Ukrainian Canadian Committee
Submission
to the
Commission of Inquiry on War Criminals

"The taking of Soviet evidence in the course of any proceedings under any circumstances... would be in violation of the principles of fundamental justice."

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Introduction

The Submission of the Ukrainian Canadian Committee was made to the Commission of Inquiry on War Criminals on 5 May 86 by John Sopinka, Q.C., counsel for the Ukrainian Canadian Committee, at the public hearings of the Commission in Ottawa, Ontario.

The Submission reflects the position of the Ukrainian Canadian Committee on behalf of the Ukrainian Canadian community.

J. B. Gregorovich
Chairman
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In its letter to counsel, the Commission requested that "final submissions" be made today. In making these submissions today, I would like to reserve the right to make further submissions when and if the Commission decides to give some kind of an indication of the evidence which it has heard in camera. It it extraordinarily difficult to make useful submissions without knowing the nature of the evidence which has been placed before the Commission. I have previously requested that counsel with standing before the Commission be provided with a confidential summary of the allegations made in respect of those against whom a prima facie case has been made out. In the absence of a reply to this request, I am obliged to make my submissions in a hypothetical manner based on situations which may or may not exist.

In my view, the Order-in-Council which established the Commission delegated two separate and distinct tasks. The first is to investigate whether and how any persons responsible for war crimes related to the activities of Nazi Germany have entered Canada, including whether any such persons are now resident in Canada. For the sake of convenience, I shall be referring to such people as suspected Nazi war criminals. The second and main task assigned to the Commission is to report on any recommendations and advice which the Commission may have relating to what further actions can be taken to bring suspected Nazi war criminals resident in Canada to justice.

My submissions today can be broadly divided into two parts. The first part concerns the question of whether there are any Nazi war criminals of Ukrainian descent in Canada today. The second part considers what remedies might be appropriate to bring alleged war criminals to justice.

PART 1 - UKRAINE IN WORLD WAR II

It is my submission that there is no evidence that Ukrainians were in any general way the allies of Nazi Germany during World War II. Far from being the allies of Nazi Germany, Ukrainians found themselves in the unenviable position of having to battle both Nazi and Soviet repression.

In order to consider properly the question of whether any Nazi war criminals are found in the Ukrainian community, I propose first to elaborate upon the definition of a Nazi war criminal and secondly to apply this definition to the various groups which were operating in Ukraine in the course of World War II.

As I have previously noted, the mandate of the Commission has been restricted by the Order-in-Council establishing it to an investigation of "persons responsible for war crimes related to the activities of Nazi Germany during World War II". The activities investigated by the Commission must thus meet the dual criteria of involving persons committing acts "related to the activities of Nazi Germany", and acts which can be qualified as "war crimes".

In recent times, international law has come to recognize individual responsibility for war crimes. I will not presume to attempt an exhaustive definition of what actions can be characterized as war crimes. The sources of international law in this regard are many. Reference can be had to the Hague Conventions of 1907 and 1899. State practice following

the first and second world wars is relevant, as are the comments of eminent international law jurists and the various tribunals which have had to deal with this topic.

Rather than attempt an exhaustive definition of what constitutes a war crime, and in the absence of any indication of the nature of the acts alleged against any individuals resident in Canada, I would only seek to underline the fact that it is entirely too facile to assume that acts of violence must always and everywhere constitute war crimes. War crimes involve acts which are contrary to the actual laws and usages of war, not to the theory of war. A war crime is an act of war which stands out for its terrible brutality. It is an act committed without a valid military objective. In other words, it is an act of savagery disguising itself as an act of war.

An example of this point is the *Ardeatine Cave* case.[1] On March 23, 1944 a bomb exploded in Rome killing 32 German policemen. An order was issued from Hitler's headquarters that 10 Italians should be shot for every German policeman killed. The next day, 335 Italian civilians were herded into a cave and massacred. The officers in charge of the massacre were tried and convicted before a British military court. The defence had claimed that the acts constituted reprisals and were permissible under international law. The prosecution apparently did not dispute the legitimacy of reprisals under international law but rather claimed that the reprisals were not proportionate to the crime committeed, and were unreasonable.

It is reasonably clear that international law has extended responsibility for war crimes from the state to individuals. Furthermore, the trials which took place immediately following World War II clearly involved civilian as well as military actors. For example, in the *Zyklon B.* case, the civilian industrialists who produced poison gas for use in the concentration camps were found guilty of war crimes.[2] In the *Velpke Childrens Home* case,[3] a number of German civilians were found guilty of war crimes in Germany. The civilians were involved in running a home for children of slave labourers deported from eastern Europe. The children were forcibly removed from their mother's care and placed in the home. The conditions at the home were so deplorable that the court was able to find that it was run with wanton and criminal neglect. The death rates amongst the children confined to the home was extremely high. Since the deportation of the mothers of the children took place as a consequence of the German war effort, and in violation of international law, the civilians who participated in the criminal treatment of the children were held to have committed war crimes.

Civilian and non-military personnel were also convicted of war crimes in many of the concentration camp cases. For example, in the *Belsen Trial*,[4] a number of defendants were tried for their role in the mistreatment and murder of prisoners at the Belsen and Auschwitz prison camps. Apart from German soldiers and SS officers, those found guilty included prisoners in the camp entrusted with responsibilities by the camp authorities. The guilt of the prisoners was established on the grounds that they had accepted roles of responsibility and identified themselves with the prison authorities. In the *Almelo Trial*,[5] a Dutch civilian who executed a British aviator under orders from a German Nazi official was found guilty of a war crime by a British military court. The British aviator was executed under conditions where he should have been treated as a prisoner of war.

The common thread which runs through all of these cases is that the civilian and other non-military individuals against whom these war crimes were alleged were directly involved in (or identified with) the German war effort. They were under the command or control of a belligerent power in the war. Their acts were such as to give rise both to their individual responsibility <u>and</u> to the state responsibility of the belligerent power in whose name the acts were committed.

The Commission's mandate however is not to investigate war crimes in general. The Commission has been specifically limited to an investigation of war crimes "related to the activities of Nazi Germany during World War II." It is submitted that this refers to war crimes

committed by persons who, in committing such crimes, were acting on behalf of Nazi Germany. This implies that the actions had the support of the Nazi regime, and were in some way encouraged and directed by that regime. I would submit that an element of command and control, or at least formal alliance must be shown before the requisite connection can be drawn.

It surely cannot be sufficient to state that the activities of a particular group which may have been carried on completely independently of German intervention were nevertheless related to the activities of Nazi Germany simply because some incidental benefit to the German war effort was involved. For example, if workers in a munitions factory in Canada struck for higher pay during the war, they could well have been said in an indirect fashion, to be aiding the German war effort. However, it cannot be said that the strikers' actions in this hypothetical case are related to the activities of Nazi Germany.

I would submit that the historical evidence does not indicate that Ukrainians were in any general or organized way the allies of the Germans during the Second World War. Rather, the evidence indicates that Ukrainians were victims of the war.

Earlier in the inquiry, the Ukrainian Canadian Committee submitted that this inquiry should be extended to all war criminals. The Commission, however, has interpreted its terms of reference so as to limit the inquiry to persons involved in Nazi activities. A brief review of the historical evidence is necessary in order to demonstrate that the Ukrainian nationalist organizations such as the Organization of Ukrainian Nationalists (the "OUN") and the Ukrainian Insurgent Army (the "UPA") were not in any way allied with the Nazis. Indeed, they were enemies.

Ukraine is a nation of some 50 million people which has been forcibly incorporated into the Soviet Union. After years of Czarist rule, the eastern part of Ukraine enjoyed a brief reign of independence before the brutal invasion of the Red Army. Under Soviet administration, Ukrainians were the victims of a brutal reign of terror. This reign has been characterized by deportations and mass murder on a scale equalled only by Hitler. It has been estimated that as many as ten million Ukrainians died in the course of the man-made famine decreed by Stalin in 1932-33.[6] The whole story of this genocide may never be known since the perpetrators of it continue to engage in an active concealment of it.

