McGILL UNIVERSITY

MONTREAL, QUEBEC, CANADA

NUREMBERG FORTY YEARS LATER - THE STRUGGLE AGAINST INJUSTICE IN OUR TIME - CLOSING PLENARY AGAINST INJUSTICE

"WAR CRIMINALS - THE RIGHT TO A FAIR AND SPEEDY TRIAL?"

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WEDNESDAY, 4 NOVEMBER 1987
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AGAINST JUSTICE

WAR CRIMINALS - THE RIGHT TO FAIR AND SPEEDY TRIAL?

The Honourable Justice Michael D Kirby, CMG*

The arguments against now taking action remain and they are not insubstantial. These matters occurred over 40 years ago. Insofar as persons now in Australia are concerned, most (but not all) have lived apparently blameless lives in Australia for many years and acquired Australian citizenship. Their crimes were committed in an entirely different environment and not against Australians. They would all now be of advanced years. Indeed, except in the case of really serious war crimes, these arguments should, I suggest prevail".

Australia, Review of Material Relating to the Entry of Suspected War Criminals into Australia (Mr Andrew Menzies), November 1986, Vol 12, p 150.

"Should prosecutions be launched against war criminals, a delay of some 45 years will have elapsed between the alleged crimes and the laying of the charges. It shall belong to the Executive and, eventually, to the Judiciary to assess the effect, if any, of this delay on the prosecutions."

Canada, Commission of Inquiry on War Criminals (Hon Jules Deschenes) December 1986, Vol 1 p 150.

"On 13 July 1948, the British Commonwealth Relations Office sent a secret telegram to the seven Dominions... It suggested essentially that ... in general, no fresh trial should be started after 31st August 1948. The British Government explained its proposal: ... "In our view, punishment of war criminals is more the matter of discouraging future generations than of meting out retribution to every guilty individual ... The British Government asked for comments ... Canada answered on 22 July by an equally secret and cyphered cable "This is to advise you that Canadian Government has no comment to make." And so the matter of war criminals quietly disappeared from the scene."

The Deschenes Report, ibid 27.

PERILS OF THE WORKAHOLIC

A few weeks ago there was an excellent program on the radio in Australia. It was about workaholism. Sadly, I did not have the time to listen to it. I was too busy working.

So it was that the organizers of this symposium caught me at my desk fighting off the waves of reserved judgments which always threaten to swamp appellate judges. It was 7 a.m. on a Sunday morning in faraway Sydney, where Summer was marching in. Learning of my visit to Montreal for the Atwater Institute on Informatics, the organisers invited me to participate in this closing plenary. It was a privilege which I seized. I did so for three reasons. First, out of respect of this important topic - upon which there have been recent developments in Australia. Secondly, out of respect for this famous Law School, and two of its Deans whom I have been privileged to know - Maxwell Cohen and John Humphrey. Thirdly, because as it happened, the judgments upon which I was working when the call came through touch - indirectly - upon the issue of justice and injustice which is the theme of this closing plenary.

THE MENZIES REPORT IN AUSTRALIA

Let me say something briefly about the Menzies report on Australian war criminals[1]. Our situations in Australia and Canada are sufficiently similar to make it important that we be aware of developments in both countries. Our legal traditions are close. Our position as recipients of large numbers of post-war refugees confront our government and people with like dilemmas[2]. We were both combatants in the Second World War against Fascist dictatorships. In 1948 we were both recipients

of the suggestion by the United Kingdom authorities that Commonwealth countries should switch the focus of their concern from the pursuit of War Criminals to surveillance of the Soviet threat. Each of us has large ethnic populations, nervous about the reopening of old controversies. Until lately, each of us has tended to treat the prosecution of war criminals and others accused of crimes against humanity as a closed chapter. Indeed in Australia this was the official position of the Government, so declared in 1961 by Sir Garfield Barwick - the then Attorney General who later became Chief Justice of Australia.

