War crimes: a comparative opportunity.

ARNELL, P.

1996

War crimes: a comparative opportunity

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Introduction

The forthcoming English war crime trial of Szymon Serafinowicz[1] provides a prime opportunity to engage in comparative analysis and speculation. This is facilitated by two legally kindred states, Canada and Australia, having relatively recently gone down a similar path. Not only is comparison valuable and enlightening *per se,* it provides a platform from which speculation as to the likely outcome of the English proceedings can be made. This article is in two sections: a comparison of the legislative provisions of Australia, Canada and the United Kingdom, and a synopsis of the judicial proceedings in Australia and Canada with comment upon the likely outcome in the English trial.

Legislative comparison

It is necessary to lay out the applicable legislation. In Canada, s. 7 (3.71) to 7 (3.77) of the Canadian Criminal Code are the relevant provisions. The core provision is s. 7 (3.71) which states:

Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if,

(a) at the time or omission, (i) that person is a Canadian citizen or is employed by Canada in a civilian or military capacity, (ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada; or (iii) that victim of the act or omission is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict; or

(b) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada and, subsequent to the time of the act or omission, the person is present in Canada.[2]

The precise definitions of 'war crimes' and 'crimes against humanity' are found in s. 7 (3.76), they read:

'crime against humanity' means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group or persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations.

'war crime' means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.

These are the main Canadian provisions.[3]

The Australian legislation is contained in the War Crimes Act 1945, as amended by the War Crimes Amendment Act 1988. Section 9 of this this states *inter alia* that:

(1) A person who:
(a) on or after 1 September 1939 and on or before 8 May 1945; and
(b) whether as an individual or as a member of an organisation; committed a war crime is guilty of an indictable offence against this Act.

The precise definition of war crime is achieved through the intermediary concept of 'serious crime'. Section 6 of the Act defines 'serious crime':

(1) An act is a serious crime if it was done in a part of Australia and was, under the law in force in that part, an offence, being
(a) murder;
(b) manslaughter;
(c) causing grievous bodily harm;
(d) wounding;
(e) rape;
(f) indecent assault;
(g) abduction, or procuring, for immoral purposes;

*The author gratefully acknowledges the comments and suggestions of Hilaire Mccoubrey made during the preparation of this article

[1] The trial is scheduled to begin at the Old Bailey on 6 January 1997, see *The Tiw,s* 11 May 1996; see also 'First war crimes trial in Britain to start in autumn', *The Tim,is* 16 April 1996, also 'First British war crimes charges faced by man of84', *The Times* 14 July 1995.

[2] Canadian Criminal Code, Revised Statutes of Canada 1985, c. C-46.

[3] Others includes. 7 (3.73) giving an accused the right to rely on any '.justification, excuse or defence' extant in either international or Canadian law at the time of the alleged offence, s. 7 (3.74) which provides that a person may be convicted even though the act or omission in question was committed in obedience to or in conformity to a law in force at the time and place of commission, and s. 7 (3.75) which provides that proceedings under this legislation may only be brought upon the consent of the Attorney General or Deputy Attorney General of Canada.

(h) an offence (in this paragraph called the variant offence) that would be referred to in a preceding paragraph if that paragraph contained a reference to:
(i) a particular intention or state of mind on the offenders part; or
(ii) particular circumstances of aggravation; necessary to constitute the variant offence;
(j) an offence whose elements are substantially the same as the elements of an offence referred to in any of paragraphs (a) to (h) inclusive; or
(k) an offence of:
(i) attempting or conspiring to commit;
(ii) aiding, abetting, counselling or procuring the commission of; or
(iii) being, by act or omission, in any way, directly or indirectly, knowingly concerned in, or party to, the commission of;
an offence referred to in any of paragraphs (a) to (j), inclusive.

(2) In determining for the purposes of subsection (1) whether an act was, under the law in force at a particular time in a part of Australia, an offence of a particular kind, regard shall be had to any defence under that law that could have been established in a proceeding for the offence
(3) An act is a serious crime if:
(a) it was done at a particular time outside Australia; and
(b) the law in force at that time in some part of Australia was such that the act would, had it been done at that time and in that part, been a serious crime by virtue of subsection (1).
(4) The deportation of a person to, or the internment of a person in, a death camp, a slave labour camp, or a place where persons are subjected to treatment similar to that undergone in a death camp or slave labour camp, is a serious crime.
(5) Each of the following is a serious crime:
(a) attempting or conspiring to deport or intern a person as mentioned in subsection (4);
(b) aiding, abetting, counselling or procuring the deportation or internment of a personas so mentioned;
(c) being, by act or omission, in any way, directly or indirectly, knowingly concerned in, or party to, the deportation or internment of a person as so mentioned.
(6) For the purposes of subsections (3), (4) and (5), the fact that the doing of an act was required or permitted by the law in force when and where the act was done shall be regarded.