The western part of Ukraine was known as the province of Halychyna or Galicia prior to World War I and was under the control of the Austro-Hungarian empire. With the fall of Austria, Galicia enjoyed a brief period of independence which was soon crushed by the invading Polish armies. Galicia was the home of a strongly organized and popular resistance movement which was able to survive in Poland, a state which had not developed repression on the scale practiced in the Soviet Union. On August 23, 1939, when Stalin and Hitler divided Eastern Europe between them, on the occasion of the signing of the Molotov-Ribbentrop Non-Aggression Pact, Galicia was agreed to be handed over to the Soviets. Hitler's invasion of Poland on September 1, 1939 started World War II. The Soviet Union however followed the German aggression with an invasion of Galicia on September 17, 1939. Pursuant to the Molotov-Ribbentrop Pact, the Soviet Union also invaded Finland and the Baltic republics.

The principal nationalist organization in Western Ukraine at that time was the OUN which had been founded in 1929. Melnyk and Bandera were two of its leaders. It was the successor of the groups which had formerly organized opposition to Polish rule.

When the Germans invaded the Soviet Union in June 1941, Ukrainian nationalists seized the opportunity to attempt to re-establish their independence. On June 30, 1941, the Bandera wing of the OUN proclaimed Ukrainian independence. However, the Nazis had other plans for Ukraine. Much of Ukraine was scheduled to be depopulated by the Nazis to make way for German settlers after the war. As Slavs, Ukrainians were considered to be sub-human

"untermenschen". There is no need to dwell on this aspect of Nazi ideology which has been explained many times before.

The Germans reacted swiftly to the OUN declaration of independence. Bandera and the leaders of the OUN who could be found were quickly arrested. The rest of the OUN was forced underground. An effort by the Melnyk wing of the OUN to establish a government in Kiev later that year was also suppressed by the Gestapo with many of its leaders meeting their fate in mass executions at Babi Yar. Western Ukraine was incorporated into the General Government established for Poland. A secret directive to the Einsatzkommando S-5 on November 25, 1941 ordered the liquidation of the Bandera movement of the OUN.[7]

In 1942, the UPA was formed as the military arm of the OUN under the leadership of Roman Shukhevych. The principal enemy of Ukrainians at that time was the Nazi German occupier. The Russian Front was hundred of miles away at that point.

Nazi repression against nationalist groups continued. Soon after consolidating their rule in Ukraine, the Nazis began a policy of mass deportation of Ukrainians and other occupied peoples as slave labourers in Germany. Far from collaborating with the Nazis, the UPA was involved in fighting them. Membership in the UPA or the OUN were considered capital offences by the Nazis who routinely executed or deported those whom they caught. There have been produced to the Commission a number of posters announcing the execution of Ukrainians accused of membership in "forbidden Ukrainian organizations", hardly a way to treat allies.[8] In the spring of 1944, the UPA held a court martial and public execution of one commander who collaborated with the Germans in order to obtain arms. These are not the actions of a collaborating militia.[9]

In the spring of 1943, the Nazis began the recruiting of Ukrainians to aid in the increasingly difficult fight against the Red Army. I will leave the story of the First Division of the Ukrainian National Army to my friend Mr. Botiuk, who is representing them before the Commission. I think that it is sufficient for my purposes to state that the Division was a Ukrainian led division used solely in military operations against the Red Army. They were not prison camp guards or "einsatz kommandos". I am not aware of any atrocities in which the Division is seriously alleged to have participated, nor am I aware of any allegations made against individual Division members.

When the Red Army advanced and recaptured most of Ukraine by mid-1944, the UPA was involved in fighting the new occupant. UPA resistance to the Soviet occupation continued for many years after the end of the war until resistance became entirely futile.

Already suffering from the famine of 1932, Ukraine lost an estimated 7.5 million of its citizens during World War II as a result of both Nazi and Soviet repression. An estimated two million Ukrainians were deported to Germany as slave labourers. It has also been estimated that in 1943 between 10 and 28% of the population of the prison camps was Ukrainian.[10] This is not the story of a people in some way favoured or privileged by the Nazis.

The crimes of the Nazis were exposed for all the world to see after the war. However, the crimes of the Soviet regime have been covered up and denied. As the victors, the Soviets have attempted to re-write history.

The Soviets have always denied their role in the man-made famine which decimated Ukraine in 1932. They view the Nationalists as a threat to their regime. The official Soviet history states that a willing Ukraine enthusiastically requested the privilege of being accepted into the U.S.S.R. The Soviets deny the deportations and mass murders by which they established their rule. Consequently, the popular nationalist movements who resisted the Soviet imposition of their rule, and who organized political and military resistance, must be cast as murderous Hitlerite cut-throats in order to give this version of history some credibility.

One Soviet publication describing a "show trial" circulated in Canada refers to the Bandera group as "gangs of vampires". It states:

The bloody paths of the Banderite stranglers and butchers stretched from village to village, from house to house ... It was difficult to listen calmly to the horrifying stories which the surviving victims and witnesses narrated ... Their accounts aroused caustic anger and hatred towards the nationalists - the followers of Bandera, Melnik, Bulba and others - towards the bandits and their fascist mentors of yesterday, and toward their foreign patrons of today .... the OUNite murderers also enjoyed resorting to the following method of execution ...[11]

Other publications repeat the lie that Shukhevych, leader of the UPA, was appointed by Himmler.[12] Accounts of this nature emerge in a steady stream from the Soviet Union, either in the English language press (for foreign distribution) or in the various pamphlets which are circulated by the Soviet embassy.[13]

The Lesinskis deposition,[14] which was filed with the Commission, makes it clear that the K.G.B. actively attempts to discredit certain personalities and groups by accusing them of war crimes. This is an element of Soviet policy testified to by a former agent of that policy.

The Ukrainian Canadian Committee views allegations of war crimes by Ukrainians emanating from the Soviet Union as a part of the Soviet effort to discredit in the eyes of the world community the story of those witnesses of the tragic events of recent Ukrainian history who have escaped Soviet control. By branding Ukrainian nationalist leaders such as Melnyk, Bandera or Shukhevych as fascists and by associating Ukrainian nationalist movements such as the OUN or UPA with Nazi atrocities, the Soviets hope to be able to ensure that their rewritten version of history prevails.

The Ukrainian Canadian Committee has previously stated its position that war criminals should be punished. However, my clients view it as absolutely critical that any investigation of *Nazi* war criminals make it abundantly clear that Ukrainian nationalist groups such as the OUN and UPA, who were the true representatives of the Ukrainian people, were not accomplices of the Nazis.

If alleged excesses of any Ukrainian nationalist groups are to come under scrutiny, it is essential that this take place in the context of a general inquiry into war crimes regardless of when or by whom they were perpetrated. As long as the Commission is restricted to investigating Nazi war crimes, it should make it abundantly clear that members of the OUN or UPA are ***NOT*** under investigation. Any other result would lend credence to the Soviet effort at historical falsification, and deal a grave blow at the efforts of Ukrainian Canadians to preserve their cultural heritage.

The Soviet effort at historical revision has had its measure of success. Groups concerned with seeking to bring to justice the perpetrators of the holocaust have become the unwitting conduits for such Soviet views. For example, Mr. Sol Littman stated before this Commission:

The Ukrainians, by reason of their larger numbers and historic hatred of Poles and Jews, proved themselves pernicious collaborationists ... Leaders of the Ukrainian "nationalist" movement, Bandera and Melnyk, readily joined the expectation that Hitler would create a totalitarian Ukraine under their leadership, free of Poles and Jews.[15]

After making this false claim of OUN collaboration with Hitler, Mr. Littman proceeded to claim Ukrainian involvement in the suppression of the Warsaw ghetto, the rounding up of Jews and the running of such prison camps as Auschwitz and Treblinka.

By linking these groups with Nazi atrocities and claiming they represented only a small portion of Ukrainian people, comments such as these put Ukrainians in the position of either having to denounce these groups and their leaders or accepting the stain of complicity in Nazi atrocities. However Melnyk, Bandera, the OUN and the UPA were the leaders of Ukrainian people. They represent a chapter of Ukrainian history which is still cherished today. This is

why attacks on the OUN or UPA are seen as attacks on the cultural heritage of which Ukrainians are proud.

I would therefore submit that your final report should clearly indicate that Ukrainian nationalist movements were not accessories to any Nazi war crimes. If there is evidence that any Ukrainians are suspected of involvement in the commission of atrocities by the Nazis (which is denied), it is of fundamental importance to the Ukrainian Canadian community that the isolated nature of such actions outside the purview of the organizations which enjoyed broad popular support amongst the Ukrainian population should be underlined. Failure to make this distinction will only serve to perpetuate the unquestioned acceptance by future generations of the myth of Ukrainian organized collaboration with the Nazis.