As a result of widespread publicity following radio and television programs and pressure in Federal and State Parliaments - from opposite sides of politics - the Menzies Inquiry was ultimately established in June 1986[3]. It was conducted by Mr Andrew Menzies, a distinguished retired public servant. He reported with commendable speed in November 1986. His report became public - save for a list of named suspects - at the close of 1986. The report was published in 1987.

I will not go over the recommendations in detail. They will be known to some of you or are readily available to the rest. In essence, they recommended reversal of the Barwick statement of 1961. They suggested the establishment of a very small unit to work with the Director of Public Prosecutions to review the cases of all suspects, present and future. They proposed some law reform procedures for extradition, local prosecution in some cases and closure of files.

> "Cases that could be put aside on various grounds, including the offense not being sufficiently serious, or insufficiency of evidence now available or likely to be available[4]."

The Australian Government, with some specified reservations, has accepted and endorsed the Menzies Report. Although politically sensitive, the issue has been dealt with in Australia with a higher level of bipartisanship than is usual for that country. The Federal Opposition specifically endorsed the retreat from the Barwick statement. Generally conservative journals have commended this decision to move to a 'firm framework' of laws and policies to guide future investigations and specifically "to bring Nazis to justice"[5].

These are commendable developments in my country. They may serve as a stimulus, and even as a model, for other countries with the like problems and circumstances. Whether they lead on to more actual cases of extradition and prosecution, remains to be seen. These are not the issues which I wish to address in these closing moments of this important and notable symposium. Instead I choose my theme both from the judgments over which I was labouring when the invitation to participate came through and from the topic of this closing session - "Against Injustice". Does this mean injustice for all? Are we so dedicated to Justice - and to the Rule of Law - that we will extend even these precious features of our societies to suspected and proved war criminals? These are the questions which I choose to address.

LIMITATION PERIODS FOR CRIMINAL PROSECUTION

The Menzies Report rightly points out that the common law of England - whose traditions have so profoundly affected the law in Canada, Australia and the United States - did not contain a general limitation on the prosecution of serious criminal offences. Thus the report says:-

> "In the Australian system of justice lapse of time has never been regarded as justification for withholding prosecution action for the most serious crimes such as murder[6]."

So it is also in England and Canada.

This is not, however, a universal rule. It was not so by Roman Law[7]. The introduction into Prussian law of statutory limitation periods for criminal prosecutions was praised at the time as being the "hallmark of the liberal legal tradition"[8]. the idea spread to most legal systems - including to every State of the United States of America, except in the case of prosecution for murder[9].

However, English law - and its derivatives - provides relief from stale prosecutions in a different way. In my own Court this has lately led to a re-flowering of jurisprudence. It was upon this subject that I was working when I was invited to join you.

By Magna Carta, King John of England promised that he would not delay justice. I will not tarry to explore the scholarly debates about whether this promise extended to ordinary subjects or to criminal process. The right to a fair trial of criminal charges is now a fundamental constitutional right which the courts will enforce.

In some countries, the right to speedy trial - as an attribute of fair trial - is enshrined in the written constitution. So it is in the United States as the Supreme Court decision in Barker v Wingo[10] makes it clear. In many of the post-independence constitutions of the Commonwealth of Nations, the idea is captured in the promise of the right to be

tried "within a reasonable time". In the case of Jamaica, the Privy Council adapted and applied the United States jurisprudence in the decision in Bell v Director of Public Prosecutions[11]. Courts must consider: (1) the length of the delay in the prosecution; (2) the reasons given to explain the prosecution's delay; (3) the prejudice caused by the delay to the trial of the accused; (4) the seriousness of the crime and the complexity and difficulty in prosecuting it; and (5) the obligation of the accused to act for his or her part, with due speed. Lately, as my own Court[12] and the Court of Appeal of Ontario[13] have emphasised, there has been added a further criterion - namely the public interest in the prosecution and trial of serious criminal offences which must be weighed against the public interest in the fair and speedy trial of accused persons[14].

