R. *v.* Finta, [1994] 1 S.C.R. 701

Her Majesty The Queen *Appellant*

v.

Imre Finta *Respondent*

and

Canadian Holocaust Remembrance Association, League for Human Rights of B'Nai Brith Canada, Canadian Jewish Congress and InterAmicus *Interveners*

Indexed as: R. *v.* Finta

File Nos.: 23023, 23097.

1993: June 2, 3; 1994: March 24.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin and Major JJ.

on appeal from the court of appeal for ontario

Criminal law -- War crimes and crimes against humanity -- Nature and proof of offences -- Allegations arising from detention, robbery and deportation to concentration camps of Jewish persons in Nazi-controlled World War II Europe -- Defence of police officer following lawful orders -- Trial judge calling own evidence --

Whether war crimes and crimes against humanity separate crimes from included Criminal Code offences or whether Code provisions jurisdictional allowing Canadian courts to exercise jurisdiction in situations of war crimes or crimes against humanity over criminal activity occurring abroad -- Whether necessary for the jury to decide, beyond a reasonable doubt not only guilt under applicable Criminal Code charges but also whether acts war crimes and/or crimes against humanity -- Whether requisite mens rea for each offence requiring the Crown to prove intent to commit criminal offence and knowledge of factual characteristics of war crimes and/or crimes against humanity -- Whether "peace officer defence" available and nature of that defence -- Whether trial judge's instructions to the jury adequately overcoming prejudice caused by defence counsel's inflammatory and improper jury address -- Whether police statement and deposition of deceased person admissible even though within recognized exception to the hearsay rule -- Whether trial judge properly calling own evidence -- Whether trial judge's instructions to the jury relating to the Crown's identification evidence appropriate -- Criminal Code, R.S.C., 1985, c. C-46, ss. 6(2), 7(3.71)(a)(i), (ii), (iii), (b), (3.72), (3.74), (3.76), 15, 25(1), (2), (3), (4), 736.

Constitutional law -- Charter of Rights -- War crimes and crimes against humanity -- Nature and proof of offences -- Allegations arising from detention, robbery and deportation to concentration camps of Jewish persons in Nazi-controlled World War II Europe -- Defence of police officer following lawful orders -- Whether infringement of principles of fundamental justice (s. 7), the right to be informed without unreasonable delay of the specific offence (s. 11(a)), the right to trial within a reasonable time (s. 11(b)), the right to be presumed innocent (s. 11(d)), the requirement that an act or omission constitute an offence (s. 11(g)), the prohibition against cruel and unusual punishment (s. 12) or the equality guarantees (s. 15) -- If

so, whether infringement justified under s. 1 -- Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(a), (b), (d), (g), 12, 15.

Respondent, a legally trained captain in the Royal Hungarian Gendarmerie, was commander of an investigative unit at Szeged when 8,617 Jewish persons were detained in a brickyard, forcibly stripped of their valuables and deported under dreadful conditions to concentration camps as part of the Nazi regime's "final solution". The only authority for implementing this barbarous policy in Hungary was the Baky Order, a decree of the Hungarian Ministry of the Interior directed to a number of officials including the commanding officers of the gendarme (investigative) subdivisions. This order placed responsibility for executing the plan on the Gendarmerie and certain local police forces.

Respondent was charged under the *Criminal Code*, R.S.C. 1927, with unlawful confinement, robbery, kidnapping and manslaughter of the victims of Szeged. There were in effect four pairs of alternate counts -- one series as crimes against humanity and the other as war crimes. After the war a Hungarian court tried respondent *in absentia* and convicted him of "crimes against the people". His punishment in that country became statute-barred and he later benefitted from a general amnesty. The Hungarian trial and conviction were found to be nullities under Canadian law and the amnesty was found not to be a pardon. The pleas of *autrefois convict* or pardon were therefore not available. Expert opinion at trial was that the Baky Order was manifestly illegal and that a person trained in Hungarian law would have known so.

The Crown's case depended in large measure on the testimony of 19 witnesses who had been interned at Szeged and deported to the concentration camps. The evidence of these survivors fell into four general groups. Six witnesses who knew respondent before the events in issue testified as to things said and done by him at the brickyard and at the train station. A second group consisting of three witnesses who did not know respondent beforehand identified him as having said or done certain things at the brickyard and at the station. A third group consisting of three witnesses who did not know respondent beforehand also testified as to things said and done at the brickyard and at the station. However, this last group based their identification of respondent on statements made to them by others. The fourth group, consisting of eight witnesses who did not know respondent beforehand and did not identify him, gave evidence as to events at the brickyard and the train station. In addition to the evidence of the survivors, the Crown relied on photographs, handwriting and fingerprint evidence to identify respondent as a captain in the Gendarmerie at Szeged at the relevant time. Expert and documentary evidence was tendered to establish the historical context of the evidence, the relevant command structure in place in Hungary in 1944 and the state of international law in 1944.

During the trial, the trial judge, on behalf of the defence, called the evidence of two eye-witnesses, Ballo and Kemeny. The statement and minutes of a third witness, Dallos, whose testimony was given at respondent's Hungarian trial, was also admitted. Dallos, a survivor of the brickyard who died in 1963, gave evidence of the existence of a lieutenant who might have been in charge of the confinement and deportation of the Jews at the brickyard. The trial judge ruled that, although the evidence was of a hearsay nature, it was admissible. He also

stated that, together with other evidence, it could leave the jury with a reasonable doubt about the responsibility of respondent for confinement and brickyard conditions. The trial judge warned the jury in his charge about the hearsay nature of the evidence.

Respondent was acquitted at trial and a majority of the Court of Appeal dismissed the Crown's appeal from that acquittal. This judgment was appealed and cross-appealed.

Several issues were raised on appeal. Firstly, was s. 7(3.71) of the *Criminal Code* merely jurisdictional in nature or did it create two new offences, a crime against humanity and a war crime, and define the essential elements of the offences charged such that it was necessary for the jury to decide, beyond a reasonable doubt, not only whether the respondent was guilty of the 1927 *Criminal Code* offences charged, but also whether his acts constituted crimes against humanity and/or war crimes as defined in ss. 7(3.71) and 7(3.76)? Secondly, did the trial judge misdirect the jury as to the requisite *mens rea* for each offence by requiring the Crown to prove not only that the respondent intended to commit the 1927 *Criminal Code* offences charged, but also that he knew that his acts constituted war crimes and/or crimes against humanity as defined in s. 7(3.76)? Thirdly, did the trial judge err in putting the "peace officer defence" (s. 25 of the *Code*), the "military orders defence" and the issue of mistake of fact to the jury and did he misdirect the jury in the manner in which he defined those defences? Fourthly, did the trial judge's instructions to the jury adequately correct defence counsel's inflammatory and improper jury address so as to overcome the prejudice to the Crown and not deprive it of a fair trial? Fifth, was the Dallos "evidence"

(police statement and deposition) admissible and, in particular, in finding it admissible even though it did not fall within any of the recognized exceptions to the hearsay rule? Sixth, did the trial judge err calling the Dallos evidence and the videotaped commission evidence as his own evidence, thereby making it unnecessary for the defence to do so and as a result depriving the Crown of its statutory right to address the jury last, and if so, did it result in a substantial wrong or miscarriage of justice? Seventh, were the trial judge's instructions to the jury relating to the Crown's identification evidence appropriate.

The constitutional questions stated on the cross-appeal queried whether s. 7(3.74) and s. 7(3.76) of the *Code* violate ss. 7 (the principles of fundamental justice), 11(*a*) (the right to be informed without unreasonable delay of the specific offence), 11(*b*) (the right to trial within a reasonable time), 11(*d*) (the right to be presumed innocent), 11(*g*) (the requirement that an act or omission constitute an offence), 12 (the prohibition against cruel and unusual punishment) or 15 (the equality guarantees) of the *Canadian Charter of Rights and Freedoms*, and if so, whether they were justifiable under s. 1.

Held (La Forest, L'Heureux-Dubé and McLachlin JJ. dissenting): The appeal should be dismissed.

Held: The cross-appeal should be dismissed. Sections 7(3.74) and 7(3.76) of the *Criminal Code* do not violate ss. 7, 11(*a*), (*b*), (*d*), (*g*), 12 or 15 of the *Charter*.

Per Gonthier, Cory and Major JJ.:

The Appeal

Jurisdiction

Canadian courts have jurisdiction to try individuals living in Canada for crimes which they allegedly committed on foreign soil only when the conditions specified in s. 7(3.71) are satisfied. The most important of those requirements, for the purposes of the present case, is that the alleged crime must constitute a war crime or a crime against humanity. It is thus the nature of the act committed that is of crucial importance in the determination of jurisdiction. Canadian courts may not prosecute an ordinary offence that has occurred in a foreign jurisdiction. The only reason Canadian courts can prosecute these individuals is because the acts alleged to have been committed are viewed as being war crimes or crimes against humanity. A war crime or a crime against humanity is not the same as a domestic offence. There are fundamentally important additional elements involved in a war crime or a crime against humanity.

The Requisite Elements of the Crime Described by Section 7(3.71)

Canadian courts normally do not judge ordinary offences that have occurred on foreign soil but have jurisdiction to try individuals living in Canada for crimes which they allegedly committed abroad when the conditions specified in s. 7(3.71) are satisfied. Here, the most important of those requirements is that the alleged crime must constitute a war crime or a crime against humanity which, compared to a domestic offence, has fundamentally important additional elements.

It is thus the nature of the act committed that is of crucial importance in the determination of jurisdiction.

In order to constitute a crime against humanity or a war crime, there must be an element of subjective knowledge on the part of the accused of the factual conditions which render the actions a crime against humanity. The mental element of a crime against humanity must involve an awareness of the facts or circumstances which would bring the acts within the definition of a crime against humanity. It is not necessary, however, to establish that the accused knew that his or her actions were inhumane. Similarly, for war crimes, the Crown would have to establish that the accused knew or was aware of the facts or circumstances that brought his or her actions within the definition of a war crime. The accused would have to have known that a state of war existed and that his or her actions even in a state of war, would shock the conscience of all right thinking people. Alternatively, the *mens rea* requirement of both crimes against humanity and war crimes would be met if it were established that the accused was wilfully blind to the facts or circumstances that would bring his or her actions within the provisions of these offences.

The wording of the section, the stigma and consequences that would flow from a conviction all indicate that the Crown must establish that the accused committed a war crime or a crime against humanity. This is an integral and essential aspect of the offence. It is not sufficient simply to prove that the offence committed in Canada would constitute robbery, forcible confinement or manslaughter. An added element of inhumanity must be demonstrated to warrant a conviction under this section. The mental element required to be proven to

constitute a crime against humanity is that the accused was aware of or wilfully blind to facts or circumstances which would bring his or her acts within the definition of a crime against humanity. However it would not be necessary to establish that the accused knew that his or her actions were inhumane. It is sufficient if the Crown establishes that the actions viewed by a reasonable person in the position of the accused were inhumane.

Similarly for war crimes the Crown would have to establish that the accused knew or was aware of facts that brought his or her action within the definition of war crimes, or was wilfully blind to those facts. It would not be necessary to prove that the accused actually knew that his or her acts constituted war crimes. It is sufficient if the Crown establishes that the acts, viewed objectively, constituted war crimes.

The Defences

The defence of obedience to superior orders and the peace officer defence are available to members of the military or police forces in prosecutions for war crimes and crimes against humanity. Those defences are subject to the manifest illegality test: the defences are not available where the orders in question were manifestly unlawful. Even where the orders were manifestly unlawful, the defence of obedience to superior orders and the peace officer defence will be available in those circumstances where the accused had no moral choice as to whether to follow the orders. There can be no moral choice where there was such an air of compulsion and threat to the accused that he or she had no alternative but to obey the orders.

Trial Judge's Calling Evidence

The trial judge, in order to take the unusual and serious step of the court's calling witnesses, must believe it essential to exercise his or her discretion to do so in order to do justice in the case. Here, where the trial judge had decided that certain evidence was essential to the narrative, it was a reasonable and proper exercise of this discretion to call the evidence if the Crown refused to do so. It is essential in a case where the events took place 45 years ago that all material evidence be put before the jury. With the passage of time it becomes increasingly difficult to get at the truth of events: witnesses die or cannot be located, memories fade, and evidence can be so easily forever lost. It is then essential that in such a case all available accounts are placed before the court. The argument that all cases pose difficulties in presenting a defence fails to recognize that this case, because of the time elapsed, presents very real difficulties for the defence in getting at the truth which is not comparable to other cases.

The trial judge properly took into account the fact that if he did not call the evidence the defence would be required to do so and as a result lose its right to address the jury last. Where the trial judge has found that the evidence in question should have been called by the Crown, the issue of who addresses the jury last is indeed relevant. If this were not so it would be open to the Crown not to call certain evidence in order to force the defence to give up its right to address the jury last. (The Crown here did not act for improper reasons.) The opportunity for such abuse should not be left open. Further, the trial judge's concern for the order of addresses to the jury was secondary to his finding that the evidence was essential to the narrative.

Finally, the trial judge did not need to wait until after the defence had decided whether or not to call evidence before he called the evidence in question. The trial judge could not wait until the defence had finished its case without risking offending the rule that a trial judge should not call evidence him- or herself after the close of the defence case unless the matter was unforeseeable. If the trial judge had waited, and the defence had elected not to call evidence, the trial judge would have been prevented from calling the evidence at that time, as the matter was readily foreseeable, and calling it at that point would have been prejudicial to the defence.

The Cross-Appeal

Does Section 7(3.74) and (3.76) of the Criminal Code Violate Section 7 of the Charter Because these Purport to Remove the Protection of Section 15 of the Criminal Code?

Respondent, even though he acted in obedience to the law (the Baky Order), could not argue that he had an honest but mistaken belief that that decree was lawful so as to absolve him of fault. He still had the guilty mind required to found a conviction. Section 7(3.74) does not, by permitting the removal of this defence, result in a breach of fundamental justice in violation of s. 7 of the *Charter*. When the *Criminal Code* provides that a defence is to be expressly excluded it is because Parliament has determined that the criminal act is of such a nature that not only is the disapprobation of society warranted, but also the act cannot be justified by the excluded defence. Such a legislative provision will not generally violate s. 7 when a defence is inconsistent with the offence proscribed in that it would excuse the very evil which the offence seeks to prohibit or punish.

Do the Impugned Sections of the Code Violate the Charter by Reason of Vagueness?

International law prior to 1944 provided fair notice to the accused of the consequences of breaching the still evolving international law offences. The legislation is not made uncertain merely because the entire body of international law is not codified and that reference must be made to opinions of experts and legal writing in interpreting it. Differences of opinion of international law experts as to these provisions and the questions of fact and law that arise in interpreting and applying them do not render them vague or uncertain. It is the court that must ultimately interpret them.

Do the Impugned Sections of the Code Violate Section 7 and Section 11(g) of the Charter?

Although the average citizen is not expected to know in detail the law with respect to a war crime or a crime against humanity, it cannot be argued that he or she had not substantive fair notice of it or that it is vague. Everyone has an inherent knowledge that such actions are wrong and cannot be tolerated whether this perception arises from a moral, religious or sociological stance. These crimes, which violate fundamental human values, are vehemently condemned by the citizens of all civilized nations and are so repulsive, reprehensible and well understood that the argument that their definition is vague or uncertain does not arise. Similarly, the definitions of "war crimes" and "crimes against humanity" do not constitute a standardless sweep authorizing imprisonment. The standards which guide the determination and definition of crimes against humanity are the values that are known to all people and shared by all.