PART II - REMEDIES

The first part of my submission was directed to the question of whether there are "persons responsible for war crimes related to the activities of Nazi Germany during World War II" currently resident in Canada. The second part of my submission comments upon the remedies which are available or might be created in order to bring such persons to justice.

A number of potential responses to the existence of Nazi war criminals in Canada have been suggested. I propose to examine each of these responses separately. However, I should reiterate here the difficulty which I have in making comments in the absence of some concrete indication of the evidence which has been heard in camera.

When this Commission was appointed, there were public accusations being made that Joseph Mengele, the infamous "angel of death" may have been in Canada. There were further claims being made that 3,000 or more Nazi war criminals might be presently resident in Canada. This number was soon reduced to some 500 names, and the claims regarding Mengele were dropped. One can only guess at what kind of evidence exists in respect of the 500 names supplied to the Commission, however the Commission did announce that it proposed to travel abroad to obtain evidence in respect of only 8 suspects.

I would submit that the nature of the response which this Commission should recommend should depend on the severity of the problem. Certainly the prospect of up to 3,000 major Nazi war criminals of Joseph Mengele's ilk remaining at large in Canada calls for stern measures. On the other hand, if there are only a handful of obscure old men against whom a minor role in Nazi war crimes is alleged, Canada may well be advised to consider less radical action or no action at all, all the more so if the Nazi link to these men's actions appears dubious and if the allegations against them are founded primarily upon unreliable Soviet evidence.

In considering what legal remedies are presently available and what legal remedies should be recommended for the purpose of bringing to justice suspected Nazi war criminals resident in Canada, it is necessary to consider what reliance can be placed upon Soviet-supplied evidence in the case of suspects of eastern European descent.

In the context of deciding whether to gather evidence from foreign sources, including the Soviet Union, the Commission heard a great deal of evidence and submissions both pro and con as to the advisability of hearing such evidence. In ultimately deciding to go and hear such evidence under appropriate conditions, I did not understand you to be making any comment upon the reliability of such evidence. Rather, if I apprehend your reasons correctly, the main factor which influenced your decision was the fact that the present proceedings are in the nature of an inquiry. No individual is on trial before the Commission. The Commissioner does not have any power to make any binding findings of fact, rather the role of the Commissioner is to recommend.

We are presently at the stage where you have asked for submissions as to what your recommendations ought to be. It is my submission that the use of Soviet-supplied evidence in the course of any proceedings against Canadian citizens suspected of being Nazi war criminals, whether under the law as it now stands or under any law which you may be in a

position to recommend, would be unjust and should not be permitted. If any recommendations under consideration would entail a heavy reliance upon Soviet-supplied evidence, I would submit that they should be rejected. While it may well be that the only evidence of complicity in Nazi war crimes against some suspects consists of evidence supplied by the Soviet Union, the interest of seeing crime punished is not paramount over the concern to see justice done according to the due process of law. Our system of criminal law has been built upon the principle that it is better that a guilty man should go free than that an innocent man should be wrongly condemned. No exception to this principle can be made because in some cases it seems somehow more important that a particular crime should not go unpunished.

I do not propose to repeat in any great detail the arguments which I developed before you in my submissions of October 3, 1985 concerning Soviet evidence. I will review the highlights of that evidence here and request that you refer to my earlier submissions for further amplification.

In the case of viva voce evidence or depositions, I submitted that such evidence is unreliable and inadmissible under the ordinary rules of evidence. The depositions are prepared under the aegis of Soviet procurators under Soviet rules of evidence. Where cross-examination is permitted, it is restricted. The Soviet procurator leads evidence in a prejudicial manner. Exculpatory evidence is difficult to obtain or is withheld. All of these factors militate against the reliability of Soviet evidence even without the necessity of assuming a deliberate intent on the part of the Soviets to fabricate evidence for the ulterior motives which I have described earlier (i.e., discrediting Ukrainian and other nationalist organizations which resisted Soviet occupation). However, when added to the pre-existing unfairness and unreliability of the evidence is the fact of the very real apprehension that the Soviets will fabricate evidence to suit their political ends, I would submit that the Soviet evidence cannot be used to form the basis of taking proceedings against a suspected Nazi war criminal. In this regard, I would refer you to the brief of Mr. Cotler in the *Scharansky* case and the comments which he made on the tampering with witnesses which occurred in that political trial.

Although documentary evidence may be slightly more reliable in that experts can examine originals for tampering, it is submitted that any such evidence should be used only in accordance with the ordinary Canadian rules of admissibility. No relaxations in the rules can be justified in favour of Soviet evidence when the liberty of a Canadian resident or citizen is concerned.

I further submitted that the use of Soviet-supplied evidence in proceedings regarding Canadians suspected of being Nazi war criminals would be prohibited by virtue of Sections 7 and 24(2) of the Charter. Section 7 of the Charter provides that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 24(2) in turn provides:

> **Where a court concludes that the evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded if it it established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.**

In my submission, the taking of Soviet evidence in the course of any proceedings under any circumstances which the Soviets could be expected to agree to, would be in violation of the principles of fundamental justice and bring the administration of justice into disrepute.

In the case of *Singh v. Minister of Employment and Immigration* [16] the Supreme Court considered whether an applicant for refugee status was entitled to fundamental justice in the determination of his claim pursuant to section 7 of the Charter. After deciding that the right did exist, Wilson J. went on to consider whether fundamental justice would require an oral hearing. She said:

....even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing.[17]

It is submitted that in any proceeding against a suspected Nazi war criminal where Soviet evidence is required to be relied upon, credibility would be a crucial issue. A full and fair oral hearing with Soviet evidence is, in my submission, impossible. The Soviets will not permit witnesses to travel, and the conduct of the depositions in the Soviet Union does not permit a fair hearing to determine credibility.

It has been submitted before that all evidence which might be relevant to the case should be examined, and that the Canadian judiciary should be trusted with the task of assessing it. With respect, I have two objections to this line of thinking. Firstly, when the liberty of the subject is involved, the common law justice system has developed rules of evidence designed to protect the rights of an accused as of paramount importance. Canadian judges do in fact refuse to consider evidence considered to be dangerously unreliable such as hearsay evidence unless it comes within one of the established exceptions. As I have previously indicated, most if not all of Soviet-supplied evidence is inadmissible in criminal or quasi-criminal proceedings in Canada under current rules.

Secondly, the Canadian judicial system is not equipped to handle a full scale trial of the Soviet legal system each and every time a particular piece of evidence is sought to be relied upon is a case-by-case approach were taken under some legislation creating an exception to the normal rules of evidence.

As you are aware, the Americans have had some experience with the use of this kind of evidence. I do not propose to review all of the American case law on the topic. I would submit that over all, the American experience has been negative. I am filing with these submissions a copy of a brief prepared by Mr. Paul Zumbakis, a Chicago attorney who has had considerable experience in this area. I would request that you refer to his brief for a full discussion of the problems which have arisen in the American experience.

(i) Extradition

There are three potential areas from which an extradition request might conceivably come upon which the Ukrainian Canadian Committee would like to make submissions. These are the Federal Republic of Germany, East Bloc countries (especially the USSR and Poland) and Israel.

(a) Federal Republic of Germany

The Ukrainian Canadian Committee does not oppose the extradition of war criminals to the F.R.G. providing such extraditions are made in the ordinary course. The Ontario Court of Appeal has established in the case of *Re Federal Republic of Germany and Rauca* [18] that the F.R.G. has jurisdiction to request extradition for crimes committed during the period of German occupation of Eastern Europe. The Ukrainian Canadian Committee is satisfied that there is a reasonable likelihood of Canadian citizens receiving a fair trial in Germany. A Canadian citizen ultimately found not guilty would be free to return to Canada. *Rauca* has stated the law in Canada in this regard, and the UCC does not propose any recommendations to alter it.

However, it appears that the F.R.G. has a policy of only requesting extradition in respect of war crimes alleged against German nationals. Should any alleged Nazi war criminals under investigation by the Commission come from other countries, extradition to the F.R.G. may not be an available remedy.

(b) East Bloc Countries

Much of the discussion before the Commission has centered upon the potential for extradition to East Bloc countries. There are two issues which arise in a consideration of extradition of alleged Nazi war criminals to East Bloc countries. The first is whether, under present law, extradition is possible. The second is whether any changes should be instituted to present law in order to permit the processing of extradition requests for East Bloc countries.