In Canada, the advent of the Charter of Rights is a notable chapter in the struggle for the protection of human rights. It is an example to other countries of the same tradition, including my own. The powerful idea that accused persons should be tried within a reasonable time is enshrined in section 11(b) of the Charter. A series of very important cases has lately come before the Supreme Court of Canada dealing with this provision. That Court's instruction - including in Mills v The Queen[15] and Rahey v The Queen[16] - the last as recently as 17 June 1987 - show the difficulty and controversy of balancing in ordinary criminal cases, the public interests which are in competition here. I emphasise the public interests. The tensions are not between the public

interest in prosecution and trial and a private or individual interest in speedy and fair trial. In conflict are two public interests. For in our just societies we declare that the whole community has a public interest in the prompt trial of accused persons. It is an attribute of our respect for human rights and for the justice of our societies that we guarantee these things.

COMMON LAW RIGHTS TO FAIR AND SPEEDY TRIAL

In Australia, we have no Charter. But we have the common law - a fertile guardian of human rights if sometimes an unpredictable one. We have used the common law techniques to fashion powerful instruments to terminate stale prosecutions of old crimes or even the old disciplinary offences[17] as an abuse of process. In the case of crimes, the Crown challenged the right of courts to terminate a prosecution which the Crown had chosen to bring. It invoked the common law tradition, referred to in the Menzies Report, that our laws know no arbitrary limitation period in crime. However this argument was rejected in the Court of Appeal[18] and in the High Court of Australia - the latter as recently as 16 October 1987[19]. It is a reserve power to be used sparingly - but to be used when perceptions of justice require it.

THE EXCUSES AND DEFENCES OF WAR CRIMINALS

Now let us return to War Criminals and the subject of our Symposium. I am not concerned to consider the arguments which have been advanced - other than delay - to justify the closing of the chapter on these prosecutions. You all know the excuses and reasons which have been urged in this connection:

* that acts alleged were usually performed under duress, in obedience to superior orders or in the performance of an "Act of State"[20]
* that the only persons prosecuted were minor functionaries and that the holders of high office generally escaped detection and prosecution[21]
* that the crimes are political or have been retrospectively and illegally declared[22]
* that they are not subject in most countries to lawful extradition[23]
* that they are disproportionately concerned with the past, whilst modern crimes against humanity, such as apartheid, go unredressed[24]
* that they are affected by local limitations laws particularly in the Federal Republic of Germany or Austria and that attempts to exempt them from such laws amount to illegal efforts in retrospective law-making[25]

Nor am I concerned to debate whether an exception has been established in international law for war crimes and crimes against humanity, whatever may be the normal principle governing criminal prosecution generally. Upon this subject there has been much writing and not a few international instruments and declarations of varying degrees of acceptability and of controversial international authority[26].

Instead - against the background of the provisions of the Canadian Charter and the recent common law developments in Australia - I want to pose a narrower question. What will our

municipal courts do - what should they do - if a prosecution be now launched for acts of such enormity done so long ago by people living in our midst?

For some the answer to that question is simple. The crimes are of such a magnitude, and so important is it for the defences against their repetition, that these files must never be regarded as closed[27]. They shocked the human community[28]. The offenders often escaped punishment by hiding, evading detection or unlawfully securing succour and asylum from countries like Canada and Australia - who opened their doors to thousands of refugees [29]. They cannot escape prosecution by the shield of their own unlawfulness, perpetrated during their reign of tyranny. During such a time the clock of human rights stopped for them as it did for their victims[30]. Unless against them the Rule of Law can be brought to bear peacefully in courtrooms, the only remedy of the outraged conscience would be violence and lawlessness which a peaceful society will seek to avoid[31].

But there is a legal and a moral dilemma here which we cannot, out of self-respect, ignore. It is posed not by our respect for War Criminals, for they have forfeited the right to claim such respect. It is posed by our respect for ourselves and by the high value which we place on the attainment of justice in our courts.