The impugned sections do not violate ss. 7 and 11(*g*) of the *Charter* because of any allegedly retrospective character. The rules created by the *Charter of the International Military Tribunal* and applied by the Nuremberg Trial represented "a new law". The rule against retroactive legislation is a principle of justice. A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed, however, is an exception to the rule against *ex post facto* laws. Individual criminal responsibility represents certainly a higher degree of justice than collective responsibility. Since the internationally illegal acts for which individual criminal responsibility has been established were also morally the most objectionable and the persons who committed them were certainly aware of their immoral character, the retroactivity of the law applied to them cannot be considered as incompatible with justice. Justice required the punishment of those committing such acts in spite of the fact that under positive law they were not punishable at the time they were performed. It follows that it was appropriate that the acts were made punishable with retroactive force.

Did the Pre- and Post-Charge Delay Violate Sections 7, 11(b) and 11(d) of the Charter?

The pre- and post-charge delay does not violate the *Charter* principles of fundamental justice (s. 7), the right to trial without unreasonable delay (s. 11(*b*)) and the right to be presumed innocent (s. 11(*d*)). The principles set out in *R. v. Askov* accordingly need not be extended to the situation here. Indeed, the delay was far more likely to be prejudicial to the Crown's case than it was to that of the defence. The documentary and physical evidence not available to the defence was probably destroyed during the war and therefore would not have been available for

trial even if held a few years after the war. With regard to post-charge delay, the indictment was preferred less than a year after the legislation was proclaimed. This was a minimal and very reasonable period of delay.

Do the Impugned Sections of the Code Violate Sections 7 and 15 of the Charter?

The impugned sections do not infringe the equality provisions of s. 15 of the *Charter*. The fact that the legislation relates only to acts or omissions performed by individuals outside Canada is not based on a personal characteristic but on the location of the crime. The group of persons who commit a war crime or a crime against humanity outside of Canada cannot be considered to be a discrete and insular minority which has suffered stereotyping, historical disadvantage or vulnerability to political and social prejudice. Similarly, these sections, notwithstanding the allegation that they allegedly subject the individual to prosecution based on an extension of jurisdiction for crimes for which the people of Canada are not criminally liable, are not contrary to the principles of fundamental justice.

Do the Impugned Provisions Violate Section 12 of the Charter?

No argument was made with respect to s. 12 (cruel and unusual punishment) of the *Charter*. It was not necessary to consider the application of s. 1.

Per Lamer C.J.: The appeal should be dismissed for the reasons given by Cory J. The cross-appeal should be dismissed as being moot.

Per La Forest, L'Heureux-Dubé and McLachlin JJ. (dissenting[*]): Section 7(3.71) of the *Criminal Code* confers jurisdiction on Canadian courts to prosecute foreign acts amounting to war crimes or crimes against humanity domestically, according to Canadian criminal law in force at the time of their commission. The provision does not create any new offences. The person who commits the relevant act is not declared guilty of an offence as in all other criminal offences. On the contrary, the nucleus of the provision is its predicate, "shall be deemed to commit that act or omission in Canada at that time". Moreover, no penalty is stipulated. A finding of war crime or crime against humanity does not result in punishment but rather merely opens the door to the next procedural step -- the placing before the jury of the charges against the accused for offences defined in the *Code* in respect of acts done outside the country, so long as those acts constitute crimes against humanity or war crimes.

The war crimes and crimes against humanity provision stands as an exception to the general rule regarding the territorial ambit of criminal law. Parliament intended to extend the arm of Canada's criminal law in order to be in a position to prosecute these extraterritorial acts if the alleged perpetrators were discovered here. Although exceptions to s. 6 (which limits the *Code*'s application to Canada) can also take the form of offence-creating provisions that expressly embrace extraterritorial acts, the wording of s. 7(3.71) closely resembles that of other purely jurisdiction-endowing provisions and can be contrasted with these offence-creating provisions. Had Parliament wished specifically to make war crimes and crimes against humanity domestic offences, it would have been much easier to do so directly.

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[*] See Erratum, [1994] 2 S.C.R. iv

No distinction should be made between territorial jurisdiction of the court (going to the determination of the proper Canadian court to hear a case) and territorial reach of the criminal law (affecting the definition of the offences themselves). Section 6(2) of the *Code* does not render Canadian territoriality a defining element of its offences. Rather, it merely precludes a person's conviction or discharge for an offence when committed outside Canada in response to the structure of international order which entrusts prosecution of a criminal act to the state in which that act was committed. The fact that an act or an omission may have taken place outside Canada's borders does not negate its quality as culpable conduct.

Questions of jurisdiction are matters of law entrusted to the trial judge. The terms of s. 6 are not absolute; they specifically envision exceptions, whether in the *Code* itself or in other Acts of Parliament. Deciding questions of jurisdiction has been found to be properly entrusted to the trial judge in other circumstances in *R. v. Balcombe* and no reason exists for a different rule to apply to the s. 6 inquiry. Whether the criteria in s. 7(3.71), (whether the act amounts to a war crime or crime against humanity, whether it constituted an offence pursuant to Canadian law at the time of commission, and whether identifiable individuals were involved) creating the exception to s. 6 have been met is a question of law entrusted to the trial judge and not to the jury. If these requirements are not satisfied, the exception to the rule of no extraterritorial application is not met, and the court must decline jurisdiction and acquit the accused even if all the elements of the offences of manslaughter, robbery, confinement or assault may be satisfied.

The jury's role will be similar to that exercised in an ordinary prosecution under our domestic law. Its function, and the charge made to it, will be like those that would be made to a jury determining the underlying offence only. The sole difference will be in relation to justifications, excuses and defences. Section 7(3.73) provides the accused with the benefit of pleading all available international justifications, excuses and defences in addition to those existing under domestic law. The one domestic defence made unavailable, by the operation of s. 7(3.74), is the defence of obedience to *de facto* law.

The requirements for jurisdiction need not be proved beyond a reasonable doubt. The trial judge, however, must consider the evidence to satisfy the jurisdiction requirements and not simply base his or her assessment of these requirements on the charges as alleged. Because some of the facts necessary to establish jurisdiction are not the same as those necessary for the jury's determination of the underlying offence, all the findings of fact cannot be left to the jury. Here, since the jury will have to hear much of the same evidence related to the offences as the trial judge would have to hear in relation to the jurisdiction issue, it will usually be more efficient to have the trial judge consider the jurisdiction issue at the same time as the jury hears the evidence related to the offence. If desired, and to keep a jury's mind clear, the parts of the evidence or expert testimony that are completely irrelevant to the jury's concerns can be heard in the jury's absence. At the close of the evidence, the judge will decide whether the conditions for the exercise of jurisdiction have been met. If so, then the court can proceed to hear the jury's verdict.

War crimes and crimes against humanity do not require an excessively high *mens rea* going beyond that required for the underlying offence. In determining the *mens rea* of a war crime or a crime against humanity, the accused must have intended the factual quality of the offence. In almost if not every case, the domestic definition of the underlying offence will capture the requisite *mens rea* for the war crime or crime against humanity as well. Thus, the accused need not have known that his or her act, if it constitutes manslaughter or forcible confinement, amounted to an "inhumane act" either in the legal or moral sense. One who intentionally or knowingly commits manslaughter or kidnapping would have demonstrated the mental culpability required for an inhumane act. The normal *mens rea* for confinement, robbery, manslaughter, or kidnapping, whether it be intention, knowledge, recklessness or wilful blindness, is adequate.

The additional conditions of the *actus reus* requirement under international law are intended to be used to ascertain whether the factual conditions are such that the international relations concerns of extraterritorial limits do not arise. Since in almost if not every case the *mens rea* for the war crime or crime against humanity will be captured by the *mens rea* required for the underlying offence that will have to be proved to the jury beyond a reasonable doubt, the trial judge will rarely, if ever, have to make any additional findings in relation to the *mens rea* to satisfy the jurisdiction requirements.

If a justification, excuse or defence that would have been available had the accused been charged with the crime under international law rather than the underlying crime is available, it should be referred to the jury with appropriate instructions whether the issue arises on the evidence presented by the Crown or the

accused. Under s. 7(3.73) of the *Code*, an accused may rely on any "justification, excuse or defence available . . . under international law" as well as under the laws of Canada. The jury would then have to decide the issue with any reasonable doubt decided in favour of the accused.

The scheme in s. 7(3.71)-(3.77) does not deprive the accused of his or her rights in a manner inconsistent with the principles of fundamental justice. The accused cannot be found guilty of the offence charged (the underlying domestic offence) unless the jury finds the relevant mental element on proof beyond a reasonable doubt. This mental element coincides with that of the war crime or crime against humanity. And if any excuse, justification or defence for the act arises under international law, the accused is entitled to the benefit of any doubt about the matter, including any relevant *mens rea* attached to such excuse, justification or defence. *Charter* jurisprudence relating to fundamental justice does not require, merely because a special stigma might attach to certain offences, that only the jury be entrusted with finding *mens rea* and only on a standard of proof beyond a reasonable doubt. Any stigma attached to being convicted under war crimes legislation does not come from the nature of the offence, but more from the surrounding circumstances of most war crimes and often is a question of the scale of the acts in terms of numbers.

Under the jurisdictional portion of s. 7(3.71), the inquiry goes to assessing whether Canadian courts are able to convict or discharge the perpetrator of the relevant conduct. The preliminary question, whether the relevant conduct constitutes a situation evaluated by the international community to constitute one warranting treatment exceptional to the general precepts of international law,

involves an assessment of Canada's international obligations and other questions concerning the interrelationship of nations. The culpability of the acts targeted by this provision, from Canada's perspective, arises from, and will be assessed according to Canadian standards of offensive behaviour as embodied in the *Code*. The preliminary question of war crimes or crimes against humanity is more of a political inquiry than one of culpability and accordingly does not traditionally fall within the province of the jury. The international community actively encourages the prosecution of those whose criminal conduct also constitutes war crimes or crimes against humanity.

It is not unfair or contrary to our philosophy of trial by jury to entrust determination of jurisdiction to the trial judge rather than the jury. The assignment of this task is just and well-designed given the technical nature of the actual factual findings that must be made by the trial judge on the preliminary jurisdictional question, as well as the complicated nature of the international law with which he or she must grapple. The technical nature of these inquiries, unrelated as they are to matters of culpability, do not form part of the special capacity of the jury.

The jury's role in the prosecution remains extensive. As in any other domestic prosecution, the jury is the sole arbitrator of whether both the *actus reus* and the *mens rea* for the offence charged are present and whether any domestic defences are available. Moreover, in addition to its normal functions, the jury also decides whether any international justification, excuse or defence is available. These determinations are not merely technical findings to supplement the extensive role of the trial judge; on the contrary, they go to the essence of the accused's culpability. The jury alone decides whether the accused is physically and mentally

guilty of the offence charged, on proof beyond a reasonable doubt. The only element removed from the jury's usual scope of considerations in regular domestic prosecutions is the *de facto* law defence (s. 7(3.74)).

Section 7(3.74) does not violate the s. 7 of the *Charter* by removing available defences. Subsections 7(3.73) and (3.74) qualify each other and together indicate that the accused has the benefit of all available international and domestic justifications, excuses or defences. The operation of s. 7(3.73) only rules out resort to the simple argument that, because a domestic law existed, the conduct was authorized and so excused. The whole rationale for limits on individual responsibility for war crimes and crimes against humanity is that there are higher responsibilities than simple observance of national law. That a law of a country authorizes some sort of clearly inhumane conduct cannot be allowed to be a defence.

The peace officer and the military orders defences put to the jury here exist under Canadian domestic law and relate to arguments based on authorization or obedience to national law. The rationale for these defences is that a realistic assessment of police or military organizations requires an element of simple obedience; there must be some degree of accommodation to those who are members of such bodies. At the same time, totally unthinking loyalty cannot be a shield for any human being, even a soldier. The defence is not simply based on the idea of obedience or authority of *de facto* national law, but rather on a consideration of the individual's responsibilities as part of a military or peace officer unit. Essentially obedience to a superior order provides a valid defence unless the act is so outrageous as to be manifestly unlawful. Further, an accused

will not be convicted of an act committed pursuant to an order wherein he or she had no moral choice but to obey.

The war crime provisions do not violate ss. 7 and 11(*g*) of the *Charter* because they are retroactive. The accused is not being charged or punished for an international offence, but a Canadian criminal offence that was in the *Code* when it occurred.

International law in this area was neither retroactive nor vague. Even on the basis of international convention and customary law, there are many individual documents that signalled the broadening prohibitions against war crimes and crimes against humanity. Numerous conventions indicated that there were international rules on the conduct of war and individual responsibility for them. International law, as expressed by international and national tribunals, continues to maintain that crimes against humanity and war crimes were well established. The strongest source in international law for crimes against humanity, however, are the common domestic prohibitions of civilized nations. The conduct listed under crimes against humanity was of the sort that no modern civilized nation was able to sanction.

The *Code* provisions do not violate s. 11(*g*) as being retroactive. Section 11(*g*) of the *Charter* specifically refers to the permissibility of conviction on the basis of international law or the general principles of law recognized by the community of nations. One of the factors motivating the terms of the provision was to remove concerns about otherwise preventing prosecution of war criminals or those charged with crimes against humanity.

Section 7(3.71) (relating to the generality of the definitions of war crimes and crimes against humanity) read with s. 7(3.76) does not violate s. 7 of the *Charter* by reason of vagueness. The offence with which the accused is charged and for which he will be punished is the domestic offence in the 1927 *Code*, and it is readily apparent that the cross appeal is not concerned with arguing that these standard *Code* provisions are unconstitutionally vague. The standard of vagueness necessary for a law to be found unconstitutional is that the law must so lack in precision as not to give sufficient guidance for legal debate. The contents of the customary, conventional and comparative sources provide enough specificity to meet this standard for vagueness.

The pre-trial delay of 45-odd years between the alleged commission of the offence and the laying of charges did not violate ss. 7, 11(*b*) and 11(*d*) of the *Charter*. Pre-charge delay, at most, may in certain circumstances have an influence on the assessment of whether post-charge delay is unreasonable but of itself is not counted in determining the delay. The *Charter* does not insulate accused persons from prosecution solely on the basis of the time that elapsed between the commission of the offence and the laying of the charge. No complaint was made as to post-charge delay.

Section 7(3.71) does not violate ss. 7 and 15 of the *Charter* by applying only to acts committed outside Canada. This provision is jurisdictional and creates no new offences. Whether impugned conduct is committed abroad or in Canada, the accused would be charged with the same offence and subject to the same penalty, if convicted. Indeed, any difference in treatment favours the extraterritorial perpetrator.

Cases Cited

By Cory J.