Mr. Corbett, the General Counsel with the Criminal Prosecutions Branch of the Department of Justice testified before the Commission that Canada has no operating extradition treaties with the U.S.S.R., the German Democratic Republic or Poland. On the other hand, Canada does have an operating extradition treaty with Czechoslovakia, Hungary and Romania.[19] The Ukrainian Canadian Committee is aware of no extradition requests originating from the three above-named countries involving Ukrainian Canadians. However, since Ukraine borders upon Czechoslovakia, Hungary and Romania, it is not inconceivable that there may be allegations which have been made to the Commission in in camera proceedings regarding the activities of Ukrainian Canadians in these countries. Consequently, I propose to make submissions on the advisability of considering extradition requests from these three countries. There are two possible means of permitting extradition to non-treaty countries such as the Soviet Union or Poland. The first would be to negotiate a treaty with them permitting such extradition under Part I of the *Extradition Act*. The second would be to amend Part II of the *Act* specifically to permit extradition to these countries without a treaty and in respect of offences committed prior to the amendment.

It is the position of the Ukrainian Canadian Committee that extradition to any East Bloc country whether under current law or under some amendment should be opposed on the grounds that such an extradition would violate the rights of Canadian citizens under Section 7 of the Charter of Rights. Such an extradition request may well contravene Section 21 of the *Extradition Act* [20] as well.

Without belabouring the point, I think that it can be concluded that there is a very reasonable apprehension that extradition of Canadian citizens to jurisdictions under control of the Soviet Union would not result in a fair trial. The submissions made earlier with respect to Soviet evidence apply with even greater force to a possible Soviet trial. It is my submission that extradition under such circumstances would clearly violate the rights of Canadians under Section 7 of the Charter of Rights.

Section 7 of the Charter of Rights provides as follows:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

It should be remembered that in deciding upon an extradition request, a Canadian Court need only be satisfied that a prima facie case has been made out.[21]

Under the circumstances, it is submitted that to send a Canadian citizen to a country where he is likely to be deprived of his life, liberty and security of the person in the course of proceedings which do not comply with our principles of fundamental justice, based upon an extradition hearing which need only be satisfied of the prima facie validity of the charges made out against the person, would be a clear violation of Section 7 of the Charter.

Even if there was a duty to extradite to a country with which Canada has a treaty, there is a world of difference between an extradition for an ordinary crime and an extradition for a war crime. In the former case, there is at least a reasonable likelihood that political interference in the already feeble judicial institutions of the East Bloc countries will be minimized. War crime investigations are, on the other hand, highly political. For example, I would refer you to the "Izvestia" article dated February 25, 1983 entitled "The Highest Measure of Justice", which notes that the investigation of war criminals is the responsibility of a branch of the K.G.B. It also makes it clear that "the motto of those who search for former Nazis, traitors, persons who committed war crimes, is - the defence of the interests of our State and justice.

These interests of the State dictate all of the in-depth, tense and complicated work in the search for war criminals".

I am mindful of the fact that a Canadian court has, in the past, sanctioned the extradition of Canadian citizens to such East Bloc countries as Yugoslavia. In the case of *Re Socialist Federal Republic of Yugoslavia and Rajovic (No. 3)* [22] the defendant was ordered extradited to Yugoslavia on charges of rape and fraud. Although counsel for the defence attempted to argue that his client should not be extradited because of the lack of civil rights in his home country, this argument was rejected as being a matter for the government and not for the court. It is submitted that the Charter has altered that situation. It is no longer an executive decision to decline to send a Canadian to be tried in a jurisdiction where the principles of fundamental justice are not respected. The Charter has restricted the liberty of the government to act in that regard. This individual has a right to fundamental justice which cannot be bargained away by treaty.

In the alternative, extradition to a country such as the Soviet Union which denies fundamental justice in the administration of justice would violate the right of a Canadian citizen to remain in Canada under Section 6(1) of the Charter. While the *Rauca* [23] case found that extradition to a West European country such as the Federal Republic of Germany was a reasonable limit on the Section 6(1) freedom, it is submitted that extradition to a country such as the Soviet Union would not be a reasonable limit which is demonstrably justifiable in a free and democratic society. Section 6(1) and *Rauca* are discussed in further detail below.

In addition to arguments based upon Sections 7 and 6(1) of the Charter, there is a possibility, depending on the facts of an individual case, that an argument could be raised pursuant to Section 21 of the *Extradition Act*, that the extradition request is politically motivated. Section 21 of the *Extradition Act* provides:

No fugitive is liable to surrender under this Part if it appears
(a) that the offence in respect of which proceedings are taken under this Act is one of a political character, or
(b) that such proceedings are being taken with a view to prosecute or punish him or an offence of a political character.

The meaning of the term "offence of a political character" was considered by Denman J. in the case of *Re Castioni,* [24] in a passage which was cited in the case of *Re Commonwealth of Puerto Rico and Hernandez* [25]

... to avoid extradition for such an act as an act of murder, which is one of the extradition offences, it must be *at least* shown that the act which is done is being done in furtherance of, and as a sort of overt act in the course of and with the intention of assisting in a political matter, such as a political rising consequent upon a *great* dispute between two parties in the State as to which is to have the government in its hands ...

An argument could be developed that an extradition request made for an individual as a result of acts committed in the course of resistance to Soviet rule can be characterized as an extradition request in respect of a political offence. The Soviets can be said to be attempting to characterize as banditry and common criminal behavious organized acts of insurrection. It should be noted that Section 21 provides that extradition can be refused under either of two circumstances. The first would appear to refer to an offence which is in substance a political offence. The second would appear to refer to proceedings in respect of what appears to be an ordinary, common law offence, but which is in fact proceeding of a political character.

In addition to the violations of Charter rights entailed by such a move, I would raise the following two issues. Assuming that a Canadian citizen was extradited to an East Bloc country, and assuming that that person was subsequently found not guilty after a trial, what guarantee is there that this person would not be subject to further trials in respect of crimes of a more expressly political nature? Further, what guarantees are there that such persons would eventually be free to return to the land which they have adopted as their own, and in which

their children and grandchildren are living? The Soviets have expansive citizenship laws and are not known for permitting their citizens freedom of movement.

Finally, I would reiterate the real danger which exists in depending upon Soviet-supplied evidence in order to make a case in favour of extradition. This has been discussed earlier and will not be repeated here. In summary, I would submit that this Commission should make it clear that it rejects extradition to East Bloc countries whether under existing treaties or under any amended *Extradition Act* or new treaty as a possible solution to the question of how to bring to justice alleged Nazi war criminals resident in Canada.

(c) Israel

The third possible source of an extradition request is the state of Israel. As appears from the extracts of Israeli statutes contained in the case of *Matter of Extradition of Demjanjuk* [26] Israel accepts jurisdiction to try persons for "crimes against the Jewish people" committed during the period of the Nazi regime. In the event that there are any persons presently living in Canada who are suspected of committing atrocities against the Jewish people as part of the infamous Nazi "final solution", Canada could well be faced with an extradition request from Israel.

Current Canadian law does not permit extradition for Nazi war crimes to Israel since Canada's extradition treaty with Israel is limited to crimes committed on Israeli territory. Part II of the *Extradition Act* , [27] which contemplates extradition to countries irrespective of the existence of a treaty is expressly non-retroactive. Section 36 of the Act provides:

> **This part applies to any crime, mentioned in Schedule III, that is *committed* after the coming into force of this Part as regards any foreign state to which this Part has by proclamation been declared to apply.**

Once again, it is conceivable that the Commission may be requested to recommend either an amendment to Part II of the Act to permit extradition for war crimes or a re-negotiation of the Treaty in order to make it apply to war crimes.

I would submit that extradition to Israel is not an option which the Commission should recommend. I stated earlier that the Ukrainian Canadian Committee did not object to the extradition of Canadians to the Federal Republic of Germany. This is because one can have reasonable confidence in the ability of the German legal system to be fair and because Germany is a country with a real and substantial connection to the crime. Although Nazi war crimes may well have been committed outside the territory of modern day West Germany, such crimes were committed under the aegis of the Nazis in areas subject to German de facto control. German civil law applied to the acts at the time they were committed, thus avoiding any taint of ex post facto law-making or victor's justice. It is fair that persons who have voluntarily identified themselves with German authority in committing such acts should be brought to justice by that same German authority. Further, German military documents and witnesses may well be relied upon.