PROTECTING THE TEMPLES OF JUSTICE

This may be a discordant note. But it must be struck, at least in my own country by its law and possibly in Canada as well. If we are truly defenders of human rights we do not

advance the attainment of justice by wishing away hard problems; by silence about difficult questions; or by contenting ourselves with ringing phrases. In Australia, Chief Justice Latham once said that the test for our adherence to respect for religious freedom was not whether such freedom was accorded to members of the majority religions. That was simple. It was whether such respect would be extended to small minorities - possibly unpopular and unorthodox minorities.

> "[I]t should not be forgotten that such a provision as s 116 [of the Australian Constitution relating to religious freedom] is not required for the protection of the religion of the majority. The religion of the majority of the people can look after itself. Section 116 is required to protect the religion (or absence of religion) of minorities, and, in particular of unpopular minorities"[31]

The test of freedom and human rights generally is how we act when dealing with the unpopular, the contemptible, the probably guilty - when they invoke the Rule of Law or assert their human rights in the courts. It is when it is hardest to accord rights that they matter most.

If it be the case that Australia and Canada consciously and deliberately delayed - for whatever cause - the prosecution or extradition of war criminals known to be in their midst would their trial now be just? Would a prosecution now be an offence to human rights? Would our courts step in to protect the right to be tried fairly and within a reasonable time? Would our courts now stop such prosecutions - or some of them - as an abuse of legal process?

There are some who could appeal to practical considerations in answering such questions. Crime is a

disturbance of public order - and old crimes cause no such disturbance and so should be let alone[32]. War crimes are political in character and their prosecution may upset ethnic groups and may even engender anti-semitism. Memories fade. A fair prosecution and trial at this remove from events cannot justly be had[33].

Still others would appeal to high principle - invoking mercy for those who gave none. Invoking the belief in redemption and the possibility of reform even for those who showed breathtaking cruelty[34].

But the gnawing argument comes back to our conception of justice and to our insistence that, even for such offenders, the Rule of Law must be observed. Even their human rights must be respected, lest our temples of justice in the courts become debased because of them in abuse of process. We pride ourselves on acting by higher principles than those who are guilty of war crimes and the greatest crimes against humanity ever conceived.

We must not let our insistence upon such principles divert us from the exposure, even today, of the horrendous crimes of such offenders. But, equally, we must not allow that insistence to deflect us from our own observance of the Rule of Law and the protection of human rights. Our seriousness about justice and human rights is tested by our resolution of this dilemma in some cases. These rights are fragile and precious features of humanity's struggle towards civilization.

As this century - which has seen so many horrors - draws to its close, we shall turn unequalled calamity into good fortune if we derive from our bitter experience this simple

instruction. That the best guarantee against repetition of such wickedness is the exposure of how it happened. And the reinforcement of the institutions - including of the law - which will help to prevent and redress its modern manifestations.

FOOTNOTES

* President, Court of Appeal, Supreme Court of New South Wales, Sydney, Australia. Commissioner, International Commission of Jurists, Geneva. Former Chairman of the Australian Law Reform Commission and Judge of the Federal Court of Australia. The views stated are personal views.

1. Australia, Review of Material Relating to the Entry of Suspected War Criminals into Australia (The "Menzies" Report") AGPS, Canberra, 1987.

2. Ibid, 63.

3. Ibid, iii.

4. Ibid, 181.

5. See eg N Rothwall, "Bringing Nazis to Justice - The Menzies Report" - Quadrant, March 1987, 21, 25.

6. Ibid, 12.

7. See M Clausnitzer, "The Statute of Limitations for Murder in the Federal Repulic of Germany" (1980) 29 ICLQ 473, 474.

8. H Schuler in Die Zeit, 23 February 1979, cited Clausnitzer, loc cit.

9. Stuckey, Procedures in the Legal System, 1976, 74, cited Clausnitzer, 475.

10. 407 US 514 (1972).