Considered: *Dover Castle*, 16 A.J.I.L. 704 (1921); *Llandovery Castle*, 16 A.J.I.L. 708 (1921); *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; **referred to**: *R. v. Finta* (1989), 69 O.R. (2d) 557; *The Case of the S.S. "Lotus"* (1927), P.C.I.J., Ser. A, No. 10; *Balcombe v. The Queen*, [1954] S.C.R. 303; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Martineau*, [1990] 2 S.C.R. 633; *R. v. DeSousa*, [1992] 2 S.C.R. 944; *R. v. Hess*, [1990] 2 S.C.R. 906; *R. v. Prue*, [1979] 2 S.C.R. 547; *Beaver v. The Queen*, [1957] S.C.R. 531; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *United States v. Bevans*, 24 Fed. Cas. 1138 (1816), rev'd on jurisdictional grounds, 3 Wheat. 336 (1818); *R. v. Smith* (1900), 17 S.C. 561; *Ofer v. Chief Military Prosecutor* (the *Kafr Qassem* case), [Appeal 279-283/58, *Psakim* (Judgments of the District Courts of Israel), vol. 44, at p. 362], in *Pal. Y.B. of Int'l L.* (1985), vol. 2, p. 69; *The Einsatzgruppen Case*, 4 Trials of War Criminals 470 (1948); *Trial of the Major War Criminals before the International Military Tribunal*, vol. 22, (1946) (Official Text in the English Language); *Kelsey v. The Queen*, [1953] 1 S.C.R. 220; *Parnerkar v. The Queen*, [1974] S.C.R. 449; *Dunlop v. The Queen*, [1979] 2 S.C.R. 881; *R. v. Faid*, [1983] 1 S.C.R. 265; *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Williams* (1985), 18 C.C.C. (3d) 356; *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *Campbell v. The Queen* (1982), 31 C.R. (3d) 166; *R. v. S. (P.R.)* (1987), 38 C.C.C. (3d) 109; *R. v. Harris* (1927), 20 Cr.

App. R. 86; *R. v. Holden* (1838), 8 Car. & P. 606, 173 E.R. 638; *R. v. Brown*, [1967] 3 C.C.C. 210; *R. v. Bouchard* (1973), 24 C.R.N.S. 31; *R. v. Black* (1990), 55 C.C.C. (3d) 421; *R. v. Tregear*, [1967] 2 Q.B. 574; *United States v. Lutwak*, 195 F.2d 748 (1952), aff'd 344 U.S. 604 (1952), rehearing denied 345 U.S. 919 (1953); *United States v. Marzano*, 149 F.2d 923 (1945); *United States v. Liddy*, 509 F.2d 428 (1974), *certiorari* denied 420 U.S. 911 (1975); *Young v. United States*, 107 F.2d 490 (1939); *Estrella-Ortega v. United States*, 423 F.2d 509 (1970); *United States v. Pape*, 144 F.2d 778 (1944); *Steinberg v. United States*, 162 F.2d 120 (1947); *United States v. Browne*, 313 F.2d 197 (1963); *United States v. Ostrer*, 422 F. Supp. 93 (1976); *R. v. Holmes*, [1988] 1 S.C.R. 914; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Penno*, [1990] 2 S.C.R. 865; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.) (Prostitution Reference)*, [1990] 1 S.C.R. 1123; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Askov*, [1990] 2 S.C.R. 1199; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Turpin*, [1989] 1 S.C.R. 1296.

By La Forest J. (dissenting[**])

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[**] See Erratum, [1994] 2 S.C.R. iv

(1927), P.C.I.J., Ser. A, No. 10; *McVey (Re); McVey v. United States of America*, [1992] 3 S.C.R. 475; *R. v. Finta* (1989), 69 O.R. (2d) 557; *Polyukhovich v. Commonwealth of Australia* (1991), 101 A.L.R. 545; *Balcombe v. The Queen*, [1954] S.C.R. 303; *Bolduc v. Attorney General of Quebec*, [1982] 1 S.C.R. 573; *R. v. DeSousa*, [1992] 2 S.C.R. 944; *R. v. Théroux*, [1993] 2 S.C.R. 5; *West Rand Central Gold Mining Co. v. The King*, [1905] 2 K.B. 391; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Lyons*, [1987] 2 S.C.R. 309; *Libman v. The Queen*, [1985] 2 S.C.R. 178; *Ofer v. Chief Military Prosecutor* (the *Kafr Qassem* case), [Appeal 279-283/58, *Psakim* (Judgments of the District Courts of Israel), vol. 44, at p. 362], in *Pal. Y.B. Int'l L.* (1985), vol. 2, p. 69; *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. Penno*, [1990] 2 S.C.R. 865; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *R. v. Morin*, [1992] 1 S.C.R. 771; *R. v. Kalanj*, [1989] 1 S.C.R. 1594; *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091.

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465(1)(*a*) [rep. & sub. R.S.C., 1985, c. 27 (1st Supp.), s. 61(1)], (3) [rep. & sub. *ibid*., s. 61(4)], 477.1 [ad. S.C. 1990, c. 44, s. 15], 607(6) [ad. R.S.C., 1985, c. 30 (3rd Supp.), s. 1].

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APPEAL AND CROSS-APPEAL from a judgment of the Ontario Court of Appeal (1992), 92 D.L.R. (4th) 1, 73 C.C.C. (3d) 65, 14 C.R. (4th) 1, 53 O.A.C. 1, 9 C.R.R. (2d) 91, dismissing an appeal from acquittal by Campbell J. sitting with jury. Appeal dismissed, La Forest, L'Heureux-Dubé and McLachlin JJ. dissenting. Cross-appeal dismissed. Sections 7(3.74) and 7(3.76) of the *Criminal Code* do not violate ss. 7, 11(*a*), (*b*), (*d*), (*g*), 12 or 15 of the *Charter*.

C. A. Amerasinghe, Q.C., and *Thomas C. Lemon*, for the appellant.

Douglas H. Christie and *Barbara Kulaszka*, for the respondent.

David Matas, for the intervener League for Human Rights of B'Nai Brith Canada.

Edward M. Morgan, for the intervener Canadian Jewish Congress.

Joseph R. Nuss, Q.C., and *Lieba Shell*, for the intervener InterAmicus.

The following are the reasons delivered by

LAMER C.J. -- I have read the reasons of my colleagues, Justice La Forest and Justice Cory. For the reasons given by Cory J. I would dismiss the appeal. This being so, I would dismiss the cross-appeal as being moot.

The reasons of La Forest, L'Heureux-Dubé and McLachlin JJ. were delivered by

LA FOREST J. (dissenting) -- This case concerns the proper understanding of s. 7(3.71)-(3.73) of the *Criminal Code*, R.S.C., 1985, c. C-46, which constitutes the scheme designed by Parliament to bring war criminals and perpetrators of crimes against humanity to justice in Canada. It also raises a number of issues concerning the constitutional validity of this legislation under several provisions of the *Canadian Charter of Rights and Freedoms*.

The legislation was enacted pursuant to the Report of the Deschênes Commission on War Criminals, *Commission of Inquiry on War Criminals Report*, Jules Deschênes, Commissioner (1986). The Commission was established by Order-in-Council No. 1985-348, which stated, in part, that the "Government of Canada wishes to adopt all appropriate measures necessary to ensure that any . . . war criminals currently resident in Canada . . . are brought to justice". Although the report, released December 30, 1986, named 774 alleged war criminals resident in Canada, to date there have been no convictions obtained using s. 7(3.71)-(3.73). This appeal concerns the first prosecution ever attempted under this legislation.

Facts

The accused, Imre Finta, was born in Kolozsvar, Hungary (now a part of Romania) in 1912. During the 1930s, he lived and studied law in Szeged, Hungary. In 1935, Mr. Finta enrolled in the Royal Hungarian Military Academy and in January 1939 he was commissioned as an officer in the Royal Hungarian Gendarmerie. The Gendarmerie is most accurately described as an armed paramilitary police force which served the Hungarian government by wielding political muscle in the country's more rural areas. By 1942, Mr. Finta had achieved the rank of captain in this notorious organization.

In March 1944, Mr. Finta was posted to Szeged as commander of the investigative subdivision of the Gendarmerie. That same month Hungary had been occupied by the forces of the Third Reich. Despite the fact that Hungary had joined the Axis powers in 1940, Germany proceeded to install an even more pro-German puppet government in the Hungarian capital of Budapest. Thus, throughout the relevant period, Hungary was a *de facto* occupied state. The Hungarian police and the Gendarmerie came under the direct command of the German SS, and these two organizations were instrumental in administering the anti-Jewish laws adopted by the Nazi government of Germany and the Hungarian government under its control.

The charges against Mr. Finta stem from his time in Szeged. Mr. Finta is alleged to have been in charge of the "de-jewification" of Szeged during the spring of 1944. This activity was authorized by the so-called "Baky Order", the Hungarian Ministry of the Interior Order passed on April 7, 1944. In its essentials,

the "Baky Order" called for the isolation, complete expropriation, ghettoization, concentration, entrainment, and eventual deportation (primarily to Auschwitz and Birkenau) of all Hungarian Jews. Once there, these Jews faced either immediate extermination or forced labour followed by eventual extermination. The events at Szeged were duplicated in villages and towns across Hungary throughout that unfortunate spring. There can be no doubt that this process, which my colleague, Justice Cory, has described in all its horrific detail, was an integral part of what the Nazis themselves dubbed the "final solution" to the "Jewish problem", namely the systematic slaughter of every last European Jew.

In 1947-48, Mr. Finta was tried and convicted, *in absentia*, by a Szeged court for "crimes against the people" relating to his role as a Gendarmerie captain during the spring of 1944 purge of Szeged's Jewish population. In 1951, Finta immigrated to Canada. In 1956 he became a Canadian citizen, and has lived in this country ever since.

Mr. Finta was charged with unlawful confinement, robbery, kidnapping and manslaughter of 8,617 Jews between May 16 and June 30, 1944 at or about Szeged, Hungary, thereby committing an offence under the definitions of these crimes in the *Criminal Code* existing at the time the offences were committed. The indictment added that such offences constituted crimes against humanity and war crimes under what is now s. 7(3.71) of the *Criminal Code*. The latter reference was added because prosecution for crimes committed abroad cannot ordinarily take place in Canada since criminal offences are generally confined to conduct that takes place in Canada (s. 6 of the *Code*), and the conduct alleged here took place in Hungary. Section 7(3.71), however, permits prosecution for conduct outside

Canada if such conduct constitutes a crime against humanity or a war crime and would have been a crime in Canada at the time it took place had it been committed here. As Cory J. states, the principal issue in this case concerns a proper understanding of this and related provisions permitting persons to be prosecuted in Canada for crimes against Canadian law if these crimes also constitute crimes against humanity or war crimes under international law.

My colleague has set forth the judicial history of the case and I need not repeat it except as may be necessary in setting forth my views. For the moment, it suffices to set forth the basic procedural steps in the proceedings. Following a pre-trial motion before the late Callaghan A.C.J. of the Ontario Court, General Division, to consider a number of constitutional issues regarding the validity of the legislation under the *Charter*, a trial was held before Campbell J. sitting with a jury. The accused was acquitted and the acquittal was affirmed by a majority of the Ontario Court of Appeal, Dubin C.J. and the late Tarnopolsky J.A. dissenting. From that decision, the Crown appealed to this Court, raising seven grounds of appeal.

The Issues

It is only necessary for me to deal with the first two grounds of appeal. These relate to (1) the proper understanding of the jurisdictional nature of the war crimes provisions, and (2) the requirements of international law in relation to the mental element in such crimes. That is because, in my view, serious errors were made in respect of these issues that require the ordering of a new trial. That being so, it is unnecessary for me to address the other issues, which for the most part go

to the particular manner in which the trial was conducted. It is right to say, however, that had the provisions been interpreted in the manner I propose, some of the problems, notably in relation to the inflammatory address by defence counsel, could have been avoided or at least mitigated.

In dealing with the two issues I have outlined, I propose to confine myself to attempting to discern the intention of Parliament in enacting the war crimes provision by reference to the ordinary rules of statutory interpretation. The trial judge and the majority of the Court of Appeal attempted to interpret it in light of certain concerns they had about the implications of the *Charter*. While I agree that where a possible interpretation of a provision is consistent with the *Charter*, and another is not, the former is to be preferred, that approach cannot go so far as to permit the courts to rewrite the section; see *R. v. Symes*, [1993] 4 S.C.R. 695. At all events, I do not think the provision as interpreted in accordance with the ordinary canons of statutory construction in any way breaches *Charter* values. I shall discuss the *Charter* issues that constitute the *leitmotif* of the respondent's interpretative approach later, and conclude with the other *Charter* challenges raised in the cross-appeal.

Before entering into a detailed examination of the issues I have just outlined, it is important first to set forth the general economy of s. 7(3.71)-(3.77) and the interrelationship of these provisions with international law for, in my view, this constitutes a necessary first step to a consideration of the specific issues. For a failure to grasp these general issues seems to me to lie at the root of much of the confusion that has arisen in this case.

Interrelationship of International Law and Section 7(3.71)-(3.76)

War crimes and crimes against humanity are crimes under international law. They are designed to enforce the prescriptions of international law for the protection of the lives and the basic human rights of the individual, particularly, as befits an international prescription, against the actions of states. They are acts universally recognized as criminal according to general principles of law recognized by the community of nations. While some of these crimes have been given a considerable measure of definition in international documents, as a whole they have not been reduced to the precision one finds in a national system of law. Crimes against humanity, in particular, are expressed in broad compendious terms relying broadly on principles of criminality generally recognized by the international community. Consequently, s. 7(3.76) defines crimes against humanity and war crimes as follows:

> **7.** . . .
>
> (3.76) For the purposes of this section,
>
> . . .
>
> "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 of 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.

Since war crimes and crimes against humanity are prescriptions governing the international legal order, it follows that they must apply against states, which have indeed been brought to account in various international fora. But a state must obviously act through individuals and it would frustrate the prosecution and punishment of war crimes and crimes against humanity if individuals could be absolved of culpability for such crimes by reason only that it was not illegal under the law of the state on behalf of which they acted. Consequently, it is clear that the mere existence of such law cannot be a defence to an individual charged with a war crime. This was well stated in *Trial of the Major War Criminals before the International Military Tribunal*, vol. 22, (1946) (Official Text in the English Language), in the following passage, at pp. 465-66:

> It was submitted that international law is concerned with the actions of sovereign states and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the state. In the opinion of the Tribunal, both these submissions must be rejected.
>
> . . .
>
> ...individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

This principle was adopted in the Canadian legislation. Section 7(3.74) of the *Criminal Code*, reads as follows:

> **7.** . . .

> (3.74) Notwithstanding subsection (3.73) and section 15, a person may be convicted of an offence in respect of an act or omission referred to in subsection (3.71) even if the act or omission is committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

The existence of such *de facto* laws is not, however, totally irrelevant in considering situations where a person had no moral choice in doing what he or she did. This can be seen from the formulation by the International Law Commission in 1950 of the Principles of the Nuremberg Charter and Judgment; see U.N. General Assembly Official Records, 5th Sess., Supp. No. 12 (A/1316). Principle IV reads:

PRINCIPLE IV

> The fact that a person acted pursuant to orders of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Having said this, I note in passing that there is ordinarily nothing all that subtle about war crimes. The moral aspect leaps immediately to the consciousness of anyone with any moral sensitivity. The shooting of civilians in the absence of a mistake of fact or a superior order is an example. In the latter case, the accused may raise this as a defence only if he has no moral choice, in which case there are defences available both under international and domestic law. Apart from this, such acts obviously involve moral culpability on the part of the perpetrator. That is surely so of the facts here where the rounding up of 8,617 defenceless people, men, women and children, and confining and transporting them under unspeakable conditions outside the country to meet their fate strikes

one as morally vile and inexcusable if it appears that an accused has done this without a valid justification, excuse or defence.