Under such circumstances, the Ontario Court of Appeal determined in the*Rauca* case that, although extradition constitutes a prima facie violation of the right of a citizen to remain in Canada pursuant to Section 6(1), it was a violation prescribed by law which was demonstrably justifiable in a free and democratic society within the meaning of Section 1 of the Charter. The Court held:

> **When the *rationale* and purpose of the *Extradition Act* and treaty under it are looked at (having in mind that crime should not go unpunished), Canada's obligations to the international community considered and the history of such legislation in free and democratic societies examined, in our view the burden of establishing that the limit imposed by the *Extradition Act* and the treaty on s. 6(1) of the Charter is a reasonable one demonstrably justified in a free and democratic society has been discharged by the respondents.[28]**

Although I would not presume to assume that Israel could not offer a fair trial in a war crimes case, it is submitted that extradition to Israel could well be found to violate s. 6(1) of the Charter and, unlike the Rauca case, not be found to be saved by s. 1 of the Charter.

Israel is a country which has no greater legal interest in prosecuting Nazi war criminals than does Canada. Israel is a state which did not exist at the time of the Second World War. It was not a belligerent power as was Canada. No Israeli nationals were involved, although some surviving victims may have acquired Israel citizenship. None of the crimes alleged (it can be safely assumed) took place on territory which now or ever has been occupied by Israel or any of its predecessors. The interest which Israel has in prosecuting Nazi war crimes is obvious, but it rests primarily on the supposed universal jurisdiction of states to try certain offences which are crimes "jure gentium".

Of the factors cited by the Ontario Court of Appeal in Rauca as justifying extradition as a limit on the section 6(1) Charter right, only the factor of ensuring that crime should not go unpunished would appear to be applicable to Israel. The theory and rationale of extradition were described by the Ontario Court of Appeal in Rauca by reference to the work of Professor G.V. LaForest (as he then was) in his work "Extradition to and from Canada", where extradition is defined as:

> **The surrender by one state at the request of another of a person who is accused, or has been convicted, of a crime committed *within the jurisdiction* of the requesting state. (emphasis added).[29]**

After citing this definition, the Court went on to state:

> **The theory of such laws is that the procedure strengthens the law enforcement agencies within the State requesting surrender by reducing the possibility of the criminals escaping. From the point of view of the State to which the criminal escapes, that State does not become a haven for such criminals. Further, as Professor LaForest points out (at p. 16), it is better in "general" that a crime be prosecuted in the country where it is committed and where the witnesses and the persons most interested in bringing the criminal to justice reside.[30]**

The international theory and practice of extradition has historically been limited to cases where the requesting state assumes jurisdiction on the principle of territoriality. In cases where a crime of universal jurisdiction is involved, Canada has in the past enacted provisions of the Criminal Code to provide for prosecutions in Canada. The paradigmatic case is that of piracy (s. 75) or hijacking (s. 6(1.1) and s. 76.1). Extradition in cases of crimes of universal jurisdiction is neither required by the theory of extradition nor by the practice as it has developed internationally. As such, it may well be that the *Rauca* case could be used to argue that extradition to Israel of suspected war criminals violates Section 6(1) of the Charter and is not saved by Section 1.

Since a change in current law would be required to permit extradition to Israel, since such a change may well not resist a legal challenge and since Israel has no greater legal jurisdiction to punish Nazi war criminals than does Canada, it would be preferable to make the necessary arrangements to provide for prosecutions of war crimes in Canada. The extradition of Canadian citizens to Israel would involve the uprooting of people who have lived peacefully here for some 40 years, who have acquired Canadian citizenship and contributed to Canada for most of their adult lives and who have established families here. They would be tried in a court which uses a foreign tongue, and be separated from their families. It would be remembered that any such people subject to extradition must be presumed innocent until proven guilty. If such people are to be put through the ordeal of a trial in order to establish their guilt or innocence, such a trial should take place in Canada where Canadian standards of justice will be applied, rather than in a foreign country with which the accused has *never* had *any* connection whatever.

(ii) Denaturalization and Deportation

I would submit that the Commission ought to reject categorically any recommendation that the vehicle of denaturalization and deportation should be used as a remedy to deal with the possibility that Nazi war criminals may be resident in Canada.

In the absence of any concrete information concerning the persons against whom allegations of complicity in Nazi war crimes have been made, I can only assume that most, if not all of such persons are Canadian citizens who have been resident in Canada for 35 or 40 years and are approaching or have reached the age of retirement. Unlike extradition, deportation and denaturalization are remedies which do not contemplate a full trial being held on the issue of the guilt or innocence of the accused. Unless a virtual criminal standard of proof were applied, this "solution" runs the serious risk of unjustly destroying the life of a presumably innocent person, without providing him or her with an adequate means of defending themselves. An order of deportation and denaturalization is made in a non-criminal context. A deported person would be barred from returning to Canada, and would not be provided with a full trial of the issue of his guilt or innocence of the crime alleged. I submit that this is an unacceptable option.

I do not propose to review in any great detail the various proposals which have been submitted as providing the means for successfully denaturalizing and deporting suspected Nazi war criminals. I think that I should point out one major flaw in the reasoning of the proponents of this unfair solution. The general assumption appears to be how does one go about ridding Canada of Nazi war criminals. Surely the first step must be the determination of which persons are *in fact* Nazi war criminals. It is only when the criminal responsibility of the individual has been established by a criminal standard of justice that such draconian measures begin to acquire a semblance of justice.

It has been suggested that a naturalized Canadian suspected of being a Nazi war criminal could be denaturalized and subsequently deported if he or she obtained citizenship, permanent residence or refugee status by means of false pretences. A citizenship applicant who fails to admit war crimes involvement could be said to have falsely represented himself as being of good character. An applicant for permanent residence status who was a war criminal could be said to have concealed his guilt of a crime of moral turpitude or his undesirability. In addition, an applicant for permanent residence status may have concealed his enemy alien status, interned enemy aliens or his membership in a subversive organization.

There are numerous problems with the application of immigration law to the situation of alleged Nazi war criminals. Firstly, there is considerable doubt that sufficient evidence in Canadian immigration records exists to permit proof of such misrepresentations. With respect to those who have propounded a differing view, this is not an obstacle which can be overcome by the presumption of regularity in the execution of official tasks. The maxim is a presumption of validity of official acts until the contrary is proven. A landed immigrant or citizen need not prove the validity of the official acts which granted him that status. It is another thing entirely to state, in effect, that the citizen who is suspected of being a Nazi war criminal is presumed to have entered irregularly. This would place an impossible burden on the defendant.

Secondly, even assuming that evidence of misleading or false declarations could be found or assumed, there remains the problem of innocent misrepresentations. At the end of the war between 1 and 2 million Ukrainian people were in D.P. camps throughout Europe. As a result of the Yalta accords, hundreds of thousands of these were forcibly repatriated to the Soviet Union, only to be liquidated or deported to Siberia. The only hope of those designated for "repatriation" was to prove their origin from outside the borders of pre-1939 Soviet Union. For Ukrainians this meant assuming new identities either as Poles or ethnic Ukrainians from the former Polish territory of Galicia. It would be simply monstrous to institute deportation proceedings against such persons merely because of a misrepresentation on their landing documents.

Another problem with deportation and denaturalization proceedings is that they are clumsy and involve administrative proceedings ill-suited to the determination of a person's guilt or innocence as a war criminal. Under current law, dual proceedings would be required.

Denaturalization must proceed through Federal Court while deportation is the task of an adjudicator (subject to review by the Federal Court).

There thus exists considerable doubt about the effectiveness of denaturalization and deportation proceedings. The individual history of each suspected war criminal would have to be examined in the light of the precise statute or regulation under which he or she was admitted and/or acquired citizenship in order to determine the likelihood of success of such proceedings.

Any deportation and denaturalization proceedings involving Ukrainians would likely involve a consideration of Soviet evidence. The same problems which have been referred to elsewhere in accepting Soviet evidence would arise in such proceedings. However, unlike criminal proceedings, the evidence would be considered in essentially administrative proceedings with a lower standard of proof and fewer procedural safeguards than a criminal prosecution.

It has been suggested that the evidentiary and technical difficulties of denaturalization and deportation proceedings could be remedied by the passage of legislation specifically providing for the deportation of Canadians who have participated in Nazi war crimes. Such legislation could not be characterized as merely procedural, but would be necessarily retrospective in operation. A retrospective statute would be repugnant to our legal traditions under all but the most exceptional conditions.