Section 7 of the War Crimes Act 1945 as amended, provides the circumstances whereby a serious crime is also a war crime. It states:
(1) A serious crime is a war crime if it was committed:
(a) in the course of hostilities in a war;
(b) in the course of an occupation;
(c) in pursuing a policy associated with the conduct of a war or with an occupation;
or
(d) on behalf of, or in the interests of, a power conducting a war or engaged in an occupation.
(2) For the purposes of subsection (I), a serious crime was not committed:
(a) in the course of hostilities in a war; or
(b) in the course of an occupation;
merely because the serious crime had with the hostilities or occupation in question a connection (whether in time, in time and place, or otherwise) that was only incidental or remote.
(3) A serious crime is a war crime if it was:
(a) committed:
(i) in the course of political, racial, or religious persecution; or
(ii) with intent to destroy in whole or in part a national, ethnic, racial or religious group, as such; and
(b) committed in the territory of a country when the country was involved in a war or when territory of the country was subject to an occupation.
(4) Two or more serious crimes constitute a war crime if:
(a) they are of the same or similar character;
(b) they form, or are part of, a single transaction or event; and
(c) each of them is also a war crime by virtue of either or both of subsections (l) and (3).

The cumulative effect of these two sections is to classify any killing in the war or occupation a war crime. Section 17 remedies this absurdity; it provides *inter alia* that:

(2) ... it is a defence if the doing by the defendant of the act alleged to be the offence:
a. was permitted by the laws, customs and usages of war; and
b. was not under international law a crime against humanity.

These are the primary Australian provisions.

In the United Kingdom the War Crimes Act 1991 contains the relevant provisions. Section 1 states *inter alia:*

I. (1) Subject to the provisions of this section, proceedings for murder, manslaughter or culpable homicide may be brought against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence if that offence-
   (a) was committed during the period beginning with 1st September 1939 and ending with 5th June 1945 in a place which at the time was part of Germany or under German occupation; and
   (b) constituted a violation of the laws and customs of war.
2. No such proceedings shall by virtue of this section be brought against any person unless he was on 8th March 1990, or has subsequently become, a British citizen or resident in the United Kingdom, the Isle of Man or any of the Channel Islands.
3. No proceedings shall by virtue of this section be brought in England and Wales or in Northern Ireland except by or with the consent of the Attorney General or, as the case may be, the Attorney General for Northern Ireland.

It is axiomatic that Canada, Australia and the United Kingdom have taken dramatically differing approaches towards the construction of war crime legislation.[4] The Canadian approach is by far the most progressive and in accordance with international practice.[5] First and foremost this is due to the fact that the Canadian provisions are not temporally limited; the relevant provision providing that 'every person who, either before or after the coming into force of this subsection.. .' This is a fundamental difference. Not only are the prescriptions applied to the events occurring during the course of the Second World War they are of continuing applicability. In theory, then, any individual suspected of having committed war crimes or crimes against humanity present in Canada could be brought to trial in regard to those acts, regardless of when they allegedly occurred. Also of note in the Canadian legislation is that it alone prescribes 'crimes against humanity' *per se.* The definition of such crimes to a large extent mirrors that of the constitutive construction of this category of crimes in the Charter of the International Military Tribunal, the basis upon which certain senior Nazis were tried at Nuremberg following the Second World War.[6] Further manifesting the closeness between the Canadian legislation and international law is the availability of inter- national justification, excuse or defence within Canadian law. In fact this defence is rendered largely otiose by the provision that opens the door for the preclusion of a superior orders defence. In practice, the Canadian legislation operates on what could be termed a dualist approach.[7] First, an underlying offence must be proven, manslaughter or unlawful confinement for example. Secondly, it must be established that these municipal crimes occurred in a particular context, and with a particular *mens rea.* With respect to crimes against humanity this contextual requirement is that the acts or omissions are inhuman and committed against any civilian population or other identifiable group of persons, with war crimes that the act in question also constituted a violation of the laws of armed conflict, conventional or customary. The additional mental element being for crimes against humanity an awareness by the accused of the circumstances that would bring the act within the definition of a crime against humanity, and likewise for war crimes a knowledge or awareness of the facts or circumstances that brought the actions within the definition of war crimes, or for both a wilful blindness thereof. It is these additional factors which in effect transform a purely national crime into a crime against humanity or war crime.