Since war crimes and crimes against humanity reflect the views of the members of the family of nations as they may be found not only in international conventions but also in customary international law in respect of such crimes, it follows that they would be subject to similar justifications, excuses and defences as apply in respect of such crimes in domestic law. For one of the sources of international law is "the general principles of law recognized by civilized nations" (see Art. 38(*c*) of the *Statute of the International Court of Justice*, Acts and Documents Concerning the Organization of the Courts, No. 4, *Charter of the United Nations, Statute and Rules of Court and Other Documents* (1978)), a matter specifically referred to in the definition of "crimes against humanity". Consequently, then, provision for these justifications, excuses and defences are provided in s. 7(3.73) of the *Code*. Of particular relevance to war crimes would be issues going to the mental intent, necessity, duress and mistake of fact, as well as defences specifically available to peace officers and military forces. There are, as well, additional defences available for these international crimes, such as military necessity, superior orders and reprisals. By virtue of s. 7(3.73), any justification, excuse or defence available under international law as well as under the law of Canada at the time of the commission of the alleged offence are made available to an accused charged by virtue of the Canadian legislation. Section 7(3.73) reads as follows:

> **7.** . . .
>
> (3.73) In any proceedings under this Act with respect to an act or omission referred to in subsection (3.71), notwithstanding that the act

> or omission is an offence under the laws of Canada in force at the time of the act or omission, the accused may, subject to subsection 607(6), rely on any justification, excuse or defence available under the laws of Canada or under international law at that time or at the time of the proceedings.

It follows from the ordinary principles of criminal law followed in Canadian courts that any reasonable doubt on these matters is to be determined in favour of the accused.

Since war crimes and crimes against humanity are crimes against international prescriptions and, indeed, go to the very structure of the international legal order, they are not under international law subject to the general legal prescription (reflected in s. 6(2) of our *Code*) that crimes must ordinarily be prosecuted and punished in the state where they are committed; see *Attorney-General of the Government of Israel v. Eichmann* (1961), 36 I.L.R. 5. Indeed the international community has encouraged member states to prosecute war crimes and crimes against humanity wherever they have been committed. See the four Geneva Conventions of 1949 (*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12 1949*, 75 U.N.T.S. 31, *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949*, 75 U.N.T.S. 85, G*eneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, 75 U.N.T.S. 135, and *Geneva Convention relative to the Protection of Civilian Persons in time of War of August 12, 1949*, 75 U.N.T.S. 287); United Nations Resolution on *Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, G.A. Res. 3074, 28 U.N. GAOR, Supp. (No. 30) 78, U.N. Doc. A/9030

(1973); *War Crimes Amendment Act 1988*, 1989 Aust., No. 3; *War Crimes Act 1991*, 1991 (U.K.), c. 13; *Restatement (Third) of the Law, the Foreign Relations Law of the United States*, vol. 1, § 404 (1987); *Trial of the Major War Criminals before the International Military Tribunal, supra*, at p. 461; *The Almelo Trial*, 1 Law Reports of Trials of War Criminals 35 (1945) (U.S.M.T. Almelo); *Trial of Lothar Eisentrager*, 14 Law Reports of Trials of War Criminals 8 (1949) (U.S.M.T. Shanghai), at p. 15; *The Eichmann Case, supra*, at p. 50, aff'd (1962), 36 I.L.R. 277, at p. 299 (Isr. S.C.); *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), at pp. 582-83, *certiorari* denied, 475 U.S. 1016 (1986); I. Brownlie, *Principles of Public International Law* (4th ed. 1990), at p. 305; S. A. Williams and A. L. C. de Mestral, *An Introduction to International Law* (2nd ed. 1987), at pp. 130-31. It would be pointless to rely solely on the state where such a crime has been committed, since that state will often be implicated in the crime, particularly crimes against humanity. This concept was forcefully and unequivocally expressed by the U.S. Military Tribunal in the justice trials (*Josef Altstötter Trial* (*The Justice Trial*)), 6 Law Reports of Trials of War Criminals 1 (1947) (U.S.M.T. Nuremberg), at p. 49, where it was stated:

> The very essence of the prosecution case is that the laws, the Hitler decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions.

The central concern in the case of crimes against humanity is with such things as state-sponsored or sanctioned persecution, not the private individual who has a

particular hatred against a particular group or the public generally. Extraterritorial prosecution is thus a practical necessity in the case of war crimes and crimes against humanity. Not only is the state where the crime took place unlikely to prosecute; following the cessation of hostilities or other conditions that fostered their commission, there also is a tendency for the individuals who perpetrated them to scatter to the four corners of the earth. Thus, war criminals would be able to elude punishment simply by fleeing the jurisdiction where the crime was committed. The international community has rightly rejected this prospect.

Turning again to the interrelationship between war crimes and crimes against humanity and Canadian criminal law, it is notable that the Deschênes Commission was of the view that a prosecution could be launched against a war criminal before a Canadian superior court of criminal jurisdiction on the basis of a violation of "the general principles of law recognized by the community of nations". This finding was based on two factors: (1) s. 11(*g*) of the *Charter*, which, in the Commission's view, adopted "customary" international law *lato sensu* into Canadian law, and (2) the principle of universal jurisdiction; see Deschênes Commission, *supra*, at p. 132. However, the Commission dismissed this option on the grounds that "[a] prosecution under international law appears too esoteric"; *ibid.*, at p. 133. The Commission took the view that a preferable vehicle for the prosecution of war criminals would be for Parliament to pass enabling legislation whereby prosecution of war criminals could be pursued in Canada based on crimes known to Canadian criminal law. The international aspect of these crimes would, pursuant to the principle of universality inherent in these grievous acts, continue to provide the jurisdictional link to Canada, so long as the international crimes were known to international law at the time and place of their commission.

Despite the Deschênes Commission's assumption that s. 11(*g*) of the *Charter*, coupled with the universality jurisdiction associated with these war crimes and crimes against humanity, could ground a prosecution in Canada, it is not self-evident that these crimes could be prosecuted in Canada in the absence of legislation. On the analogy of other international authority in the area, it is certainly arguable that the international norm regarding universality of jurisdiction is permissive only (see *The Case of the S.S. "Lotus"* (1927), P.C.I.J., Ser. A, No. 10), and the language of s. 11(*g*) of the *Charter* also appears to be framed in permissive terms. Thus it is by no means clear that prosecution could automatically be pursued for these crimes before the courts of the various states, especially Canada where, barring express exception, crimes must comply with the requirement that they were committed within Canada's territory (s. 6 of the *Code*). Under these circumstances, it is not surprising that Parliament saw fit by s. 7(3.71) of the *Code*, to confer jurisdiction on Canadian courts by providing expressly that, notwithstanding any provision in the *Code* or any other Act, a war crime or crime against humanity shall be deemed to have been an act committed in Canada.

But Parliament, like the Commission, quite rightly in my view, accepted the position that war crimes and crimes against humanity would be crimes in Canada. For although they may not, in those terms, be crimes under Canadian law, they are in essence reflections of general principles of law recognized by the community of nations, and so would, if committed in Canada, be subject to prosecution here under various provisions. It is evident that compendious expressions like "murder, extermination, enslavement, deportation, persecution, or any other inhumane act or omission" include acts and omissions that comprise such specific underlying crimes as confinement, kidnapping, robbery and

manslaughter under our domestic system of law. A somewhat similar relationship between compendiously described unlawful acts in international treaties and specific crimes under domestic law exists in the law of extradition; see *McVey (Re); McVey v. United States of America*, [1992] 3 S.C.R. 475, at pp. 514-15.

I should note, however, that war crimes and crimes against humanity often include additional circumstances relating them to the international law norms they subserve. Thus crimes against humanity are aimed at giving protection to the basic human rights of all individuals throughout the world, and notably against transgression by states against these rights. That is why such crimes are aimed at an "act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission"; see s. 7(3.76). The law referred to in that expression is, of course, the local domestic law, not international law, as counsel for respondent argued. For these crimes were at the relevant period violative of the law of nations. As Callaghan A.C.J. ruled in his pre-trial ruling in the present case (*R. v. Finta* (1989), 69 O.R. (2d) 557 (Ont. H.C.), at p. 569):

> A brief review of international conventions, agreements and treaties, clearly demonstrate [*sic*] that, by World War II, war crimes or crimes against humanity were recognized as an offence at international law, or criminal according to the general principles of law recognized by the community of nations.

This proposition is well supported by the international sources cited by Callaghan A.C.J. and I shall have occasion to return to this later. For the moment, I would simply note that many of the defendants tried in Nuremberg also raised this plea,

in the form of *nullum crimen sine lege*, and this defence was rejected; *Trial of the Major War Criminals before the International Military Tribunal*, *supra*, at pp. 461-65; *Josef Altstötter*, *supra*, at pp. 41-49. The following words of Sir David Maxwell-Fyfe (Foreword to R. W. Cooper, *The Nuremberg Trial* (1947)), are apt (at p. 11):

> With regard to "crimes against humanity", this at any rate is clear: the Nazis, when they persecuted and murdered countless Jews and political opponents in Germany, knew that what they were doing was wrong and that their actions were crimes which had been condemned by the criminal law of every civilized State. When these crimes were mixed with the preparation for aggressive war and later with the commission of war crimes in occupied territories, it cannot be a matter of complaint that a procedure is established for their punishment.

I again, however, underline the fact -- which finds expression in the statement just quoted -- that the acts comprised in war crimes and crimes against humanity are in this country in essence crimes that fall under the familiar rubrics of our law such as confinement, kidnapping, and the like. They would be equally blameworthy if done by private individuals or criminal groups for other similar vile motives. The additional circumstances are added to crimes against humanity to tie them to the international norm and permit extraterritorial prosecution by all states.

The same approach applies to war crimes. There must, of course, be an "international armed conflict". In other cases, other conditions may be imposed. Shooting at enemy forces is generally not a war crime, but shooting at civilians is subject to more stringent requirements. Other conditions under which one acts may also determine the difference between whether such acts are war crimes or

not. As in the case of the existence of a state of war, these conditions are what ties them to international norms and empowers extraterritorial prosecution.

In enacting enabling legislation respecting war crimes and crimes against humanity, Parliament could have proceeded in one of two ways. These crimes could have been simply made offences in their own terms in Canada even though committed abroad. This, I understand, is what has been done, for instance, in Australia; see *Polyukhovich v. Commonwealth of Australia* (1991), 101 A.L.R. 545 (Aust. H.C.). Another technique is to enable prosecution under domestic law by the device of deeming the acts constituting a war crime or crime against humanity to have been committed in Canada. Since these acts are then deemed to have been committed in Canada, the person accused of having committed them may be charged with any of the relevant underlying offences that encompass these acts under the law of Canada. That is the course that was taken by Parliament, an approach somewhat similar to that followed in Great Britain; see *War Crimes Act 1991*, 1991 (U.K.), c. 13. By section 7(3.71), a provision cited and discussed at length later, Parliament provided that a person who has committed an act or omission outside Canada that constitutes a war crime or crime against humanity shall be deemed to have committed that act in Canada. The provision adds a second requirement for the operation of this clause. To avoid punishing someone for an act that would not at the time have been a crime under Canadian law, it further requires that the act must constitute a crime in Canada according to the law at the time, a provision reinforced by s. 7(3.72) which requires that any prosecution in respect of such act be conducted according to the then existing laws of evidence and procedure.

There are obvious advantages to the second approach. The judge and especially the jury are able to function largely pursuant to a system of law which, being our own, is more familiar to us and more precise. As much as possible, the intricacies of what constitutes international law and how it functions (with which even the judge is often unfamiliar) are avoided. The judge is able to instruct the jury secure in his or her knowledge of Canadian law. With the exception of international defences, which are available to the accused, the jury can then perform its function pursuant to Canadian law which demands proof beyond a reasonable doubt that the accused committed the offence -- a Canadian offence -- with which he or she is charged.

Interpretation of Section 7(3.71)

General

I turn now to the first ground of appeal concerning the correct interpretation of s. 7(3.71). Ignoring for the moment the *Charter* issues at stake, a clear understanding of the intention of the legislature can, in my view, be ascertained through the normal rules for the interpretation of legislative provisions.

To clarify the issue, it is useful to examine how it was dealt with in the courts below. It first arose before Callaghan A.C.J. in the course of dealing with the constitutionality of s. 7(3.71) and (3.74) in a pre-trial ruling. In his view, s. 7(3.71) is of a procedural nature and does not create new offences, but merely confers retrospective and extraterritorial jurisdiction to Canadian courts over acts that would have been offences under Canadian law at the time of their occurrence

if they had taken place in Canada, so long as those acts constitute war crimes or crimes against humanity.

Though the trial judge agreed with Callaghan A.C.J.'s ruling that s. 7(3.71) is exclusively jurisdictional in nature, he determined that the question of jurisdiction, though ordinarily a matter determined by the trial judge as a matter of law, should in this case be left with the jury. Under this ruling, the trial judge, it is true, would determine abstract legal questions such as whether crimes against humanity constituted a contravention of customary or conventional law or was criminal according to the law of nations, but it was for the jury to decide whether the respondent's acts or omissions constituted a war crime or crime against humanity.

The majority of the Court of Appeal (1992), 92 D.L.R. (4th) 1, upheld the conclusion of the trial judge but on another basis. They did not agree that s. 7(3.71) was procedural and relevant only to the jurisdiction of the court to try the respondent for the domestic offences such as confinement, robbery, kidnapping and manslaughter. As they put it, at p. 108:

> . . . we arrive at the same conclusion reached by the trial judge, although we interpret s. 7(3.71) differently. We do not regard the allegations that Finta's acts or omissions constituted war crimes or crimes against humanity as going to the jurisdiction of the trial court so as to bring them within the purview of the judgment in *Balcombe* [*Balcombe v. The Queen*, [1954] S.C.R. 303]. Instead, we view these issues as integral to the fundamental question of whether Finta committed the offences which were alleged against him in the indictment.

As Dubin C.J. put it, at p. 20, ". . . the upshot of the majority view is that s. 7(3.71) of the *Criminal Code* creates two new offences, namely, a crime against humanity and a war crime. . . ." Like Dubin C.J. and Tarnopolsky J.A., and for that matter Callaghan A.C.J., I respectfully disagree with the position taken by the trial judge and the Court of Appeal. I do so for the following reasons.

On a literal reading of s. 7(3.71), an appreciation of its legislative context along with analogous provisions in the *Code* and an understanding of its legislative history, I conclude that s. 7(3.71) is unquestionably intended to confer jurisdiction on Canadian courts to prosecute domestically, according to Canadian criminal law in force at the time of their commission, foreign acts amounting to war crimes or crimes against humanity. The provision does not create any new offences. Section 7(3.71) reads:

> **7.** . . .
>
> (3.71) 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 of the act 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) the 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. [Emphasis added.]

I am quite unable to see anything in s. 7(3.71) that creates new offences of war crimes and crimes against humanity. Nowhere is it declared, as it is in the case of all other *Code* offences, that a person who commits the relevant act is guilty of an offence. On the contrary, the nucleus of the provision is its predicate, "shall be deemed to commit that act or omission in Canada at that time". All the rest gravitates towards this focus. Moreover, no penalty is stipulated. The subjection to domestic prosecution that results from a finding of war crime or crime against humanity is not punishment; it is, rather, merely the next procedural step. What the provision does is empower the prosecution to lay charges against the accused for offences defined in the *Code* in respect of acts done outside the country, so long as those acts constitute crimes against humanity or war crimes.