This principle was discussed by Langelier J. in the case of *Collector of Revenue v. Boisvert*.[31] He said:

> **The legislator should very seldom give a law retroactive effect, and if he does so, it is his duty to say so very clearly; he should always do so with prudence and caution, and only in cases where social utility requires it very strongly. That is the only occasion where it is justifiable to enact for the past.[32]**

It is submitted that retroactively providing for the expulsion from Canada of people otherwise lawfully established here would be an unjustifiable retroactive provision.

It has been said that denaturalization and deportation proceedings enjoy a certain evidentiary advantage over direct prosecutions for war crimes. The case in support of this proposition is that of *Fedorenko*,[33] where a former prison camp guard was ordered deported from the United States to the Soviet Union although the evidence did not permit a finding that he was actually guilty of war crimes.

I would submit that the *Fedorenko* case is precisely the reason why denaturalization and deportation should not be used. It is, in my submission, cruel and inhuman to uproot an individual from his family and whatever life he has built in 35 or more years as a productive Canadian on the *suspicion* that he *might* have been a war criminal. It is precisely because of the "evidentiary advantage" in deportation and denaturalization proceedings that I would submit that the Commission should reject such proceedings as a means of bringing war criminals to justice. No punishment should be inflicted upon a suspected war criminal unless his or her guilt is fairly established by Canadian standards of justice.

(iii) Prosecution Under Existing Law

There are three avenues which have been put forward as offering a means of prosecuting suspected Nazi war criminals. These are prosecution at common law, prosecution under the *War Crimes Act*,[34] and prosecution under the *Geneva Conventions Act*,[35].

(a) Common Law Prosecutions

It is submitted that a prosecution in Canada under the international common law would not be successful. Even if war crimes are assumed to be crimes "jure gentium", and therefore of universal jurisdiction, it does not follow that a common law prosecution of such a crime could lawfully be held in Canada.

Section 8 of the Criminal Code provides that "no person shall be convicted (a) of an offence at common law ... ". The prohibition of common law prosecution is, in my submission, clear and unequivocal. International law is only the law of Canada by virtue of its introduction into Canada as part of the English common law.[36] A prohibition of prosecutions under the English common law must be taken as a prohibition of prosecutions under both the domestic common law and the "international" common law which the domestic common law has incorporated.

The rule of construction which states that a statute shall be interpreted if possible so as not to derogate from the international law duties of Canada is only a rule of construction. If it was intended that international common law offences should be left untouched by the codification of the criminal law, then such international law offences as piracy would not have been included in the Criminal Code. Furthermore, it is incorrect to state that Canada has an international law duty to create an offence of being a Nazi war criminal in its domestic law. To the extent that there is an international law duty to see that war criminals are brought to justice, this duty can be satisfied by means of international co-operation, extradition, etc. Section 8 of the Criminal Code does not violate the international law and therefore does not require the extremely dubious application of what is only a principle of construction.

It has also been argued that the Charter has rendered inoperative Section 8 of the Criminal Code insofar as it applies to international law offences. Apparently this argument relies upon Section 11(g) of the Charter which provides:

Any person charged with an offence has the right ...
(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal a·cording to the general principles of law recognized by the community of nations.

The wording of Section 11 cannot reasonably be construed as amounting to a positive obligation to permit common law prosecutions. Section 11 of the Charter creates an individual right. It applies to persons "charged with an offence". It does not create an offence. As has been pointed out numerous times in the course of the proceedings before the Commission, Section 11(g) of the Charter was drafted in order to permit legislation of a retroactive effect providing for the prosecution of war criminals.

(b) Geneva Conventions Act

The suggestion has been put forward that Nazi war criminals may be brought to justice by means of a prosecution in Canada pursuant to the *Geneva Conventions Act*.[37] Section 3 of the Act reads in part:

3 (1) Any grave breach of any of the Geneva Conventions of 1949, as therein defined, that would, if committed in Canada be an offence under any provision of the Criminal Code or other act of the Parliament of Canada, is an offence under such provision of the Criminal Code or other act if committed outside Canada.

(2) Where a person has committed an act or omission that is an offence by virtue of the section, the office is within the competence of and may be tried and punished by the court having jurisdiction in respect of similar offences in the place in Canada where that person is found in the same manner as if the offence had been committed in that place, or by any other court to which jurisdiction has been lawfully transferred.

It is my submission that the *Geneva Conventions Act* cannot be read so as to apply to the commission of war crimes prior to its enactment, or at least the enactment of the Geneva Conventions which are appended to the Act. Whatever the merit of the argument that a new war crime statute is merely procedural in providing for the prosecution of offences which were

illegal at the time, the *Geneva Conventions Act* creates a new offence. The offence created is a grave breach of any of the Geneva Conventions of 1949. These Conventions did not exist until after the war and consequently could not have been breached by any suspected Nazi war criminals. Furthermore, the Conventions themselves do not contain any wording suggestive of a retroactive intent. The parties to the Conventions undertake prospectively to respect the provisions thereof. It does not purport to be a Convention which is declarative of present law. It is axiomatic to state that a statute, such as the *Geneva Conventions Act*, will not be interpreted so as to have a retroactive effect unless clear words or necessary implication require such an interpretation. Far from being clearly retroactive, it is my submission that the *Geneva Conventions Act* is clearly prospective.

The Ontario Court of Appeal in the *Rauca* case appears to have foreclosed any attempted prosecution under the *Geneva Conventions Act*, at least until such time as the opinion of the Supreme Court of Canada on the matter is solicited. The Court of Appeal held that:

Not only is the *Geneva Conventions Act* not a statute of general application, but it is a piece of substantive law, which does not have a retroactive effect.[38]

It is my submission that the Ontario Court of Appeal was correct in its interpretation of the *Geneva Conventions Act* in the *Rauca* case. At the very least, the opinion of the Ontario Court of Appeal would render extremely uncertain the prospect of a successful prosecution under that statute. Consequently, this is not a solution which should be recommended.

(c) The War Crimes Act

The third avenue for prosecuting suspected Nazi war criminals in Canada is found in the *War Crimes Act*,[39]. It is submitted that the *War Crimes Act* may well not apply to a prosecution of alleged Nazi war criminals who are now Canadian citizens resident in Canada. Even if the Act did apply, it is further submitted that the procedures established therein violate the Charter in several respects.

The *War Crimes Act* was passed in 1946 to ratify retroactively the Regulations which had been promulgated under the *War Measures Act* to deal with the trials of war criminals in Europe in the immediate post-war period. The Act provides quite simply in Section 1 that:

The War Crimes Regulations (Canada) made by the Governor in Council on the thirtieth day of August, one thousand nine hundred and forty-five, as set out in the Schedule to this Act, are hereby re-enacted.

The Regulations which are attached in the appended Schedule do not create an offence. They provide in Section 3 that:

The custody, trial and punishment of persons charged with or suspected of war crimes shall, on and after the date hereof, be governed by these Regulations.

War crime is defined in Section 2(f) as a "violation of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the 9th day of September, 1939". Thus, rather than create an offence, the Regulations simply provide for the trial of people charged with an offence.

Judge Macdonald, who was involved in the investigation of war crimes on behalf of Canada and who was the prosecutor at the trial of Kurt Meyer under the Regulations, testified as to the background of the Act. He was involved in the drafting of the Regulations. He stated that the British had passed similar regulations pursuant to the Royal Prerogative of the King in his capacity as Commander-in-Chief of the Armed Forces. The Canadian Regulations were passed under the *War Measures Act* and eventually ratified by means of the *War Crimes Act* in order to remove any doubt as to their validity.[40]

It is clear from all of the testimony heard that the *War Crimes Act* was intended to apply only in respect of persons accused of committing war crimes against members of the

Canadian Armed Forces. The question however is whether despite the intent of the Government at the time, it can be said that the actual Regulations have gone farther.

Apart from the historical evidence as to the intent of all involved in drafting and promulgating the Regulations, there are four factors which can be referred to as tending to indicate that the Act is not intended to apply to war criminals presently resident in Canada who were not involved in committing war crimes against Canadian personnel.