A somewhat distinct yet still dualist approach is explicitly present in the Australian legislation. This is achieved through the mechanisms of 'serious crimes' and 'war crimes'. The precise operation and applicability of this approach, and indeed the Australian legislation generally, have been succinctly summarized as exposing to punishment 'any person who (a) being an Australian citizen or resident when charged with the offence; (b) committed an act of the kind referred to in s. 6; (c) in Australia or outside Australia; (d) between 1 September 1939 and 8 May 1945 (inclusive); (e) in circumstances (defined in s. 7) connected with any armed conflict in Europe between the dates mentioned, whether Australia was involved in that conflict or not; (f) being an act that is not 'permitted by' the laws, customs and usages of war or being under international law a crime against humanity.[8] In comparison to the Canadian provision, the War Crimes Act 1945 as amended is considerably more limited, and further removed from international law. The legislation applies only for a period of less than six years. It does not

[4] Each of these sets of provisions or acts had been the product of long and at times acrimonious debate. Official reports leading to the respective legislation are in Canada the *Report of tlie Deschenes Commissi,m of Inquiry on War Criminals 1986,* in Australia the *Report on Review of Material Relating to tlie Entry of War Criminals into Australia 1986,* and in the United Kingdom the *Report of tJu, War Crimes Inquiry,* 1989, Cmnd. 744 (the Hetherington Report).

[5] International in its true sense. Canada's legislation most closely mirrors, for example, the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, (1993) 32 *ILM* 1159; (1994) 5 *CLF* 597.

[6] The Charter of the !MT was annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis of 8 August 1945, (1945) 8 *UNTS* 279; (1945) 39 *AJIL* 257.

[7] This terminology is apt in particular in regard to Canada and the United Kingdom in that the term 'dualist' is traditionally used to denote the municipal-international legal distinction, as it does to a degree here.

[8] Polyukhovich v. The Commonwealth [1991], 172 *Commonwealth Law Reports* 501, at 547 per Brennan J. The inverted commas surrounding 'permitted by' rightly emphasize the inaccuracy of the phraseology. The laws of war are formulated not in permissive terms, but are prohibitory in nature. As Brennan, J. points out at p. 545.

comprise a category of crimes under the rubric 'crimes against humanity', although the conception of 'war crimes' is so wide that it is not unreasonable to view the Australian provision as a conflation of the international crimes encompassed by the expressions 'war crimes' and 'crimes against humanity'.[9] The applicability of the provision is also dependent upon the nationality or residence of the accused at the time of the charge being laid; in the Canadian provision it is merely the presence in Canada of an alleged offender that is required. This legislation is unique of the three states examined in being rather removed or apart from international law, with only a limited and oblique reliance upon international law and the laws of war.[10] This in turn was to a significant extent the basis of the dissenting judgements in the constitutional challenge of the legislation discussed below.

Of the three provisions, that of the United Kingdom is clearly the most limited. It is, as the Australian legislation, temporally limited to the period of the Second World War. Again as with Australia, its applicability requires that the accused either be a citizen or resident. Significantly, its substantive content.is limited to murder, manslaughter and culpable homicide.[11] Even if one ignores the possible relevance of crimes against humanity, this particular manifestation of 'war crimes' is narrow indeed. Clearly the War Crimes Act 1991 does not come close to including all the crimes extant in the Canadian and Australian legislation. That said, the manner in which the War Crimes Act 1991 operates is similar to that of the Canadian legislation in its conditional reliance upon 'the laws and customs of war' in s. 1 (l)(b) of the Act. This provides a linkage between the War Crimes Act in United Kingdom municipal criminal law and international law; as such it is crucial. It legitimizes the taking of cognisance of extraterritorial criminal acts, and ensures that such assumptions of jurisdiction do not overstep the bounds of international acceptability. In doing so, however, it also raises the difficult ques- tion as to the precise nature of international law at the relevant period.