This reading of s. 7(3.71) also makes sense when viewed in its legislative context. Found in Part I, the "General" section of the *Criminal Code*, the provision stands as an exception to the general rule regarding the territorial ambit of criminal law, which appears in the immediately preceding section. Section 6(2) of the *Code* reads:

> **6.** . . .
>
> (2) Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 736 of an offence committed outside Canada.

The perpetration of acts constituting war crimes and crimes against humanity, of course, transcends national borders, yet the perpetrators are often not identified until later, after they have displaced themselves to a new country. Parliament's intention was to extend the arm of Canada's criminal law in order to be in a position to prosecute these extraterritorial acts if the alleged perpetrators were discovered in our midst. The enactment of s. 7(3.71) was necessary because Parliament's plan derogated from the general principle of s. 6(2). As I noted earlier, by specifically deeming the extraterritorial act to have taken place in Canada, Parliament has expressed its view that the normal concerns about extraterritoriality are not present.

Similarly structured deeming provisions that also embrace extraterritorial acts are found among the other subsections of s. 7; see s. 7(3) in relation to offences committed against internationally protected persons or their property, s. 7(3.1) in relation to hostage-taking and s. 7(4) in relation to public service employee offenders. Similarly worded provisions are found in other parts of the *Code*, as well. Section 477.1 deems to be committed in Canada acts occurring in, above or beyond the continental shelf. A close parallel can be drawn with the conspiracy provision set forth in s. 465(3) of the *Code*, which reads:

> **465.** . . .
>
> (3) Every one who, while in Canada, conspires with any one to do anything referred to in subsection (1) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do that thing in Canada.

The nature of this provision was considered by this Court in *Bolduc v. Attorney General of Quebec*, [1982] 1 S.C.R. 573, where, at pp. 577 and 581, it is stated:

> It is apparent on its face that this subsection does not create an offence. It creates a presumption of territoriality so as to make the conspiracy an offence punishable in Canada. Where, as in the case at bar, persons conspire in Canada to effect an unlawful purpose in the United States, which would not in itself be an offence punishable in Canada, they "shall be deemed to have conspired to do in Canada that thing". The result is to introduce the essential aspect which would otherwise be absent, and to make the offence punishable in Canada.
>
> . . .
>
> The offence charged is common law conspiracy committed in Canada, to effect an unlawful purpose. Causing persons to enter the United States unlawfully constitutes an offence under American law, just as causing persons to come into Canada unlawfully constitutes an offence under Canadian law. As a consequence of the presumption of s. 423(3) [currently s. 465(3)], the conspirators are deemed to have conspired to commit the offence in Canada. It is as if they had conspired to cause persons to come into Canada unlawfully. [Emphasis added.]

As in the case of s. 7(3.71), s. 465(3) deems Canadian territoriality where a criterion is met. While the criterion for s. 465(3) is the unlawfulness of the act conspired according to the law of the place of the conspired act, the criteria for s. 7(3.71) are threefold: that the act constitutes a war crime or crime against humanity; that the act was unlawful in Canada at the time of its commission; and that specifically defined individuals are involved. Just as the offence charged in the former case is conspiracy committed in Canada, the charge in the latter is that of the underlying domestic offence, be it murder, robbery or the like. The similarity of the structure of these two provisions supports a consistent interpretation.

Admittedly, exceptions to s. 6 can also take the form of offence-creating provisions that expressly embrace extraterritorial acts. However, the wording of s. 7(3.71) closely resembles that of other purely jurisdiction-endowing

provisions and can be contrasted with these offence-creating provisions. For example, another conspiracy provision reads:

> **465.** (1) . . .
>
> (*a*) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and liable to a maximum term of imprisonment for life;

This section deals, *inter alia*, with conspiracy to murder abroad. The provision itself makes this extraterritorial act an offence and attaches a sanction to it. A similar approach is taken with respect to the criminalization of piracy, in s. 74(2):

> **74.** . . .
>
> (2) Every one who commits piracy while in or out of Canada is guilty of an indictable offence and liable to imprisonment for life.

The distinction between this *Code* treatment of extraterritorial acts and that embodied by s. 7(3.71) and its kin is obvious. The former reflects Parliament's intention to approach the relevant acts as domestic offences unto themselves, in contrast to the latter's effect of deeming the acts to come within the scope of offences already created elsewhere in the *Code*.

Parliament's intention to confine itself to a rule governing the application of offences is also evident from the position of s. 7(3.71) in the *Code*. It appears, I repeat, in Part I of the *Code*, which is appropriately titled "General". No offence is created in that Part. It deals, as its name implies, with interpretive matters, application, enforcement, defences and other general provisions. Offences

are dealt with in other parts of the *Code*, and are usually entitled as such, among others "Part II. Offences Against Public Order", "Part VIII. Offences Against the Person and Reputation", "Part IX. Offences Against Rights of Property", and so on. One should assume some minimal level of ordering in an Act of Parliament. Had Parliament wished specifically to make war crimes and crimes against humanity domestic offences, it would have been much easier to do so directly, and I cannot imagine why it would have done so in the General Part of the *Code*.

This reading of s. 7(3.71) is bolstered by its legislative history. Sections 7(3.71)-(3.77) represent the consummation of the recommendations of the Commission of Inquiry on War Criminals (the "Deschênes Commission"). The crux of the Commission's recommendations, we saw, was not the domestic creation of these international offences, but rather, the removal of the obstacle of extraterritoriality and the enablement of Canada to serve as a <u>forum</u> for the domestic prosecution of these offenders. This thrust of the Report is reflected, at p. 158, as follows:

> Need it be stressed again: we are not aiming to make acts, which were deemed innocent when committed, criminal now; such would be unacceptable retroactivity. But extermination of a civilian population, for instance, was already as much criminal in 1940 as it would be today, under the laws of all so-called civilized nations. We are only trying to establish now in Canada a forum where those suspected of having committed such offences may be tried, if found in Canada.

In formulating its recommendations, the Commission specifically commented, at p. 165, that "[t]he Code must contain an express grant of jurisdiction to the courts in Canada". Tarnopolsky J.A. made this observation as well, at p. 60, in the Court of Appeal:

> Rather than creating a substantive offence of war crime or crime against humanity, Parliament chose, on the recommendation of the Deschênes Commission, to extend the applicability of existing *Criminal Code* provisions extant at the time of the acts.

The Commission's view, as I read it, is that new offences did not have to be created; censure of the actual relevant acts was already provided for in the Canadian *Criminal Code,* as it was in the law of most civilized nations. So any such acts could have been prosecuted under the ordinary Canadian criminal provisions if committed here. What Canadian courts had to be equipped with was the capacity to hear and decide the prosecutions. Consistent with the requirements of international law, the link to international law concepts of war crimes and crimes against humanity was the mechanism selected to ensure that only the cases envisioned by the Report would endow a Canadian court with the capacity to serve as a forum for the prosecution of extraterritorial acts. The question of the presence of war crimes or crimes against humanity is thus one of jurisdiction. The offence with which the accused is charged, on the other hand, is the underlying domestic offence, drawn from the already existing Canadian criminal law at the time of commission.

Questions of jurisdiction are matters of law entrusted to the trial judge. In *Balcombe v. The Queen, supra,* Fauteux J., speaking for this Court, had this to say, at pp. 305-6:

> The question of jurisdiction is a question of law -- consequently, for the presiding Judge -- even if, to its determination, consideration of the evidence is needed. It is a question strictly beyond the field of these matters which under the law and particularly under the terms of their oath, the jury have to consider. They are concerned only with the guilt or innocence of the prisoner at the bar. Indeed the lawful fulfilment of their duties rests on the assumed existence of the

> jurisdiction of the Court to try, at the place where it is held, the accused for the crime charged. They are concerned with facts as they may be related to guilt or innocence but not to jurisdiction. [Emphasis added.]

Being a question of law, the trial judge would make his or her determination of whether the act or omission in question amounted to a war crime or a crime against humanity on a balance of probabilities. The jury's duty is to determine the guilt of the accused of the offence with which he or she was charged.

The majority of the Court of Appeal would distinguish *Balcombe* on the grounds that all of the essential elements of the offence must be put to the jury, and that this includes the offence of a war crime or crime against humanity. As will become clear, I do not view the existence or non-existence of a war crime or crime against humanity as an essential element of the offence but rather as the jurisdictional link grounding prosecution for the underlying Canadian domestic offence. At the same time, however, the jury would of course have to consider whether as a fact the acts that constitute the war crime or crime against humanity occurred in determining whether the offence under Canadian law was committed. The jury is not acting in a vacuum.

I respectfully reject the distinction drawn by the majority of the Court of Appeal between territorial jurisdiction of the court and territorial reach of the criminal law. The majority seems to have attempted to differentiate between the former, which it characterizes as going to the determination of the proper Canadian court to hear a case, and the latter, which it identifies as affecting the definition of the offences themselves.

With respect, s. 6(2) of the *Code* does not render Canadian territoriality a defining element of its offences. Rather, it merely precludes a person's conviction or discharge for an offence when committed outside Canada. This general principle of our criminal law system reflects, in addition perhaps to the need for accommodation in the interest of efficiency, Canada's acceptance of the general premise of the sovereignty of nations that underlies international relations. The fact that an act or an omission may have taken place outside Canada's borders does not negate its quality as culpable conduct in the eyes of Canadians and the underlying values of Canadian criminal law. This is reflected, as well, in the law of immigration, deportation and extradition. The principle of territoriality simply responds to the structure of the international order; the prosecution of the perpetrator of a criminal act is normally entrusted to the state in which the act was committed.

Questions of territoriality in all cases deal with the same matter: where did the event take place? Of course, the result of this determination may differ depending on whether the inquiry involves distinguishing between two provinces, on the one hand, or between Canada and another country, on the other. In the former case, the proper provincial court is determined, while in the latter, the capacity to try at all pursuant to the *Code* is at stake. In either case, however, the skill called upon to make the determination is the same: the technical ability to demarcate the location of the relevant act. In *Balcombe*, *supra*, this Court held that this function was properly entrusted to the trial judge. I see no reason why a different rule should apply to the s. 6 inquiry.

The terms of s. 6 are not absolute; they specifically envision exceptions, whether in the *Code* itself or in other Acts of Parliament. In making the territorial determination dictated by s. 6, the trial judge must consider whether these exceptional provisions apply. These exceptional provisions typically deem territoriality where relevant specified criteria are met. Although perhaps not enacted neatly in one *Code* provision, s. 6 and its exceptions constitute a united inquiry, destined to establish whether the court in question can hear the prosecution of the accused. In order to decide on the application of the general rule, the application of the exceptions would have to be assessed. To entrust the latter decision to the jury, while leaving the general question to the judge, would be an illogical division of labour and could only result in unnecessary confusion. The entire question of jurisdiction should therefore be assigned to the trial judge as a matter of law.

Section 7(3.71) of the *Code* is one of these exceptional provisions. Its criteria, whether the act amounts to a war crime or crime against humanity, whether it constituted an offence pursuant to Canadian law at the time of commission, and whether identifiable individuals were involved, are thus questions of law entrusted to the trial judge and not to the jury.

The Role of Judge and Jury

On this interpretation of the jurisdiction sections, a clear role for both judge and jury emerges.

The role of the jury will be similar to its role in an ordinary prosecution under our domestic law. Its function, and the charge made to it, will be like those that would be made to a jury determining the underlying offence only. The sole difference will be in relation to justifications, excuses and defences. Section 7(3.73) provides the accused with the benefit of pleading all available international justifications, excuses and defences in addition to those existing under domestic law. The one domestic defence made unavailable, by the operation of s. 7(3.74), is the defence of obedience to *de facto* law. I shall have more to say about this in discussing the constitutionality of the scheme. It is enough to say here that it is clear to me that this is the scheme contemplated by Parliament.

For his or her part, the trial judge must determine whether all the conditions for the exercise of jurisdiction are met. If the requirements set by Parliament are not satisfied, then the exception to the rule of no extraterritorial application is not met, and the court must decline jurisdiction and the accused acquitted even if all the elements of the offences of manslaughter, robbery, confinement or assault may be satisfied.

It is evident from my earlier comments that I do not agree with the trial judge and the majority of the Court of Appeal that the requirements for jurisdiction be proved beyond a reasonable doubt. Unlike the dissenting judges in the Court of Appeal, however, I believe that the trial judge will have to consider the evidence to satisfy the jurisdiction requirements. The judge cannot simply base his or her assessment of these requirements on the charges as alleged, and leave all the findings of fact to the jury, because some of the facts necessary to establish jurisdiction are not the same as those necessary for the jury's determination of the

underlying offence. Thus, for example, a jurisdiction requirement of a war crime requires that the action be done during an international military conflict, a fact that need not be found by a jury determining whether there was manslaughter or kidnapping, (though inevitably these facts will be before them and may, in some cases, be relevant to their task in relation to some justification, excuse or defence under international law).

I see no procedural quagmire in the different functions of judge and jury, although it may at times call for some procedural ingenuity. Certainly, if the charges even as alleged do not meet the jurisdiction requirements, then on motion the judge can decline jurisdiction. Beyond that, however, the judge will have to examine the evidence to determine that the jurisdictional facts are established. In ordinary cases, the judge hears the evidence in relation to the jurisdictional point in a *voir dire*, since most of it is irrelevant for the jury's issues. However, since in this case the jury will have to hear much of the same evidence related to the offences as the trial judge would have to hear in relation to the jurisdiction issue, it will usually be more efficient to have the trial judge consider the jurisdiction issue at the same time as the jury hears the evidence related to the offence. If desired, and to keep a jury's mind clear, the parts of the evidence or expert testimony that are completely irrelevant to the jury's concerns can be heard in the absence of the jury. At the close of the evidence, the judge will decide whether the conditions for the exercise of jurisdiction have been met. If so, then the court can proceed to hear the verdict of the jury.

<u>The Mental Element Required for War Crimes or Crimes Against Humanity</u>

While my finding on the first ground of appeal is sufficient to allow this appeal, I shall also deal with the second ground of appeal which relates to the requirements of international law regarding the mental element in war crimes and crimes against humanity. The appellant argues that the trial judge seriously erred in his understanding of the requirements of these crimes, and in particular, that the judge set far too high a requirement for the mental element required for there to be a war crime or crime against humanity. For reasons that will appear I agree that the trial judge and the majority of the Court of Appeal erred on the second ground of appeal as well.

In making his determination on the issue of jurisdiction, the judge must determine that there was a war crime or crime against humanity. What these entail is partly set out by the *Code* (s. 7(3.76)), but will also require reference to international law. This creates some complexity, but the requirements can be deciphered by reference to theoretical constructs of criminal law already familiar to us. The structure of most of the international law in relation to war crimes and crimes against humanity can be conveniently examined under the familiar analysis of the elements of the act (the *actus reus*), the mental elements and defences. The judge must examine the evidence and compare it to the international law to determine whether the requirements of the crime are satisfied, as well as what defences may be available.