11. [1985] 1 AC 937. See also Grant v Director of Public Prosecutions (Jamaica) [1982] AC 190; Republic v Taabere & Anor [1985] LRC (Crim) 8; Konig v Federal Republic of Germany (1978) 2 EHRR 170.

12. See eg Carver v Attorney General, unreported, CA (NSW) 2 July 1987; (1987) NSWJB 149.

13. See R v Rauca (1983) 41 OR (2d) 225. Cf K M Narvey, "Trial in Canada of Nazi War Criminals: Overcoming certain Obiter in Rauca" (1983) 34 CR (3d) 126. Note also R v Antoine (1983) 34 CR (#d) 136 and commentary by H R Johnson, loc cit, 154. The subject of a stay of proceedings for undue delay in prosecuting was specifically reserved in the Candian Report. See Canada, Commission of Enquiry on War Criminals (The Deschenes Report), CGPC Ottawa, 1986, Report, Part I, 150 ff.

14. See discussion in Aboud v Attorney General, unreported CA (NSW), 16 October 1987.

15. [1986] 1 RCS 863.

16. [1987] 1 SCR 588.

17. Herron v McGregor & Ors (1986) 6 NSWLR 246.

18. Watson v Attorney General, unreported, CA (NSW), 29 May 1987; (1987) NSWJB 103. See also Barron v Attorney General, unreported, CA (NSW) 18 August 1987; (1987) NSWJB 154. Levinge v Director of Custodial Services, unreported, CA (NSW) 23 July 1987; (1987) NSWJB 139; Young v Torrington & Ors, unreported, CA 22 September 1987; (1987) NSWJB 175.

19. *Attorney General in and for the State of New South Wales* v Watson & Anor, unreported, HCA, 16 October 1987 (transcript). Mason CJ speaking for the Court (comprising himself and Wilson and Dawson JJ) refused special leave to appeal in Watson with the following words: "In our view the Court has a discretionary/supervisory power to stay criminal proceedings unconditionally. Although it is a power which is exerciseable sparingly, and with the utmost caution such that its exercise is not encouraged, we are not persuaded that its exercise in the present case involved any question of principle. The application is therefore refused".

20. See discussion N Lerner, "The Convention on the Non-Applicability of Statutory Limitations to War Crimes" (1969) 4 Israel Law Rev 512, 526; D R Gelfand, "Nazi War Criminals in the United States: It's Never to Late for Justice" 19 Vanderbilt J transntl L. 855, 883 (1986).

21. See discussion, Gelfand, 884.

22. Ibid, 887, 890. See also, Narvey 132.

23. See discussion Gelfand, 891; Lerner, 526.

24. Lerner, 530; see also discussion H Miller "The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. 65 Am J Interntl L 476, 499 (1971). Cf Lerner, 530. Note also L C Green, "Political Offences, War Crimes and Extradition". (1962) 11 ICLQ 329, 348.

25. See generally discussion in Clausnitzer, 473; Lerner, 516, Miller 478. In the Federal Republic of Germany, the limitation period in cases of murder was successively extended from 20 to 30 years and then, in 1979, abolished. See Clausnitzer, 473.

26. See eg J Lekschas, "A Time Limit for Punishment of War Criminals" (1965) 14 ICLQ 627 and generally Gelfand (above); Green (above); Lerner (above) and Miller (above).

27. See discussion, Clausnitzer, 475.

28. Justice Robert H Jackson, Chief United States Prosecutor, opening statement before the International Military Tribunal, Nuremberg, November 1945. In R Jackson, The Case against the Nazi War Criminals, 1946, 3, cited Gelfand 856-7.

29. The Menzies Report, 33; the Deschenes Report, 25.

30. Lekschas, 629.

31. Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth (1943) 67 CLR 116, 124.

32. Lerner, 628.

33. See C van den Wijngaert, "War Crimes, Crimes Against Humanity and Statutory Limitations" in M C Bassiouni (ed) International Criminal Law, Vol 3 (Enforcement), Transnational NY, 89, 98.

34. Lerner, 628.