Canadian and Australian experience

The recent Canadian and Australian experiences of war crimes trials have not a few similarities. Both prosecutions resulted in acquittals.[12] Both trials spawned lengthy and complex interlocutory and/ or appellate proceedings, with these proceedings to some degree touching upon similar issues. In Canada the legal proceedings additional to the trial itself occurred both prior to and following the trial. They took the form of pre-trial motions as to the constitutionality of the applicable provisions,[13] and two appeals against acquittal, first to the Ontario Court of Appeal,[14] and then to the Supreme Court of Canada.[15] In Australia the ancillary proceedings took the form of a constitutional challenge to the legality of the War Crimes Act 1945 as amended, and occurred prior to the trial.[16]

[9] Section 6 (4) refers to the deportation to, and internment in, *inter alia* a death camp, acts consonant with crimes against humanity. Also present are elements of the international crime of genocide. This is found in one of the conditions a serious crime must meet to be a war crime, namely being committed 'in the course of political, racial, or religious persecution' or 'with intent to destroy in whole or in part a nation- al, ethnic, racial or religious group, as such,' language that mirrors that found in the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 78 *UNTS* 277, (1951) 45 *AJIL* 7 (Supp).

[10] Ins. 17.

[11] The latter to accommodate Scottish criminal law.

[12] Canada prosecuted one Irma Finta, the trial beginning 8 December 1989. He was acquitted of all charges 25 May 1990, see *Keesing's Record of World Events* 1990, p 37899. Australia's prosecution of Ivan Polyukhovich began 18 March 1993, he was acquitted 18 May I993. For an account of the circumstances giving rise to and surrounding the Australian trial, and the trial proceedings themselves, see D. Bevan, *A Case to Answer, The Story of Australia's fir.,t European War Crimes Prosecution* (Kent Town South Australia: Wakefield Press, 1994}.

[13] R v. Finta, (1989) 61 *Dmniniun Law Reports* (4th) 85.

[14] R v. Finta, (1992) 92 *Dmninion Law Reports* (4th) I.

[15] R v. Finta, (1994) 112 *Dominion Law Reports* (4th) 513.

[16] Polyukhovich v. The Commonwealth, see note 8 above.

The trials

The Canadian trial of Irma Finta began on 8 December 1989.[17] He was charged with unlawful confinement, kidnapping, robbery and manslaughter under the Canadian Criminal Code[18]. The indictment, in effect, consisted of four pairs of alternate counts, each of the individual crimes of robbery, manslaughter etc. being characterized as a war crime or a crime against humanity. The indictment alleged that in May and June 1944 Finta, in Szeged, Hungary, robbed, forcibly confined, kidnapped and caused some of the deaths of 8617 Jews. Although acknowledging his presence at the time and place of the offences, Finta denied all responsibility. During the course of the trial the Crown called 43 witnesses, including 19 eyewitnesses. On behalf of the defence the trial judge called two eyewitnesses, the evidence of a third was admitted by statement and minutes. The unlawful confinement and kidnapping charges rested upon it being established that Finta was in charge of a brickyard where the alleged offences occurred. The majority of the eyewitnesses for the Crown testified to this effect. Witnesses speaking on behalf of the defence raised the possibility of someone other than Finta being in charge of the brickyard, and the defence lawyer attacked witnesses supporting his presence at the brickyard and a railway station because of discrepancies in their testimony.[19] It was never firmly established that this was indeed the case.[20] The trial judge stated that the evidence 'could leave the jury with a reasonable doubt about the responsibility of Finta for confinement and brickyard conditions'.[21] The 'conclusion to be drawn is that in the absence of documentary proof, the jury disbelieved survivors who said Mr Finta was in charge of the brickyard and supervised the loading of Jews into boxcars'.[22] In regard to the robbery charge, identification was not an issue as Finta admitted he was in the brickyard camp supervising the confiscation of valuables. This issue turned on 'peace officer defence', namely that Finta had reasonable grounds to believe that the roundup and confiscation orders were lawful.[23] Finally, in regard to the manslaughter charge the jury was directed that it would be 'dangerous to convict' him in the absence of any medical evidence on the causes of death.[24] Finta was acquitted of all charges.