Actus Reus Requirement

The issue raised is confined to the *mens rea* relating to a war crime or crime against humanity, but to understand that issue, it is necessary to examine

briefly the requirements of the *actus reus* necessary to constitute a war crime or crime against humanity. Both the *Code* and international law contain requirements of particular types of acts or omissions. Thus, for example, the war crime of mistreatment of civilians requires that the accused have done actions that amount to mistreatment. As Manfred Lachs, *War Crimes: An Attempt to Define the Issues* (1945), chapter 7, observed, these acts are usually characterized by violence. In addition, particular circumstances are frequently required. This is clearly exemplified by the requirement that war crimes involve actions that occurred during a state of war. At times, the actions may also have to be directed at certain objects. For example, some actions, though permissible against enemy soldiers in the field, are war crimes if committed against civilians or prisoners. The trial judge must be satisfied that these particular requirements required by international law and by the *Code* are met for there to have been a crime against humanity or a war crime. While this may at times raise difficult and complex issues, the general idea of an act or omission, and possibly consequences and circumstances, is well understood; see Lachs, *supra*, at pp. 16-24; L. C. Green, *International Law: A Canadian Perspective* (2nd ed. 1988), Part VI, at §§ 359-64.

A good example is the requirement that to constitute a crime against humanity the impugned act have been directed at "any civilian population or any identifiable group" (see s. 7(3.76)). Again one must return to the international system perspective to understand this requirement. As mentioned earlier, this is the specific factor that gives the crime the requisite international dimension and that permits extraterritorial prosecution, thus distinguishing it from an "ordinary crime" that the state is expected to prosecute. Unlike ordinary crimes, it is of direct concern to the international community and may be prosecuted wherever the

alleged offender may be found. As earlier mentioned, this exception to the ordinary principle that criminal law is territorially limited is made necessary by a number of considerations. As mentioned, where the crime is especially widespread in that it is directed against an entire population (whether of a town, or region, or even nationally) or an identifiable group within the population, foreign enforcement is especially important because there is often the possibility that the government in the state where the crime occurs may not be willing to prosecute; indeed it may be the source of the crimes. For this reason, international law permits other states to exercise jurisdiction to try such crimes. Given that this is the condition to assuming jurisdiction, the trial judge would have to find that the criminal conduct was directed at a civilian population or identifiable group.

Apart from his error in putting this question to the jury, the trial judge seems to have had a good sense of the *actus reus* requirements under international law. Thus he specifically noted such requirements as that for war crimes there must be international conflict, and that the accused had to be an agent of an occupying force. To cover other elements of a war crime, he also referred to the acts having to be of the "factual quality" of war crimes or crimes against humanity. This appears to be too ambiguous and should have more specifically been considered against specific types of war crimes or crimes against humanity. This concept illustrates some of the problems of putting this entire question to the jury: this determination clearly involves an assessment of the legal quality of the acts as well as their factual components. This aspect of the judge's understanding of war crimes or crimes against humanity would, however, appear to be adequate if the question were decided, as I have indicated it should be, by the judge as a question of law.

More serious was that the trial judge at several points referred to the accused's actions having "risen up" to the quality of a war crime or crime against humanity. This is not strictly accurate; there may be different considerations for the offences under international law, and they may have some additional requirements to those for domestic offences, but these are not always higher and may not be related to individual culpability. To use language that suggests that somehow there is a higher degree of culpability required in relation to the international crimes is misleading.

Mens Rea Requirement

The trial judge was quite rightly concerned that the acts or omissions should be of a type that is prohibited as war crimes or crimes against humanity as defined in the *Code* and under international law. But from this the judge drew some seriously erroneous implications about the mental element required to find that there was a war crime or crime against humanity. With all respect, the trial judge, in my view, made two types of errors, which are related in their effect: first, in requiring that there be a mental element for each and every component of a war crime or crime against humanity, and secondly, partly as a result of the first error, in suggesting that the accused needed to have known that his actions were illegal. The simple fact, as I see it, is that there is no need for the jury to be concerned with the mental element in relation to the war crimes and crimes against humanity beyond those comprised in the underlying domestic offence with which the accused is charged. In other words, as I will attempt to demonstrate, the mental blameworthiness required for such crimes is already captured by the *mens rea* required for the underlying offence. The additional circumstances of the *actus reus*

required in terms of the international system to justify extraterritorial jurisdiction do not require that the accused individually have knowledge of these matters. These components of the *actus reus* really have nothing to do with individual culpability. As I see it, the law does not require that the accused individually have had knowledge of these factors. Such a requirement cannot be found in either Canadian or international law.

In neither the jurisdiction nor the definition section of the *Code* (s. 7(3.71) and s.7 (3.76) respectively) is any mental element specifically alluded to; all that is stated is that there be behaviour that constitutes an act or omission that is contrary to international law. In turn, the requirements for the mental element under international law are often not as clearly established as under our national law. I suspect that this lack of express discussion of the requirement is largely because nobody ever really thought that there was a need for an individual *mens rea* that went beyond that required for the basic nature of the conduct, whether that be murder, assault, robbery or kidnapping. In international law, the mental element frequently seems to be ignored, and focus is instead placed on the special factual circumstances in which the culpable conduct occurred. However, if a detailed refutation is required, it seems justified to use our established common law rules of *mens rea* where the international law does not have specific standards.

Most criminal offences require that there be a *mens rea* in relation to the basic act or omission. At times, but by no means invariably, some form of *mens rea*, sometimes knowledge, sometimes recklessness or even inadvertence, is required in relation to consequences and circumstances as well. In the present case, however, the trial judge insisted that there be a subjective mental element in

relation to all the elements of the act that constitute the war crime or crime against humanity. For example, in relation to the first count of unlawful confinement, the trial judge considered the necessary mental element to be:

Essential Elements of Count 1: Confinement: Crime Against Humanity

> (3) The accused knew that the confinement had the factual quality of a crime against humanity in the sense that it was
>
> (1) enslavement or
>
> (2) inhumane or persecutorial deportation or
>
> (3) racial or religious persecution or
>
> (4) an inhumane act and
>
> (4) The accused knew that the people confined were a civilian population or any identifiable group of persons and
>
> (5) The accused knew the confinement was in execution of or in connection with the conduct... of war or any war crime. [Emphasis added.]

Moreover, he emphasized that this was a subjective condition which the particular accused must satisfy; any such knowledge could not be simply inferred from the conduct or intent or knowledge to do the simple act. The judge instructed the jury on the second count in exactly the same way except that he substituted "crime against humanity" with "war crime", and he followed a similar pattern in respect of robbery, kidnapping and manslaughter.

In my view, this is far too high a standard; a *mens rea* need only be found in relation to the individually blameworthy elements of a war crime or crime against humanity, not every single circumstance surrounding it. This approach receives support in Canadian domestic law. In *R. v. DeSousa*, [1992] 2 S.C.R. 944,

at pp. 964-65, this Court held that reading in such a requirement for every element of an offence misconstrues and overgeneralizes earlier decisions of this Court. Rather, the proper approach, it noted, was that "there must be an element of personal fault in regard to a culpable aspect of the *actus reus*, but not necessarily in regard to each and every element of the *actus reus*" (p. 965). [Emphasis added.]

This reasoning is especially appropriate in dealing with circumstances related to international offences that do not involve culpability but are of a more technical nature. For example, the trial judge, in my view, erred in requiring for a finding of war crime that the accused knew that he was an agent of an occupying force or that there was actually war. Had the accused acted not as an agent but on his own, his individual culpability would be no less -- he might, indeed, be more culpable. The same would be true if he had committed the acts charged in peace time. As I have already indicated, all that matters is that these factual conditions be present. In the scheme as set out by the legislature, these conditions constitute a justification in the international system for extraterritorial prosecution rather than matters going to individual culpability. They go to jurisdiction.

The same is true of the trial judge's instruction that it was necessary that the accused know that the actions were directed against a civilian population or an identifiable group. I would argue that such knowledge on the part of the accused is strictly irrelevant to his individual culpability. To forcibly confine or kidnap 8,617 people is equally blameworthy whether he knew or did not know that they were Jews. On a practical level, the lack of real relevance of knowledge about such matters is evident from the circumstances. Can anyone doubt that an adequate knowledge would be that difficult to find? When one is aware that the

actions are directed at a large number of people with the same characteristic, such knowledge would be easily inferred. In this case, for example, since Jews had expressly been the only subject of all these actions to the knowledge of those involved, then it seems readily apparent that the requisite knowledge in relation to this circumstance is met. Similar considerations apply to other issues of this kind, such as whether a state of war existed.

I should at this stage, however, underline that there may be a requirement of a mental element for certain justifications, excuses and defences under international law, but, as previously noted, these are made available to the accused in defending himself or herself of the domestic offence, e.g., kidnapping, with which he is charged. If any such justification, excuse or defence arises on the evidence, it must be put to the jury and if the jury has any reasonable doubt respecting that mental element it must, of course, resolve that doubt in favour of the accused, as is the case of any defence available to the accused under Canadian law.

As earlier noted, the trial judge's overemphasis on knowledge on the part of the accused led him to a different, if intertwined, type of error. It led him to confuse the difference between the mental element in relation to the factual nature of the impugned act and its legal or moral quality. As Dubin C.J. noted this confusion is best exemplified in the instruction in relation to the term "inhumane act" contained in the definition of "crime against humanity" in s. 7(3.76). This general category should not be taken to import a knowledge of the inhumanity of the behaviour. If an accused knowingly confines elderly people in close quarters

within boxcars with little provision for a long train ride, then the fact that the accused subjectively did not consider this inhumane should be irrelevant.

This confusion between appreciation of the factual as opposed to the moral or legal quality of the accused's actions was exacerbated by further comments in the trial judge's charge that indicated his view of the *mens rea* requirement. While the judge did refer on a number of occasions to the accused's knowledge of the factual quality of a crime against humanity, as Dubin C.J. points out, he returned again and again to his view that the jury had to be satisfied beyond a reasonable doubt that the accused knew that the act he did was inhumane (i.e., a crime against humanity). Dubin C.J. refers to a number of these instances (at pp. 32-33). I cite a few here:

> Remember always that before the accused can be convicted, it has to be proved beyond a reasonable doubt, *whatever he did to his knowledge rose up to the level of a war crime or rose up to the level of a crime against humanity*.
>
> *Even if the Crown proved beyond a reasonable doubt the accused committed confinement, robbery, kidnapping or manslaughter*; *you must acquit unless the Crown also proves beyond a reasonable doubt that to the knowledge of the accused what he did rose up to the level of a war crime or rose up to the level of a crime against humanity*.
>
> . . .
>
> One of the ways for the Crown to prove Count 1 is to prove beyond a reasonable doubt that the accused personally knew that the confinement had the factual quality of a crime against humanity in the sense that it was an inhumane act. Now, this is just one element. Of course, there are six or seven other things the Crown has to prove, but this is one example of one element the Crown has to prove. So *it is an essential element on that count that the Crown has to prove beyond a reasonable doubt the accused knew that the confinement was an inhumane act*. [Emphasis added by Dubin C.J.]

In my view, these instructions introduced elements of knowledge of both the legal and moral status of the conduct, in a way that is not required by either domestic or international law.

It is well established in our domestic criminal law jurisprudence that knowledge of illegality is not required for an accused. Section 19 of the *Code* echoes a requirement found in earlier codes (including the one in effect at the time the actions in this case were alleged to have been committed): ignorance of the law by one who commits an offence is not an excuse for committing the offence. At common law the principle is well established. As Smith and Hogan, *Criminal Law* (7th ed. 1992), put it, at p. 81:

> It must usually be proved that D intended to cause, or was reckless whether he caused, the event or state of affairs which, as a matter of fact, is forbidden by law; but it is quite immaterial to his conviction (though it might affect his punishment) whether he *knew* that the event or state of affairs was forbidden by law. [Emphasis in original.]

Nor should it be forgotten that awareness that the act is morally wrong is also immaterial. Smith and Hogan, *supra*, note, at p. 53:

> A man may have *mens rea*, as it is generally understood today, without any feeling of guilt on his part. He may, indeed, be acting with a perfectly clear conscience, believing his act to be morally, and even legally, right, and yet be held to have *mens rea*.

In *R. v. Théroux*, [1993] 2 S.C.R. 5, at p. 18, McLachlin J. emphasized that regardless of the nature of the circumstances or consequences required:

> First, as Williams underlines, this inquiry has nothing to do with the accused's system of values. A person is not saved from conviction because he or she believes there is nothing wrong with what he or she is doing. The question is whether the accused subjectively appreciated that certain consequences would follow from his or her acts, not whether the accused believed the acts or their consequences to be moral.

The underlying rationale behind the *mens rea* requirement is that there is a lack of sense of personal blame if the person did not in some way even intend to do the action or omission. In finding a war crime or crime against humanity, the trial judge must, of course, look for the normal intent or recklessness requirement in relation to the act or omission that is impugned. However, there is rarely any requirement that the accused know the legal status or description of his or her behaviour. This is not part of the rules of our criminal law and, in my view, is not required under international law. It would be strange if it were. For as counsel for the intervener B'Nai Brith observed, in the case of crimes against humanity, for example, the issue of humaneness would have to be judged in terms of the moral values of the perpetrator of the prohibited act, rather than the moral views of the international community that established the norm.

The Crown's international law expert, Professor Bassiouni, it is true, did at some point in his testimony suggest that an accused must have had knowledge of international law in order to find that he or she has committed a war crime or crime against humanity. While he readily agreed with the Crown that an accused need not know that his or her actions comprised some particular offence under international law, he suggested that the accused would have to have a "general sense" that his or her conduct was illegal under international law. Representative

of his somewhat confusing viewpoint is the following exchange with crown counsel:

> Q. Does he have to know that his conduct amounts to a war crime or crime against humanity at international law?
>
> A. He doesn't have to know that with the specificity that you're claiming it, and I suppose by my analogy is, does a person who commits murder know that the act of murder constitutes murder in the first degree in that time of a statute. So it is the general knowledge that there is a prohibition by law that you're supposed to have, as opposed to a specific knowledge of the specific type of crime that you might be committing.
>
> Q. And so would the victim or the -- ignorance of the law is no excuse in the application of international law?
>
> A. Yes, indeed, because it is a general principle of law because it exists in every legal system of the world.
>
> Q. So what is it that a perpetrator must know in order to attract culpability or liability at international law for war crimes or crimes against humanity?
>
> A. Well, the individual must obviously have knowledge of the nature of the acts he is engaging in. He must know that these acts are a violation of the law. He does not have to know the specific label of the violation that he has committed. And he must act with knowledge or intent.

M. Cherif Bassiouni in his later book, *Crimes Against Humanity in International Criminal Law* (1992), suggests that there should be a "rebuttable presumption" of knowledge of international criminal law. He states, at p. 364:

> This rebuttable presumption includes knowledge of the illegality of the act performed, based on the standard of reasonableness. Notwithstanding this standard of reasonableness, an individual may present the defense of ignorance of the law. Thus, this legal standard is not ultimately objective, but subjective.

Given this basic viewpoint, the trial judge was not surprisingly confused as to the *mens rea* requirement.

It is instructive at this point to say something about the utility of the views of learned writers such as Professor Bassiouni in determining the applicable international law. They are extremely useful, of course, in bringing before the Court the various relevant sources of law, and as Lord Alverstone observed in *West Rand Central Gold Mining Co. v. The King*, [1905] 2 K.B. 391, at p. 402, they also render "valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged". But, as he went on to add (at p. 402), "in many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to be... the conduct of nations *inter se*, than the enunciation of a rule or practice as universally approved or assented to [by nation states] as to be fairly termed . . . `law'". In a word, international conventions and the practices adopted and approved as law by authoritative decision makers in the world community, along with the general principles of law recognized by civilized countries are what constitute the principal sources of international law. The pronouncements of learned writers on international law are extremely useful in setting forth what these practices and principles are, but the personal views of learned writers in the field, though useful in developing consensus, are of a subsidiary character in determining what constitutes international law. This approach, which is universally accepted by the international community, is authoritatively set down in Art. 38(1) of the *Statute of the International Court of Justice* which reads:

Article 38

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (*a*) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
>
> (*b*) international custom, as evidence of a general practice accepted as law;
>
> (*c*) the general principles of law recognized by civilized nations;
>
> (*d*) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. [Emphasis added.]