Firstly, the Act provides in Section 3 that it continues in force until a day fixed by proclamation. Normally acts of Parliament, especially ones which create criminal offences, are of indefinite duration. Providing for repeal by executive action is rather exceptional, and tends to underline the intention that the Regulations and Act were intended to be of temporary effect only and not applying once the Canadian forces had returned to Canada. Secondly, the Act has not been consolidated in any subsequent consolidations of the Statutes of Canada, a factor which is at least an indication that the statute was an extraordinary one which was not intended to survive the war for long. Thirdly, the procedure provided for convening a trial under the Regulations obviously does not contemplate trials taking place in peacetime in Canada. Authority to convene a court is conferred upon the competent officer "whether in the field or in occupation of enemy territory or otherwise": Section 4(1). The competent officer may convene a court when it appears to him "that a person then within the limits of his command or otherwise under his control has at any place committed a war crime". The procedures to be used in conducting the trial are to conform as closely as possible to the procedures for a *field* court-martial, a provision which is suited for trial by an army of occupation in the immediate post-war chaos, but is hardly suitable for peacetime. Finally, the Regulations were passed originally under the *War Measures Act* at a time when that Act had been validly invoked. The *War Measures Act* is no longer in force. The *War Crimes Act*, it could be argued, was only intended to validate measures taken under the *War Measures Act*, and not to constitute a permanent statute applying so as to give authority to hold military trials in respect of war crimes in peacetime, in respect of persons not under military authority and in respect of crimes committed against other than Canadian servicemen.

In the *Rauca* case Evans C.J.H.C.[41] and the Ontario Court of Appeal held that the *War Crimes Act* was not an alternative available for the prosecution of Rauca in Canada. The Ontario Court of Appeal held:

> ... the *War Crimes Act* is not a statute of general application and by its very terms does not cover the present factual situation where the crimes were not committed against Canadian citizens.[42]

While the finding of the Court concerning the applicability of the War Crimes Act was not entirely necessary for its decision, it nevertheless represents a considered opinion of the applicability of the statute.

I would therefore submit that, despite the general language employed by the War Crimes Act, the better interpretation of the Act is that it is not applicable to the trial of suspected Nazi war criminals presently living in Canada. Apart from the issue of the current applicability of the statute, in the case of suspects from the east European area, there is at least an arguable case that the Act does not apply since they were not involved in a war with Canada unless they were formally members of the armed forces of a country against whom Canada had declared war.

Even if the War Crimes Act can be said to apply to permit the trial of Canadian citizens in a military court, there is a strong possibility that such a proceeding would run afoul of numerous provisions in the Charter of Rights.

Firstly, as the Court of Appeal noted in the Rauca case, a trial under the War Crimes Act could run afoul of Section 11(f) of the Charter which guarantees the right to a trial by jury where the maximum punishment for the offence is imprisonment for five years or more. A trial under the War Crimes Act is not a trial under military law before a military tribunal so as to be saved from contravening Section 11(f) of the Charter. Rather, Section 5 of the Regulations under the Act provides that the procedures in the Army Act and the Rules of Procedure shall apply "as if military courts were field general courts-martial and the accused

were persons subject to military law charged with having committed offences on active service". Thus the basis for applying military procedure is a deemed provision that the accused is subject to military law. While military law is being applied by the Act, it is being applied "as if" the accused were subject to military law.

Other of the procedures contemplated by the Act violate the right of a suspected Nazi war criminal to equality before the law under Section 15 of the Charter and the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice pursuant to Section 7 of the Charter.

The Regulations provide for officers of allied powers to be appointed to the court by the convening officer. The accused is not entitled to object to the president or any member of the court or to offer any plea as to the jurisdiction of the Court. Section 10 of the Regulations relaxes considerably the rules of evidence. For example, hearsay evidence is admissible pursuant to Section 10(1)(a), evidence from depositions or proceedings in any other military court is admissible under Section 10(1)(d), the rules regarding the admission of confessions are relaxed regardless of whether the accused was given any caution by Section 10(1)(g), and the co-conspirators rule is broadened somewhat by subsections (3), (4) and (5) of Section 10 which contains an expansive concept of collective responsibility. In view of the fact that the Act does not expressly create an offence but merely establishes procedures, the finding that many of the procedures violate the Charter would essentially render the statute inoperable.

Apart from the procedural unfairness of a trial carried out pursuant to the Regulations under the War Crimes Act, it is arguable that a trial before a military court under different rules than apply to other Canadian citizens is a denial of the equality rights guaranteed by Section 15 of the Charter. Section 15(1) of the Charter provides as follows:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It is submitted that subjecting accused murderers who happened to have committed their crime in the course of a war to a military trial constitutes discrimination. This discrimination exists on several grounds.

Firstly, the *War Crimes Act* only provides a procedure for punishing war criminals who committed their crimes in a war in which Canada was engaged. Arguably this constitutes discrimination since not all war criminals are punished. Only those war criminals who committed their crimes in the course of a war with Canada are subject to punishment. This distinction is not one which has a rational basis since the moral quality of a war crime is unaltered by the war in which it is committed. Secondly, war criminals are subject to a separate and distinct standard of justice both from military offenders and from civilian offenders. The *War Crimes Act* sets out a completely independent tribunal. The judges are not necessarily professional judges. Their independence is not insured. No appeal lies from the decisions of the court other than by way of petition to the convening officer. This exceptional proceeding denies accused persons the same rights which other Canadians enjoy to have a normal appeal procedure and normal criminal rules of evidence and procedure applied to them.

Once again, an objection to the securing of a conviction under the*War Crimes Act* which relies upon evidence obtained from Soviet sources would be made. In this respect, I would refer you to my general comments regarding the utilization of Soviet evidence in prosecution of suspected Nazi war criminals.

It has been argued that provision for trial under military law does not breach the principle of equality before the law. This argument relies upon the decision of the Supreme Court of Canada in the case of *MacKay v. The Queen*,[43]. The *MacKay* case was dealing with the Bill of Rights. The accused was charged with an offence under the*National Defence Act* which was

also an offence under civil law. The decision of the court in *MacKay* under the Bill of Rights is of little use in interpreting the Charter of Rights. Unlike the Charter of Rights, the Bill of Rights does not operate so as to overrule a statute.

In approving trial by military courts, the court was careful to note the concurrent existence of jurisdiction on the part of the civil courts and the historic necessity for recognizing a separate code of law administered within the services as an essential ingredient of service life. It is submitted that this rationale does not apply to a civilian who, if he or she was ever a member of any military force, has been living as a civilian for over 35 years. The argument that special knowledge is required for a trial of war crimes is not sufficient to justify an extraordinary tribunal with an inferior standard of justice. Almost any crime could be said to be better tried by someone with some specialized knowledge of the area involved. However, no one suggests that hijacking should be tried by a court composed of airline pilots or that commercial fraud should be tried by a court composed of bankers. Furthermore, in view of the fact that the Canadian Forces have not seen active duty in combat since the time of the Korean War renders it somewhat unlikely that members of the Canadian Forces will have any extraordinary experience in being able to distinguish between war crimes and ordinary military acts. The men who had conduct of these trials after the war were by and large simply ordinary civilian lawyers doing their tour of wartime military service. They were not professional soldiers.

In conclusion, it is submitted that the *War Crimes Act* does not provide an appropriate means of bringing to justice suspected Nazi war criminals presently residing in Canada both due to doubts as to its applicability and due to serious objections as to its capacity to withstand a challenge based on the Charter of Rights.

(iv) Changes to Current Law

From my review of the existing legal framework, it is apparent that of all of the remedies suggested, only extradition to the Federal Republic of Germany or another West European country appears to be available as a means of bringing to justice a suspected Nazi war criminal. Whether any further remedies are required would depend on the evidence which the Commission has heard in camera. For example, if most or all of the suspected war criminals presently resident in Canada are former German military officers whom the Federal Republic of Germany could be expected to extradite, then the problem would be largely resolved. There is no question that the law, as it presently stands, is able to ensure that justice is meted out to the masterminds of Nazi atrocities such as Joseph Mengele.

If your investigations have revealed only a relatively small number of suspects, and if the actions attributed to them do not constitute major war crimes but may well be actions on the borderline between legitimate warfare and illegitimate warfare, and especially if any subsequent proceedings would need to place any significant reliance upon Soviet-supplied evidence, it is my submission that it would be more advisable for the Commission to recommend that no new legislation be introduced. This would, in my view, be preferable to the risks which are inherent in some of the other courses of action which have been recommended. One must not be blinded by the understandable desire to do justice and see that responsible culprits are punished. This cannot be used as an excuse for trampling upon the rights and freedoms of Canadian citizens and risking the setting of a precedent for the future. For example, if the rules are successfully bent today to permit denaturalization and deportation or extradition of suspected Nazi war criminals to the Soviet Union or other East Bloc countries despite the potential injustice which this would cause, a precedent could well be set for future actions against other categories of citizens.