The Australian prosecution of Ivan Polyukhovich paints a somewhat similar picture. His trial began on 18 March 1993. He was accused of having committed 'war crimes' contrary to s. 9 of the War Crimes Act 1945, as amended, taking the form of the murder of three individuals and being knowingly concerned in or party to the murders of 850 others.[25] The final form of the charges followed lengthy and complex committal and other proceedings which saw them reduced and reintroduced, the final charges being significantly less than what the prosecution had once desired to proceed with.[26] Polyukhovich pleaded not guilty, denying his presence at the scene of the crime. The prosecution case thus involved establishing Polyukhovich's presence at the relevant place and time. A number of witnesses were called, many being limited in the evidence they could give as it did not directly relate to the charges. The evidence establishing the accused's presence at the scene and involvement in the alleged acts was contradictory and ineffective. One of the witnesses, for example, manifestly contradicted himself at trial from what he had said a year earlier as to something so crucial as the accused being present at the rounding up of Jews on the day of their massacre.[27] A main witness for the prosecution in regard to the murder charges who had allegedly witnessed the event, had not known Polyukhovich at the time and had only seen him from a distance, making it difficult to establish that it was in fact him who committed the crime. The prosecution also led expert evidence. It concerned the role of 'foresters' in the German occupation of the Ukraine, the accused being one. The historian giving evidence on this issue was placed under severe limitation as to what evidence he could give.[28] For the defence there was only one witness, the accused's first wife. She gave evidence on video which was played to the court. Her evidence cast aspersions upon identification evidence. Indeed it was the identification of the accused that was the crux of the case. This was greatly handicapped by the passage of time. In summing up, the Supreme Court Justice of South Australia went to the heart of the matter by stating' the issue is, obviously, that the extraordinarily long lapse of time will be an important consideration in all these [witness] identifications'.[29] He continued:

[17] A synopsis of the trial and historical background is found in the Supreme Court opinion of Cory, J., R v. Finta, note 15 above, pps. 576- 582. See also *The Globe and Mail,* 'War- crimes jury acquits Finta on all counts', 26 May 1990.
[18] Revised Statutes of Canada 1927, c. 36, as amended. The Criminal Code as it was then.
[19] See *The Globe and Mail,* 'Several trials needed to test war- crimes law', 28 May 1990.
[20] *Ibid.*
[21] R v. Finta, see note 15 above, at p.581-2.
[22] *The Globe and Mail,* see note 19 above.
[23] That the jury sought clarification regarding the defence immediately prior to returning with the acquittal leads to the conclusion that it a played a part in the acquittal on this charge, *ibid.*
[24] *Ibid..*
[25] The former comprised the accused marching a Jewish women and two her children into a pit where large numbers of Jews were killed outside Serniki, Ukraine, in September 1942 and killing them. The latter took the form of ordering villagers at the pit to bring water, towels and chairs to the pit.
[26] Bevan, note 12 above at pps.178-183. See also M. Kirby, *War Crimes Prosecution -An Australian Update,* (1993] Commonwealth Law Bulletin 781 for an outline of the proceedings leading up to the prosecution of Polyukhovich.
[27] Bevan, see note 12 above at pp.215-17.
[28] *Ibid* at pp.223-6.
[29] *Ibid* at p.243, per Cox, J.

... it is not really correct to say that the factor of delay is just an option that you may consider ... or not ... You are bound to have regard to the possibility that, had the accused been charged with such offences as these much closer to the time when the offences are said to have taken place, he would have been able to explore the circumstances when they were still fresh, as it were, and perhaps chase up witnesses who could have thrown doubt on the crown evidence. Witnesses who, perhaps, for one reason or another are not now available. Given that possibility it would be dangerous for you to convict the accused on the evidence that has been brought against him unless ... you are satisfied of the truth and accuracy of that evidence.[30]

In light of this summation, with the relatively weak and at times contradictory prosecution evidence, on 18 May 1993 Polyukhovich was acquitted. The one and only war crimes case to come to trial under the War Crimes Act 1945 as amended was over.[31]

Interlocutory and appellate proceedings

The Supreme Court of Canada's decision in the case of R v Finta is a complex amalgam of issues of Canadian criminal law, constitutional law and international law.[32] In essence the Crown averred that the trial judge erred in leaving to the jury the issue as to whether or not the acts constituted war crimes or crimes against humanity, erred in leaving to the jury the defence of obedience to superior orders, and misdirected the jury with respect to the *mens rea* of the offences. The former point was dealt with by holding that since the question of whether the alleged acts constituted war crimes or crimes against humanity went to the nature of the offence (as well as being necessary for Canadian jurisdiction), it was correctly left to the jury.[33] The Crown contention concerning the leaving of the defence of superior orders to the jury was also dismissed. It was held that'... the defences may have been applicable to all counts depending on how the jury viewed the facts. Since there was an air of reality to the defences, the trial judge acted properly in putting them to the jury.'[34] Regarding the nature of the *mens rea* of the offences, the Supreme Court agreed with the trial judge that what was required for conviction was a *mens rea* additional to that of the domestic offences with which Finta was charged. It was held that:

To convict someone of an offence when it has not been established beyond reasonable doubt that he or she was aware of conditions that would bring to his or her actions that requisite added dimension of cruelty and barbarism violates the principles of fundamental justice. The degree of moral turpitude that attaches to crimes against humanity and war crimes must exceed that of the domestic offences of manslaughter and robbery.[35]

There was a final issue facing the Supreme Court; this was a cross-appeal by the accused averring that the legislation contravened the Canadian Charter of Rights and Freedoms. This issue in essence concerned the rule prohibiting the non-retroactivity of criminal prescriptions.[36] This was dealt with in two ways; one element of the Court accepted that there does exist a degree of retroactivity but 'only in so far as it established individual criminal responsibility', the acts being unlawful at international law but only to that date giving rise to collective responsibility.[37] In the conflict between retroactivity to this extent and the nature of the acts in question, 'the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice'.[38] A second section of the Court held that the legislation was not retroactive; the acts being proscribed by reference to 'the general principles of law recognized by civilised nations', and the 'conduct listed under crimes against humanity was the sort that no modern civilised nation was able to sanction'.[39]

The Australian interlocutory proceedings concerned the constitutionality of the relevant legislation. The question facing the High Court was, 'Is section 9 of the War Crime Act 1945 as amended, invalid in its application ... against the plaintiff'?[40] The Court held that the Act was valid in its application to the accused. The precise reasons for this are obfuscated by the judgement comprising seven separate opinions, one by each member of the Full Court. In particular, the Court was faced with two issues of Australian constitutional law; the powers of the legislature to enact laws with respect to 'external affairs', and a possible usurpation of judicial powers. The former of these issues was dealt with by reference to judicial precedent and reasoning as to the scope of external affairs power. It was held that:

[30] *Ibid* at pp.249-50.

[31] Two others charged under the Act did not face trial. Mikolay Berezowski had his charges discharged due to insufficient evidence and Heinrich Wagner was not prosecuted due to his ill health.

[32] Only the Supreme Court decision will be deal with here. It explicitly or implicitly reviewed the lower decisions.

[33] R v. Finta, see note 15 above at 591-2, per Cory, J.

[34] *Ibid* at 619-20, per Cory, J. It is clear that the defence of superior orders involves questions of both law and fact: what the law was at the relative time, and whether the accused knew or ought to have known that law. For the defence generally see H. McCoubrey, and N. D. White, *International Law and Armed Conflict* (Aldershot: Dartmouth Publishing Co., 1992), pp.340-2.

[35] *Ibid* at p. 597.

[36] Section 11 (g) of the Charter states 'Any person charged with an offence has the right (g) not to be found guilty on account of the act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations'.

[37] R v. Finta, see note 15 above, at p.638, per Cory, J. citing H. Kelsen, *Will theJudgement in the Nuremberg Trial Constitute a Precedent in lnLemational Law,* (1947) I *ICLQ* 153 at 165.

[38] *Ibid.*

[39] R v. Finta, see note 15 above, at p.570, per La Forest, J.

[40] Polyukhovich v. The Commonwealth, see note 8 above at p.503.

The legislation makes conduct outside Australia unlawful, thereby visiting that conduct with legal consequences under Australian law. The conduct made unlawful constitutes a crime triable and punishable in this country. But, to the extent that s. 9 operates upon conduct which took place outside Australia and makes that conduct a criminal offence, the section is properly characterised as a law with respect to the external affairs and is a valid exercise of power, subject to a consideration of the argument based upon an usurpation of judicial power.[41]

The second issue is of more importance for our purposes. It is an argument averring that by amending the War Crimes Act 1945 to its present form, the Australian Parliament in effect tried and convicted the plaintiff, an exclusively judicial role.[42] This argument in essence attacks the putative retroactivity of the Act. As with the part of the Canadian judgement it was accepted that criminal prescriptions were being applied retroactively. It was stated 'The Act is truly retrospective - that is to say, retroactive - in its application to past events. Actions in the past which were, as a matter of domestic law, not criminal, are made criminal. The Act is, therefore, an ex post facto law.[43] As this implies, the majority of the opinions do not refer to the state of war crimes or crimes against humanity in international law at the relevant time. Instead they accept the power of the Australian Parliament to enact retroactive legislation if it desires, stating 'Whatever the objections which might be raised to ex post facto laws ... there can be no doubt about the capacity of Parliament to pass them'.[44] Certain of the opinions proceed to justify on grounds of higher justice the acceptability of retroactive criminal provision in certain circumstances. For example, '... the ex post facto creation of war crimes may be seen to be justifiable in a way that is not possible with other ex post facto criminal laws ... The wrongful nature of the conduct should have been apparent'.[45] Later in the judgement is found the telling statement, 'The Act is not *offensively* retroactive in relation to the information laid against the plaintiff.[46] The constitutional challenge was dismissed.

