the atrocities of the Third Reich. The decision whether to pursue prosecutions of war criminals in the future, unfortunately, may be influenced by the events in the *Demjanjuk* case.⁷³⁷

X. CONCLUSION

Following World War II, the Allied Powers initiated prosecutions against various major Nazi war criminals.⁷³⁸ Other war criminals and individuals who assisted in Nazi atrocities were able to take cover under the canopy created by the chaos of post-war Europe and immigrated to various Western democracies.⁷³⁹ These countries were preoccupied with post-war domestic and international reconstruction and had little interest in devoting resources to the punishment of their former foes. There was a concern with antagonizing countries, such as Italy and West Germany, which had enlisted as comrades in the Cold War struggle against Russian communism.⁷⁴⁰

In the 1980s, the improved relationship between the Western democracies and the Soviet bloc led to increased access to communist archives and to an enhanced confidence in the competence and credibility of Soviet officials. This development combined with embarrassing revelations concerning the presence of suspected Nazis to encourage Anglo-American democracies to renew their pursuit of war criminals.⁷⁴¹

Great Britain, Canada, and Australia adopted the view that it was fundamentally unfair to denaturalize and to deport individuals who had resided within their States for over forty years.⁷⁴² Instead, these three countries enacted statutes permitting the domestic criminal prosecution of suspected war criminals.⁷⁴³ The potential drain on prosecutorial resources, along with the problems of proof, raise questions regarding the effectiveness of this approach.⁷⁴⁴

The United States, in contrast, has relied on the civil remedies of denaturalization and deportation.⁷⁴⁵ This is based on the belief that those who assisted, or committed, war crimes or crimes against humanity should not enjoy the continued benefits of American life.⁷⁴⁶ The Supreme Court attempted to facilitate the denaturalization process by shifting the burden of

737. *But see* Benjamin Weiser, *U.S. Seeks to Expel Ex-Salesman Accused of Role in Nazi Killings*, N.Y. TIMES, Aug. 4, 1998, at A11.

738. *See supra* notes 70-72 and accompanying text.

739. *See supra* notes 105-06, 206-08 and accompanying text.

740. *See supra* note 209 and accompanying text.

741. *See supra* note 203 and accompanying text.

742. *See supra* notes 110-11 and accompanying text.

743. *See supra* notes 122-23 and accompanying text.

744. *See supra* notes 299-300 and accompanying text.

745. *See supra* notes 386-403, 418-38 and accompanying text.

746. *See supra* notes 565-66 and accompanying text.

proof to defendants.⁷⁴⁷ Courts, however, have differed on the appropriate legal standard. Most have adopted a broad assistance in persecution or organizational standard while others have adhered to a strict subjective test.⁷⁴⁸ The implementation of both the broad and strict standards has been complicated by the vagaries of memory,⁷⁴⁹ eyewitness testimony,⁷⁵⁰ the authenticity of documents,⁷⁵¹ and the emotional desire and political pressure for retribution and revenge.⁷⁵² These problems undermined the integrity and legitimacy of the judicial process in *Demjanjuk*, a case which may have sounded the death-knell for future efforts to denaturalize and to deport Nazi war criminals.⁷⁵³

The victims of the Holocaust lack the ability and authority to bring those who perpetrated this barbarity to the bar of justice. The efficacy of the United States' reliance on a civil remedy as means of achieving retribution might be questioned. The next decade, nevertheless, presents the last opportunity to denaturalize and to deport those who assisted in the Nazi genocide. The challenge is to maintain the integrity of the legal process while adjudging liability for offenses which occurred forty years ago. A failure to prosecute those involved in assisting Nazi persecutions will send a strong signal to individuals currently contemplating atrocities that there will be few, if any, consequences for their criminal conduct. On the other hand, the rule of law demands that those accused of even the most venal offenses are accorded due process protections.⁷⁵⁴

Domestic courts within the Western democracies often have seemed overwhelmed by the enormity of the Holocaust. It is unfortunate that those countries that were the site of the Shoah generally have expressed little interest in bringing the perpetrators of this atrocity to justice. A partial solution may involve international cooperation in bringing the remaining Nazi war criminals before a reconvened and reconstituted Nuremberg Tribunal⁷⁵⁵ or before an international criminal court.⁷⁵⁶ The sad fact, though, is that the failure of the Allied Powers to have pursued, prosecuted, and punished Nazi war criminals following the war has made the smooth and successful prosecution of these individuals forty years later virtually impossible.

747. See *Kungys*, 485 U.S. at 777-79.

748. See *supra* notes 560-63 and accompanying text.

749. See *supra* notes 585-91 and accompanying text.

750. See *supra* notes 596-630 and accompanying text.

751. See *supra* notes 561-73 and accompanying text.

752. See *supra* notes 640-42 and accompanying text.

753. See *supra* notes 710-36 and accompanying text.

754. See *supra* notes 565-66 and accompanying text.

755. See generally Matthew Lippman, *Nuremberg Forty-Five Years Later*, 7 CONN. J. INT'L L. 1 (1991).

756. See generally Matthew Lippman, *Towards an International Criminal Court*, 7 SAN DIEGO JUST. J. 1 (1995).