On an examination of these sources of international law, I am in complete agreement with the dissenting judges in the Court of Appeal that international law does not require such a high mental element as the majority in that court and the trial judge thought necessary. In fact, Bassiouni does not represent the consensus of legal writers. He himself made it clear that the majority view among international law scholars was that there was no requirement of knowledge of the international legal quality of the actions. Clearly, this is not the international law emerging out of the *Charter of the International Military Tribunal*, for which no such knowledge requirement is included. Nor was it considered to be a requirement in the war crimes and crimes against humanity decisions at Nuremberg. And if we turn to the general principles of law recognized by civilized nations, Bassiouni in the passage in the testimony produced above accepted the principle that ignorance of the law is no excuse in that application of international law "because it exists in every legal system of the world".

Indeed, as one goes back through the history of international law, knowledge of international law has never been a requirement for culpability.

Traditionally, the western and Christian conception of international law especially in this area can be seen to coincide with the dictates of natural law; under the Roman Law, for example the *jus gentium* which was applied to non-Romans was presumed because it coincided with the *jus naturalis*. In Grotius' theory of international law, which applied to all individuals as well, the dictates of international law followed as dictates of natural reason. Piracy or slavery would be contrary to international law as long as the accused had preyed on ships or traded in slaves, regardless of whether the pirates or slavedealers were aware of how their conduct was classified under international law. In the international realm as much as the domestic, blameworthiness in criminal law does not consist of knowingly snubbing the law, but rather in deliberately engaging in certain types of conduct that international law prohibits.

It is evident from his book that Bassiouni required a knowledge of the legal quality of the actions because of his concerns about the state of international law prior to World War II. I will more fully address the issue of the alleged retroactivity of the international law below. It suffices at this point to say that this view appears to be based on an impoverished view of the nature and sources of international law. As Bassiouni himself noted in testimony, his view is a minority one. In relation to war crimes, the content of the prohibited actions was incontestably well established. And in relation to crimes against humanity (with which Bassiouni was concerned in his comments above), the more representative view is that these crimes were well established by the customs of international law as evidenced in practice and in a variety of earlier conventions, and their existence was justified, in particular, on the basis of the widespread practice of many national laws, including those of Germany, which criminally sanctioned such

conduct. For example, Schwarzenberger, *International Law*, vol. 2, *The Law of Armed Conflict* (1968), at pp. 23-27, emphasizes that the foundation of the Nuremberg decisions on crimes against humanity was the existing prohibitions in civilized nations. For still greater certainty, this alternative (but well established) source for international law is, as noted earlier, specifically referred to in the definition of "crime against humanity" set forth in s. 7(3.76), which alludes to the three alternative sources of international law, conventional international law, customary international law and "the general principles of law recognized by the community of nations".

To summarize, then, the correct approach, in my view, is that the accused have intended the factual quality of the offence, e.g. that he was shooting a civilian, or that he knew that the conditions in the train were such that harm could occur to occupants. It is not possible to give an exhaustive treatment of which circumstances must have an equivalent knowledge component. Whether there is an equivalent mental element for circumstances will depend on the particular war crime or crime against humanity involved. However, in almost all if not every case, I think that our domestic definition of the underlying offence will capture the requisite *mens rea* for the war crime or crime against humanity as well. Thus, the accused need not have known that his act, if it constitutes manslaughter or forcible confinement, amounted to an "inhumane act" either in the legal or moral sense. One who intentionally or knowingly commits manslaughter or kidnapping would have demonstrated the mental culpability required for an inhumane act. The normal *mens rea* for confinement, robbery, manslaughter, or kidnapping, whether it be intention, knowledge, recklessness or wilful blindness, would be adequate. As Egon Schwelb notes in "Crimes Against Humanity" (1946), 23 *Brit. Y.B. Int'l*

L. 178, at pp. 196-97, almost all the serious crimes of the municipal law of civilized nations are also in some basic sense culpable offences in the minds of humanity; for a similar view, see Law Reform Commission of Canada, *Our Criminal Law* (1976), at pp. 3, 5 and 7. The additional conditions of the *actus reus* requirement under international law are intended to be used to ascertain whether the factual conditions are such that the international relations concerns of extraterritorial limits do not arise. Since in almost all if not every case the *mens rea* for the war crime or crime against humanity will be captured by the *mens rea* required for the underlying offence that will have to be proved to the jury beyond a reasonable doubt, the trial judge will rarely, if ever, have to make any additional findings in relation to the *mens rea* to satisfy the jurisdiction requirements.

From what I have been able to determine, the issue does not arise in this case, but assuming there may in certain cases be circumstances relating to crimes against humanity and war crimes that involve the individual culpability of an accused that is not captured by the mental element in the underlying offence, I do not think this could lead to any unfairness. It must be remembered that under s. 7(3.73) of the *Code*, an accused may rely on any "justification, excuse or defence available . . . under international law" as well as under the laws of Canada. If a justification, excuse or defence that would have been available had the accused been charged with the crime under international law rather than the underlying crime, it should be referred to the jury with appropriate instructions whether the issue arises on the evidence presented by the Crown or the accused. The jury would then have to decide the issue, with any reasonable doubt decided in favour of the accused.

For these reasons, I conclude that the trial judge and majority of the Court of Appeal erred in requiring an excessively high *mens rea*, one going beyond the *mens rea* for the underlying offence.

Charter Issues

Up to this point, I have focused on distilling the proper interpretation of s. 7(3.71)-(3.77) of the *Criminal Code*, which I have found to be a jurisdiction-endowing provision, and on defining the precise limits of the trial judge's role in ruling on the preliminary jurisdictional question. I now turn to the constitutional issues raised by the respondent and by the courts below. As I earlier noted, the trial judge and the majority of the Court of Appeal intermixed the interpretative exercise with accommodation of *Charter* concerns. I prefer first to extract the true intention of Parliament in accordance with the ordinary canons of statutory interpretation, and only then to measure that interpretation by constitutional standards. This approach is especially appropriate in the present case since, as I see it, that interpretation does not pose *Charter* difficulties. I shall now set forth the questions raised and my response to them.

Does the Interpretation of Section 7(3.71) of the Criminal Code as a Jurisdictional Section Violate Sections 7 and 11(f) of the Charter, by Taking From the Jury the Determination of War Crime/Crime Against Humanity?

This challenge was not raised by the respondent as a ground of cross-appeal *per se*; rather, it underlies his argument and the majority reasons in the Court of Appeal regarding the proper interpretation of s. 7(3.71)-(3.77). For the respondent, the concern lies more with s. 7 of the *Charter*. He argues that those on

trial as a result of s. 7(3.71)-(3.77) are highly stigmatized. Consequently, he argues, unless the accused's guilt of war crimes or of crimes against humanity is found by a jury beyond a reasonable doubt and knowledge and subjective *mens rea* attach to such crimes, the exigencies of fundamental justice would not be met.

This argument reflects a misunderstanding of this Court's jurisprudence on the dictates of fundamental justice respecting *mens rea* for an offence that involves special stigma. In *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, at p. 653, this connection between stigma and necessary *mens rea* was expressed by Lamer J. (as he then was):

> . . . there are, though very few in number, certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime.

I observed, at p. 665, that:

> . . . because of the stigma attached to a conviction for murder, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime, namely one referable to causing death. . . . It is sufficient to say that the mental element required by s. 213(*d*) of the *Criminal Code* is so remote from the intention specific to murder (which intention is what gives rise to the stigma attached to a conviction for that crime) that a conviction under that paragraph violates fundamental justice.

I do not take our reasons in *Vaillancourt*, *supra*, to have dictated a necessary standard of proof or to have required that the jury decide certain matters, in cases of special stigma, in order to accord with the principles of fundamental justice. As I read it, the Court viewed certain offences, which import a high degree of stigma,

as demanding a higher degree of *mens rea*, on a substantive level, reflecting the nature of the relevant offence. The debate arises on a substantive, not a procedural plane. The issue is one of finding where, on the objective-to-subjective scale of intent, a particular offence falls. Our assessment of fundamental justice in *Vaillancourt*, *supra*, and in all subsequent cases, did not lead us to conclude that because a special stigma might attach to certain offences, only the jury is to be entrusted with finding *mens rea* and only on a standard of proof beyond a reasonable doubt. I note that in *R. v. Lyons*, [1987] 2 S.C.R. 309, this Court has held that a hearing for the "labelling" of a convicted person as a dangerous criminal does not require the determination of dangerousness by a jury, though such a determination clearly carries a serious stigma.

The scheme set up by Parliament in s. 7(3.71)-(3.77) of the *Code* does not deprive the accused of his or her rights in a manner inconsistent with the principles of fundamental justice. The accused cannot be found guilty of the offence with which he or she was charged, i.e., the underlying domestic offence, unless the jury finds the relevant mental element on proof beyond a reasonable doubt, a mental element which, we saw, coincides with that of the war crime or crime against humanity. And if any excuse, justification or defence for the act arises under international law, the accused is entitled to the benefit of any doubt about the matter, including any relevant *mens rea* attached to such excuse, justification or defence.

I would add that any stigma attached to being convicted under war crimes legislation does not come from the nature of the offence, but more from the surrounding circumstances of most war crimes. Often it is a question of the scale

of the acts in terms of numbers, but that is reflected in the domestic offence; for example, a charge of the kidnapping or manslaughter of a hundred people in the domestic context itself raises a stigma because of the scale, but one that s. 7 is not concerned about. Similarly, the jurisprudence does not allow for stigma that may also result from being convicted of an offence in which the surrounding circumstances are legally irrelevant but public disapproval strong. Thus one convicted of a planned and deliberate murder can face additional stigma because his or her actions were particularly repulsive or violent, but our system does not make any additional allowance for that.

A separate but related concern is that reflected in the Court of Appeal majority's interpretation of s. 7(3.71). The majority looked to the *Charter* right of trial by jury, found in s. 11(*f*), to reinforce its other justifications for reading s. 7(3.71) as creating the offences of war crime and crime against humanity. The majority observed that the function of the jury is strongly rooted in determining the guilt or innocence of the accused. In its view, the determination of whether the accused's conduct amounts to a war crime or crime against humanity involves a question of culpability and thus must be entrusted to the jury. At page 111 of its reasons, the majority explained:

> There can be no doubt that the allegations that Finta committed war crimes and crimes against humanity go to his culpability. Without these allegations Canada has no interest in and no justification for bringing Finta before a Canadian criminal court to answer for his conduct. The moral claim that Canada has against those who have committed the offences referred to in s. 7(3.71) outside Canada comes not from the mere alleged violation of Canadian domestic criminal law but from the additional allegation that the violation reached the dimension and status of a war crime or a crime against humanity. Canada's international obligation to prosecute such offences rests on the same foundation.

The question, in the eyes of the Court of Appeal, thus was properly left to the jury.

In my view, Canada always has an interest, or a moral claim, in bringing those who commit acts that it regards as offensive behaviour to justice. Conduct is not viewed as any less culpable merely because it is committed abroad; murder of anybody anywhere is something we find abhorrent. This is reflected, as I earlier noted, in our laws of immigration and extradition. However, because of Canada's respect for the underlying premises of international relations, i.e., comity and respect for the sovereignty of independent states, a self-imposed limit is placed on its ability to prosecute these culpable acts when committed outside its territory. As part of our respect for sovereignty and part of our confidence in the standards of other nations, we would normally expect that other nations would punish the culpable conduct. Such a limit is also justified on the basis of efficacy of prosecution; it is usually more efficient and effective to prosecute in the place where the criminal act actually occurred. Nevertheless, we should never forget that, throughout, in our view, this conduct constitutes culpable conduct in violation of our legal standards. This perspective is reflected in s. 6 of the *Code*, explored above. The general principle embodied therein does not strip extraterritorially committed offences of their culpability in Canadian eyes; rather, the ability to convict or to discharge is removed.

The concern towards which the jurisdictional portion of s. 7(3.71) is directed is, rather, the determination of the appropriate court to hear the case. Put another way, the inquiry goes to assessing whether Canadian courts are able to convict or discharge the perpetrator of the relevant conduct. The international community agreed, presumably because of the general revulsion for these types of

conduct and their recognition of the need for cooperation because of the difficulty in bringing offenders to justice in the place where they were committed, that war crimes and crimes against humanity presented cases worthy of exception to the general concerns of international law. The preliminary question in s. 7(3.71), whether the relevant conduct constitutes a situation evaluated by the international community to constitute one warranting treatment exceptional to the general precepts of international law, involves an assessment of Canada's international obligations and other questions concerning the interrelationship of nations. The culpability of the acts targeted by this provision, from Canada's perspective, arises from, and will be assessed according to our standards of offensive behaviour as embodied in the *Code*. In the absence of international accord, we would still have found the conduct criminal and culpable, but for other policy reasons, would not have prosecuted in our courts. It is this domestic evaluation of culpability that served as the instigator for Canada's agreement to be bound by international conventions in this area. The decision to give Canadian courts jurisdiction in the case of war crimes and crimes against humanity, as is the case in the other situations of extraterritorial jurisdiction granted in s. 7 of the *Code*, is based not on culpability, but on other often totally unrelated policy considerations. The preliminary question of war crime or crime against humanity is more of a political inquiry than one of culpability. As such, the issue is not one that is viewed as traditionally falling within the province of the jury. Admittedly, the standard used to determine whether these exceptional cases are present is one of international "crimes". However, this does not take away from the fact that the considerations underlying this determination will involve questions of international obligations, with which the trial judge is better equipped to deal.

In my view, this situation is similar to that on which I commented on in *Libman v. The Queen*, [1985] 2 S.C.R. 178, a case concerning Canadian criminal jurisdiction. I there noted that the concerns of international comity normally called for restraint in the extraterritorial application of Canadian criminal law. But I added that, in the context there, the dictates of international comity were not offended because there was a substantial Canadian element in the criminal activities involved. Moreover, I noted that our respect for the interest of other states was in fact served by assisting in the prosecution of offences having a transnational impact on other states. In an increasingly interdependent world, I observed (at p. 214), "we are all our brother's keepers" -- we are all responsible for the welfare of those in other societies. Nowhere can our international responsibility be more at stake than in the situation of war crimes and crimes against humanity. The international community has not only stated that it does not object to our exercising jurisdiction in this field; it actively encourages the prosecution of those whose criminal conduct also constitutes war crimes or crimes against humanity. From the sheer viewpoint of our moral responsibility, I fail to see any injustice in prosecuting these crimes in accordance with our normal criminal procedures.

When one considers the technical nature of the actual factual findings that must be made by the trial judge on the preliminary jurisdictional question, as well as the complicated nature of the international law with which he or she must grapple, it is apparent that the assignment of this determination to the trial judge is just and well-designed. As noted earlier, the factual issues involve matters specific to war, state policy and the classification of groups or individuals. In the case of a specific war crime, the trial judge would be confronted with questions of

circumstances, such as whether the actions occurred during a state of war, as well as of definition of the objects of the relevant conduct, such as whether the victims were enemy soldiers, surrendered prisoners or civilians. Where a crime against humanity is alleged, the trial judge's findings would have to include such issues as whether the impugned conduct was the practical execution of state policy and whether the conduct targeted a civilian population or other identifiable group of persons. The technical nature of these inquiries, unrelated as they are to matters of culpability, do not form part of the special capacity of the jury. This leads me to conclude that it is not unfair or contrary to our philosophy of trial by jury to entrust these issues to the trial judge rather than the jury.