Possible English outcome

To the extent that comparisons can be drawn with the experiences of Canada and Australia, it appears that the English war crimes prosecution is likely to end unsatisfactorily. That said, there is an argument to be made that the conservative and relatively simplistic nature of the British war crimes legislation might aid in conviction. From the legislation it is clear that what must be established beyond reasonable doubt is that the accused committed murder or manslaughter,[47] that the crimes occurred during the requisite period and in a place part of Germany or under German occupation, and that the offence constituted a violation of the laws and customs of war. The complex issues raised in the Canadian prosecution and appeal, such as the additional requisite *mens rea,* are not applicable.[48] The legal argument concerning the putative retroactivity of the War Crimes Act 1991 does however stand to come into question.[49] The United Kingdom is a party to the European Convention of Human Rights 1950, Article 7 of which prohibits the retrospective application of criminal law.[50] However an offence can equally exist under international law as national law and so escape the prohibition on retroactivity. Further, an act which is 'criminal according to the general principles of law recognised by civilised nations' by reason of so being also militates against the retroactive proscription of an act in municipal law.[51] The question then arises as to what was the exact nature of 'laws and customs of war' with regard to murder and manslaughter in 1941-42, the period of Serafinowicz's alleged crimes? In particular, were they either crimes in international law or crimes according to the general principles of law recognized by civilized nations? The answer is almost certainly yes. This follows from *inter alia* Article 46 of the Regulations annexed to the Hague Conventions 1899 and 1907. This states 'Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated'.[52] As to the position of the Hague Conventions, the Hetherington Report states:

[41] *Ibid* at p.530 per Mason, C.J.

[42] The submission is that one of the essential elements in the exercise of judicial power is the determi- nation by a court of the issue of whether the accused person infringed a rule of conduct prescribed in advance. According to the plaintiffs argument, the Act determined that all persons who engaged in con- duct of the kind declared unlawful are guilty ofan offence', *ibid,* pp.531-2, per Mason, C.J.

[43] *Ibid,* p.642 per Dawson, J.

[44] *Ibid,* p.644 per Dawson, J.

[45] *Ibid,* p.643 per Dawson, J.

[46] *Ibid,* p.690 per Toohey, J., emphasis added.

[47] Serafinowicz is in fact charged with murder. In particular he faces three charges; that he murdered an unknown Jew in Mir on 9 November 1941, that he murdered an unknown Jew at Krymiczne between 31 December 1941 and I March 1942 and that he murdered an unknown Jew at Dolmatowszczyzna between 9 November 1941 and 1 March 1942, *Tiu Times,* 16April !996.

[48] It would appear that the issue of the applicability or nature of any internationally derived defence or excuse is also not relevant. The Act is silent as to the issue, and the charge relates wholly to murder in English law.

[49] For a discussion of the issue of retroactivity in England and France see E. Steiner, 'Prosecuting War Criminals in England and France', (1991] *Criminal Law Review* 180.

[50] (1965) *UKTS* 38, Cmnd. 2643. Article 7(1) *intera/ia* provides 'No one shall be held guilty of any crim- inal offence on account of any act which did not constitute a criminal offence under national or international law at the time when it was committed'. It should be noted that Canada, Australia and the United Kingdom are all parties to the International Covenant on Civil and Political Rights, (1977) *UKTS* 6, Cmnd 6702, (1967) 6 *ILM* 368, Article 15 of which mirrors Article 7 of the ECHR. The former convention plays no role at all in the Canadian Supreme Court decision, and an ambiguous role in the Australian decision, being used to support the existence of a rule against retroactivity in international law (and so supporting the illegality of the legislation), see Polyukhovich, note 6 above, at p.574 per Brennan, J. and alternatively supporting the legislation by reference to the exceptions in Article 15(1) and I5 (2), at p.643 per Dawson, J.

[51] By Article 7 (2). The right to a hearing within a reasonable time in Article 6 (1) is not applicable as the time runs not from the commission of an act but from the individual being 'charged' within the meaning of the Convention, see D.J. Harris, M. O'Boyle, and C. Warbrick, *Law of tlu European Convention on Human Rights* (London: Butterworths, 1995), p.223.