Even if some action was warranted, I would submit that the Commission should strongly recommend against the establishment of a Canadian equivalent to the American Office of Special Investigations (the "O.S.I."). The O.S.I. has been the source of the creation of considerable friction between ethnic communities in the United States. If in fact your investigation has revealed that, far from there being 3,000 or more suspected Nazi war criminals in Canada there are only a handful (if any), there can be no justification for establishing an exceptional prosecution arm of the state. Rightly or wrongly, the O.S.I. has caused many ethnic groups to feel that they are being persecuted. They feel that they are

being singled out for attack and that their good name in the community is being besmirched by association with the Nazis. Whether rightly or wrongly, they feel that the O.S.I. has permitted itself to become an instrument of the K.G.B. It does not really matter whether the apprehensions of the ethnic communities in the United States are justified. If the problem of Nazi war criminals in Canada has not been found to be widespread by your Commission, then I would submit that there is no real benefit which can be gained by establishing an O.S.I. in Canada and yet there are very real disadvantages associated with such an institution. The problem would be of a magnitude that could be handled by existing institutions. I would refer you to the brief of Mr. Zumbakis which has been filed with these submissions for further discussion of the potential damage which an O.S.I. can do to the case of ethnic harmony.

Your Commission has thoroughly investigated the existence of suspected Nazi war criminals in Canada. Any information which you have gathered can be turned over to the police and handled in the normal course. An O.S.I. is not necessary in order to track down any new Nazi war criminals who should surface since it is not likely that many new immigrants will be of an age and an ethnic background which might warrant their being suspected of being Nazi war criminals.

If your Commission has determined that the extent of the problem warrants new legislation to deal with Nazi war criminals resident in Canada, it is my submission that any new legislation must be applicable to all war criminals without discrimination. However, in view of the limitations placed upon the scope of your inquiry by the Order-in-Council, it is my submission that the Commission has not heard sufficient evidence to enable it to say what type of legislation would be desirable.

It is my submission that any war criminal legislation cannot distinguish between war criminals based upon the war in which they committed their crimes or the side upon which they fought. If such distinctions are drawn, it is my submission that the legislation would be open to challenge under Section 15 of the Charter.

Surely it must be true that war crimes do not become more or less reprehensible based upon the time in which they are committed or the cause which they are committed for. If war crimes are to avoid the label of being political crimes, their criminal nature should not depend upon the nationality of either the perpetrator or the victim of the crime. It is submitted that there is no non-discriminatory basis upon which the State could decide to prosecute only one type of war criminal. A decision to prosecute only Nazi war criminals would be open to the charge of discrimination based, *inter alia*, upon race or national origin.

The so-called Finestone amendment to Bill C-18[44] would appear to be an amendment to the Criminal Code which would be able to withstand a Section 15 attack. It applies equally to all war criminals. It is the sort of amendment which the Ukrainian Canadian Committee would be prepared to consider supporting. As far as can be seen, the ordinary rules of evidence and criminal procedure would apply to a prosecution under the proposed amendment to the Code.

However, an amendment of the scope of the Finestone amendment has not been investigated by this Commission. Such an amendment falls outside the terms of reference of the Commission. The Commission has not heard evidence upon the advisability or desirability of bringing to justice war criminals of all types. For example, is it possible to argue that Canadians or Americans involved in the carpet bombing of such German cities as Dresden should be now sought after and prosecuted as war criminals? Many Canadians and Americans who are resident in Canada fought in the war in Vietnam. I would not presume to comment one way or the other on whether it is an advisable public policy to prosecute such people. It may well be. The point which I would make however is that this is not a problem which has been the subject of extensive debate or inquiry by this Commission. The Commission does not have the information necessary to make a considered recommendation on this point.

SUMMARY

In summary, I would submit that your report should indicate that the evidence which you have heard does not show that Ukrainians in the various Ukrainian nationalist groups which have been discussed were involved in war crimes related to the activities of Nazi Germany. Your report should describe the extent of the problem of Nazi war criminals as has been revealed to you by the evidence which you have heard. In recommending means of bringing such Nazi war criminals to justice, I would recommend that you note the availability of extradition to the Federal Republic of Germany, and the fact that any further action would have to be taken on a non-discriminatory basis. Upon the information available, I submit that you should refrain from recommending any changes to current legislation until an adequate investigation of the whole problem of war crimes without distinction based upon nationality has been carried out.

FOOTNOTES

1. Trial of General von Mackensen and General Maelzer, (1949), Case no. 43 Law Reports of Trials of War Criminals, Vol. VIII, p. 1

2. Zyklon B. Case (1945), Law Reports of Trials of War Criminals, Vol. I, p. 93.

3. Trial of Heinrich Gerike and Seven Others (1946), Case no. 42, Law Reports of Trials of War Criminals, Vol. VII, p. 76

4. Trial of Josef Kramer and 44 Others (1945), Case no. 10, Law Reports of Trials of War Criminals, Vol. II, p. 1

5. Trial of Otto Sandrock and Three Others (1945), Case no. 3, Law Reports of Trials of War Criminals, Vol. I, p. 35

6. c.f. Armstrong, John, Ukrainian Nationalism, 2nd ed, (1963), New York, Columbia University Press (general historical overview, bibliography)

7. Trial of Major War Criminals Nuremberg, Vol. 39, p. 269-70 reproduced in "The Restoration of the Ukrainian State in World War II", p. 10, p. 41

8. Commission of Inquiry on War Criminals, exhibits P-67 Submission of Network Canada, June 10, 1985, exhibit 4

9. Lebed, Mykola, "U.P.A.", (1946) Press Bureau, U.H.V.R. pp. 73-74

10. Commission of Inquiry on War Criminals, Submission of Committee of Ukrainian Political Prisoners, May 22, 1985, p.p. 1-3 exhibit 4

11. The Day of Reckoning, Kiev, 1982 p.p. 3-5

12. supra fn. 10, exhibit 8

13. ibid p.p. 9-10

14. United States of America vs. Liudas Kairys Dist. Ct., Illinois, Civil Action no. 80 - C-4302, Deposition of Imants Lesinskis, April 9, 1982

15. Commission of Inquiry on War Criminals, transcript of proceedings, April 24, 1985, Vol. III, p. 366

16. (1985) 14 C.R.R. 13 (S.C.C.)

17. ibid at p. 53

18. (1983) 41 O.R. (2d) 225 (C.A.)

19. Commission of Inquiry on War Criminals, Transcript of Proceedings, April 10, 1985, Vol. III, pp. 236-238

20. Extradition Act R.S.C. 1970, c. E-21

21. Federal Republic of Germany v. Rauca (1982) 38 O.R. (2d) 705 at p. 709, (H.C.)

22. (1981) 62 C.C.C. (2d) 544 (Ont. Co. Ct.)

23. supra fn. 18

24. (1980) 60 L.J. 22

25. (1972) 8 C.C.C. (2d) 433 at p. 440 (Ont. Co. Ct.)

26. 612 F. Supp. 544 (1985)

27. supra fn. 20

28. supra fn. 18 at p. 246

29. G. V. LaForest, "Extradition to and from Canada", (1977, 2nd ed.),

30. supra fn. 18 at p. 237

31. (1915) 24 C.C.C. 138 (Que S.P.)

32. ibid at p. 140

33. 597 F. 2d 946 (1970); 101 5 Ct. 737 (1981)

34. S.C. 1946, c. 73

35. R.S.C. 1970, c. G-3

36. c.f. Reference re Foreign Legations, [1943] S.C.R. 208, per Duff C.J. at p. 230-231; see also Chung Chi Cheung v. The King, [1939] A.C. 160 (P.C.)

37. supra fn. 35

38. supra fn. 18 at p. 245

39. supra fn. 34

40. Commission of Inquiry on War Criminals, transcript of proceedings, April 11, 1985, Vol. II, p. 163-164

41. Federal Republic of Germany v. Rauca, (1982) 38 O.R. (2d) 705 (H.C.

42. supra fn. 18 at p. 245

43. (1980) 114 D.L.R. (3d) 393 (S.C.C.)

44. Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, House of Commons, March 14, 1984, Issue 15, p.p. 3-4