[52] The Hague Convention (II) With Respect to the Laws and Customs of War on Land 1899, (1907) 1 *AJIL* (Supp) 129, and Hague Convention (IV) Respecting the Laws and Customs of War on Land, (1908) 2 *AJIL* (Supp) 90. The two Conventions are largely similar, and so dealt with as one. It is the Regulations annexed to the Conventions that contain the applicable rules.[53] The Hetherington Report, see note 4 above, para. 5.42, p. 54.

It appears that in 1939 the 1899 and 1907 Hague Conventions were accepted by the civilised world as part of the laws and customs of warfare. Elements from the regulations annexed to the Fourth Hague Convention had been incorporated into the military manuals of the United Kingdom and Germany, as well as those of other nations.[53]

Later the report states:

... by 1939, before the offences which this Inquiry is required to investigate were allegedly committed, violations of the customs and uses of war, or war crimes as they were later called, were internationally recognised as crimes, both Britain and Germany being among the signatories of the Hague Conventions which confirmed them as such.[54]

This leads to the conclusion that if the crimes in question did not exist under international law as international crimes at the relevant time, then they were 'criminal according to the general principles of law recognised by civilised nations'. Legally, then, the War Crimes Act appears not to fall foul of any extant international norms, the absence of any written British constitution or charter of rights negating a challenge on the front. It is undoubtedly the case that the relative simplicity and limited scope of the Act serves it well in this regard.

As was seen in the Australian and, to a lesser extent, Canadian prosecutions, what appears to have led to acquittal was not legal impediment, or confusion born of legal obfuscation, but rather a failure by the prosecution to establish beyond reasonable doubt that the accused committed the crimes in question. This is in no small measure due to the trials occurring in time and space apart from the alleged events.[55] The same hurdle faces the English prosecution. While at this stage one can merely speculate upon the nature of the evidence, and the jury's reaction to it, comments upon and the conclusion of the second, unpublished, part of the Hetherington Report containing the core of the evidence against Serafinowicz support the likelihood of conviction. The evidential component of the Report generally has been described as '... a chilling story of cold-blooded murder on a horrendous scale - committed not in the heat of the battle, but in circumstances which have no possible connection with military objectives'.[56] Indeed, the prosecution is occurring precisely because of the conclusion of the authors of the Report that '... there is sufficient evidence to support criminal proceedings against some persons living in the United Kingdom'.[57] Prior to this conclusion however is, in light of the Canadian and Australian experiences, the ominous comment 'We would not wish the difficulties of prosecution to be underestimated... Because of their age and ill-health it is likely that many witnesses will be unable to travel to the United Kingdom. Some have indicated that they do not wish to do so, and they are not compellable'.[58] The upcoming prosecution then, while appearing to be legally founded, faces fundamental difficulties inherent in trying events a time and space apart, and as such appears fated to fail.

Conclusion

From almost all perspectives modern war crimes prosecutions for alleged atrocities occurring in the course of the Second World War have been and will continue to be a failure. From the point of view of those who desire that war criminals, whatever their age and position, be punished for the crimes they committed there appears to be no justice. The difficulties inherent in trying acts occurring in a time and place apart appear to be too great. Those concerned with the putative retroactive application of the legislation will not be satisfied as a basic tenet of criminal justice is, in their view, trampled. Others, motivated by the less lofty but tangible question of the great expense of such an exercise will not be satisfied with the great sums spent, regardless of whether they see merit in prosecution or would prefer that the past remain buried. Even in the unlikely event of a conviction, those desirous of such a result may well get little satisfaction from an exercise which may cast aspersions upon historical realities, and conclude with an elderly gentleman walking free steadfastly denying his culpability. Modern war crimes trials for half century old events appear destined to end in ignominy, or, at best, Pyrrhic victory. A conclusion that acids to the concern at the injustice of the allegedly guilty remaining untried the scandal of past inaction, almost guaranteeing an acquittal for those now brought to trial.

[54] *Ilnd,* para. 6.44, p. 63.
[55] This is what in effect led to the end of the Demjanjuk saga. He was released by the Israeli Supreme Court on 29 July I 993 because of 'reasonable doubt' about his identity, see *Keesing,· Record of World Evenls* 1993, p.39581.
[56] Hansard, House of Commons, vol. 188, col. 24, per K. Baker, the then Home Secretary.
[57] The Hetherington Report, see note 4 above, para. 9.59, p. 103. It is beyond question that the Canadian and Australian prosecutorial authorities and politicians for that matter felt similarly at one time.
[58] *Ibid* at para. 9.44, p. I02.