Moreover, even among the authorities, much confusion exists as to the distillation of the contents of international law. No clear articulation of the physical and mental elements of the international offences of war crimes and crimes against humanity and their defences is found among scholars in this area. This confusion is understandable and unavoidable in our system of international law among sovereign nations. Although some aspects of these offences are delineated in conventions, this is not the case for all; another important source of international law is custom. To establish custom, an extensive survey of the practices of nations is required. Moreover, in the case of crimes against humanity, the *Criminal Code* definition is informed by the general principles of law recognized by the community of nations. As L. C. Green remarks, "Canadian Law, War Crimes and Crimes Against Humanity" (1988), 59 *Brit. Y.B. Int'l L.* 217, at p. 226:

> . . . a major problem would arise in seeking to ascertain just what is meant by the `general principles of law recognized by the community

> of nations'. . . . The difficulty lies in determining what are `general principles of law' and what percentage of the world's States constitutes a sufficient proportion to be considered `the community of nations'. Does this collection have to include every major power or be representative of all the leading legal systems of the world?

It is, of course, not an answer to this complicated task to say that the contents of international offences are too difficult to distill and, therefore, that the accused cannot be found guilty; the confusion is the reality of the international law which Canada has obliged itself to observe and apply. This abandonment of international obligation, however, is likely to occur where the jury is called upon to determine the contents of the international offences. The necessary confusion could mislead the jury into believing that international norms are not really law and opens the door to manipulative lawyering. The questions of pinpointing international law, therefore, are best left in the hands of the trial judge whose training better equips him or her for the task. Not only is the judge better trained than the jury in evaluating international law, but, in fact, his or her interpretation of international law bears some force internationally (see Art. 38 of the *Statute of the International Court of Justice*). Again, the inquiries required are not of a kind immediately related to the accused's culpability for the domestic offence; rather, they are more legal and technical. There can, in my view, be no doubt that justice is better served by leaving the question of international law to the trial judge. I can perhaps make the point that the process bears some similarity to that of determining the content and application of common law, except that the latter, fluid and moveable as it may be, is far more precise.

The approach taken in the courts below leads to the following incongruous result. War crimes and crimes against humanity were viewed as so

heinous as to require a procedure so unmanageable as to make successful prosecution unlikely. This is certainly not called for by the *Charter*. From *R. v. Lyons*, *supra*, onwards, this Court has repeatedly reiterated that s. 7 requires a fair procedure, not the procedure most favourable to the accused that can be imagined, and that fairness requires a proper consideration of the public interest (at p. 362). And here the public interest is no less than Canada's obligation as a responsible member of the world community to bring to justice those in our midst who have committed acts constituting war crimes and crimes against humanity -- an obligation clearly contemplated by the *Charter* (s. 11(*g*)). This procedure, devised by Parliament, is essential to underline the fundamental values shared by Canadians with the world community. It must be workable not only to render justice in relation to the horrors of the past. It must also respond to the ongoing atrocities that daily assault our eyes whenever we turn on the television and that, we all have reason to fear, will continue into the future. And, of course, the procedure, as devised by Parliament, is fair. With appropriate modifications to ensure that Canada is respectful of the jurisdictional limits under the law of nations and the additional defences it provides, it is the same procedure we use to prosecute Canadians for crimes committed in Canada. With one exception required by international law, those accused of war crimes and crimes against humanity are accorded no less. They deserve no more.

As we have seen, many cogent reasons justify Parliament's choice to entrust to the trial judge the preliminary jurisdictional question of the presence of a war crime or a crime against humanity to be determined on a balance of probabilities. It must be realized, however, that the jury's role in the prosecution remains extensive. As in any other domestic prosecution, the jury is the sole

arbitrator of whether both the *actus reus* and the *mens rea* for the offence with which the accused is charged are present and whether any domestic defences are available to the accused. Moreover, in addition to its normal functions, the jury also decides whether any international justification, excuse or defence is available. These determinations are not merely technical findings to supplement the extensive role of the trial judge; on the contrary, they go to the essence of the accused's culpability. The jury alone decides whether the accused is physically and mentally guilty of the offence charged, on proof beyond a reasonable doubt.

The only element removed from the jury's usual scope of considerations in regular domestic prosecutions is the *de facto* law defence (s. 7(3.74)). This constitutes the respondent's second ground of cross-appeal, to which I now turn.

Does Section 7(3.74) of the Criminal Code Violate Section 7 of the Charter by Removing Available Defences?

Section 7(3.74) must be read in conjunction with s. 7(3.73) in understanding the overall scheme of defences permitted by the *Code*. For convenience, I will repeat them:

> **7.** . . .
>
> (3.73) In any proceedings under this Act with respect to an act or omission referred to in subsection (3.71), notwithstanding that the act or omission is an offence under the laws of Canada in force at the time of the act or omission, the accused may, subject to subsection 607(6),

> rely on any justification, excuse or defence available under the laws of Canada or under international law at that time or at the time of the proceedings.
>
> (3.74) Notwithstanding subsection (3.73) and section 15, a person may be convicted of an offence in respect of an act or omission referred to in subsection (3.71) even if the act or omission is committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

The correct interpretation of these two sections is that they qualify each other. Section 7(3.73) does not in my view contradict s. 7(3.74). Together they indicate that the accused has the benefit of all available international and domestic justifications, excuses or defences. All that is ruled out by the operation of s. 7(3.74) is the simple argument that because a domestic law existed that authorized the conduct, that in itself acts as an excuse. I have indicated earlier that this rule is taken from the international law on the subject, and is founded on the very rationale for the existence of that law; see *Principles of the Nuremberg Charter and Judgment*, Principle IV, *supra*.

The inclusion of the international justifications, excuses and defences will allow any recognized doctrines peculiar to the international context to be included. An example of a peculiar form of international defence is that of reprisals or the more general doctrine of military necessity; see, for example, W. J. Fenrick, "The Prosecution of War Criminals in Canada" (1989), 12 *Dalhousie L.J.* 256, at pp. 273-74. However, no such international justifications, excuses or defences are claimed here, and none applies.

The two defences put to the jury in this case are ones that exist under our domestic law. They are the peace officer and military orders defences, which

are both related to arguments based on authorization or obedience to national law. These defences are not simply based on a claim that there existed a national law under which the accused acted. The rationale for these defences is that a realistic assessment of police or military organizations requires an element of simple obedience; there must be some degree of accommodation to those who are members of such bodies.

At the same time, it is generally recognized that totally unthinking loyalty cannot be a shield for any human being, even a soldier. The Canadian domestic provisions are probably more generous than required under international law. For example, a number of international lawyers have observed that the superior orders defence lacks official recognition under international law; see for example, Yoram Dinstein, *The Defence of `Obedience to Superior Orders' in International Law* (1965). The *Charter of the International Military Tribunal* and the trials pursued under it did not accept such a defence, except in mitigation of punishment. The defence, however, is part of the military law of many nations. The American military trial of soldiers for the horrendous My Lai massacre during the Vietnam War is a widely known military case where the defence was raised. In my view, the defence is part of our national law, as explained notably in the work of L. C. Green; see, for example, *Superior Orders in National and International Law* (1976). The defence is not simply based on the idea of obedience or authority of *de facto* national law, but rather on a consideration of the individual's responsibilities as part of a military or peace officer unit. For these reasons, such a defence can be considered by the jury, and is not excluded under s. 7(3.74).

Essentially obedience to a superior order would appear to provide a valid defence unless the act is so outrageous as to be manifestly unlawful. Further, in any case, an accused will not be convicted of an act committed pursuant to an order wherein he or she had no moral choice but to obey. The flavour of the defence and the circumstances under which it may apply can perhaps be caught by excerpts from relevant authorities on the matter, many of which are reproduced in L. C. Green,"The Defence of Superior Orders in the Modern Law of Armed Conflict" (1993), 31 *Alta. L. Rev.* 320. I set forth a few of these. Lauterpacht, having referred to British and American manuals of military law, has this to say about it in his revised edition of Oppenheim's *International Law* (6th ed. 1944), vol. 2, at pp. 452-53:

> . . . a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. . . . However, . . . the question is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity.

That there is nothing unfair in not permitting superior orders as a defence where the act is "manifestly unlawful" is evident when one considers the nature of a manifestly unlawful order as it appears in *Ofer v. Chief Military Prosecutor* (the *Kafr Qassem* case) [Appeal 279-283/58, *Psakim* (Judgments of the District Courts of Israel), vol. 44, at p. 362], cited in appeal before the Military Court of Appeal, *Pal. Y.B. Int'l L.* (1985), vol. 2, p. 69, at p. 108, where the Military Court of Appeal of Israel approved the following judgment:

> The identifying mark of a `manifestly unlawful' order must wave like a black flag above the order given, as a warning saying: `forbidden'. It is not formal unlawfulness, hidden or half-hidden, not unlawfulness that is detectable only by legal experts, that is the important issue here, but an overt and salient violation of the law, a certain and obvious unlawfulness that stems from the order itself, the criminal character of the order itself or of the acts it demands to be committed, an unlawfulness that pierces the eye and agitates the heart, if the eye be not blind nor the heart closed or corrupt. That is the degree of `manifest' illegality required in order to annul the soldier's duty to obey and render him criminally responsible for his actions.

In this area, the trial judge did a balanced job in setting out the requirements of the defence. For the peace officer defence he instructed the jury that the Crown must prove beyond a reasonable doubt that: (1) no reasonable person in the position of the accused would honestly (even if mistakenly) believe that he or she had lawful authority; or, (2) any reasonable person in the position of the accused would know that the offence (e.g., confinement) had the factual quality of a crime against humanity or a war crime; or, (3) the accused used unnecessary or excessive force. For the military orders defence, the judge instructed the jury that the Crown had to prove beyond a reasonable doubt that: (1) no reasonable person in the position of the accused would honestly (even if mistakenly) believe that the order was lawful, or, (2) any reasonable person in the position of the accused would know that the confinement had the factual quality of a crime against humanity or a war crime; and, (3) the accused had a moral choice to disobey because no reasonable person in the position of the accused would honestly (even if mistakenly) believe on reasonable grounds that he or she would suffer harm equal to or greater than the harm he or she caused. In my view, such limits on these defences give effect to the intent of the s. 7(3.74) exclusion of the claim *simpliciter* of obedience to *de facto* national law.

It must be remembered that "the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked"; see *Lyons*, *supra*, at p. 361. I would agree with Callaghan A.C.J. at p. 586 that "[t]here is no statutory or common law rule that supports the proposition that all defences are applicable to all offences". In *R. v. Bernard*, [1988] 2 S.C.R. 833, a majority of this Court agreed that the removal of a particular defence does not violate the principles of fundamental justice in s. 7 of the *Charter* even when that defence, drunkenness, arguably concerns the existence of *mens rea*. This is particularly the case where the exculpatory defence would undermine the entire purpose of an offence; for example, the defence of drunkenness cannot be used as a defence to impaired driving because it constitutes the very nature of the offence; see *R. v. Penno*, [1990] 2 S.C.R. 865. Less controversially, justifications and excuses are commonly restricted in their application, and there is no suggestion that this violates the principles of fundamental justice. For example, s. 14 of the *Code* prevents the operation of the defence of consent in relation to offences of causing death.

The whole rationale for limits on individual responsibility for war crimes and crimes against humanity is that there are higher responsibilities than simple observance of national law. That a law of a country authorizes some sort of clearly inhumane conduct cannot be allowed to be a defence. Indeed, one main concern of both war crimes and especially crimes against humanity relates to state-sponsored or authorized cruelty. To allow the state to authorize and immunize its agents from any responsibility simply by enacting a law authorizing behaviour that is contrary to the principles of international law and the general principles of law observed by all civilized nations is in my view untenable. The basic viewpoint of

a country such as Canada that recognizes that the standards of international law are part of our domestic law cannot allow for other states simply to deny or violate observation of the standards of international law by the enactment of contrary domestic laws.

Before turning to the remaining *Charter* issues raised in the cross-appeal, I should say that I largely accept the reasoning of both Callaghan A.C.J. and the Court of Appeal judges as more than adequate to dispose of these remaining issues, but I would make some additional observations. The reasons I have just given in no way detract from the findings of Callaghan A.C.J., accepted by the unanimous Court of Appeal, regarding the four remaining *Charter* issues on the cross-appeal.

Do the War Crime Provisions Violate Sections 7 and 11(g) of the Charter Because They Are Retroactive?

On its face, the jurisdiction provision, s. 7(3.71), specifically requires that the impugned conduct be illegal under both the Canadian law and the international law at the time. The simplest answer to this *Charter* argument is again that the accused is not being charged or punished for an international offence, but a Canadian criminal offence that was in the *Criminal Code* when it occurred. Nevertheless, the accused argues that the international law in this area was both retroactive and vague. This argument is in my view based on a shallow understanding of the nature and contents of international law.

The definitions of "war crime" and "crime against humanity" in s. 7(3.76) requires that the act "at that time and . . . place, constitutes a contravention

of customary international law or conventional international law". The definition of "crime against humanity" expressly allows for a third alternative, that the act be "criminal according to the general principles of law recognized by the community of nations".

The nature of a decentralized international system is such that international law cannot be conveniently codified in some sort of transnational code. Its differing sources may alarm some strict legal positivists, but almost all international lawyers now recognize that such a crude analogy to the requirements of a domestic law system is simplistic; see, for example, Williams and de Mestral, *supra*. The most common sources for international law are in the custom of international state practice and in international conventions. But other sources are also well established. For example, Art. 38(1)(*c*) of the *Statute of the International Court of Justice* provides as a third source, "the general principles of law recognized by civilized nations".

Even on the basis of international convention and customary law, there are many individual documents that signalled the broadening prohibitions against war crimes and crimes against humanity. Particularly with regard to war crimes there were numerous conventions that indicated that there were international rules on the conduct of war and individual responsibility for them. These limits were found in Christian codes of conduct, in rules of chivalry and in the writing of the great international law writers such as Grotius. All of this customary European law was confirmed and developed in a number of treaties and conventions through the 19th and 20th Centuries, for example, in the *Hague Conventions* of 1899 and 1907. This impressive list of prohibited forms of conduct in war extended to

treatment of non-combatants, innocent civilians and the imprisoned, the sick and the wounded.

As well, one should note that international law continues to maintain that crimes against humanity and war crimes were well established. This remains the official view of both international and national tribunals. As Bassiouni, *supra,* notes, at pp. 534-35:

> . . . arguments challenging the legality of the Charter's enunciation of "crimes against humanity" were consistently raised at the Nuremberg and Tokyo trials, the post-Nuremberg prosecutions under CCL [Allied Control Council Law] 10, before the proceedings conducted by the Allies in their occupation zones, and in the special military tribunals set up by the United States in the Far East. Similar claims were also raised in national tribunals, such as in the Eichmann and Barbie trials held, respectively, in Israel and France. They have always been rejected.

Bassiouni himself continued to have concerns about the somewhat uncertain status of crimes against humanity. It is part of his view that an entirely separate international court and a separate and elaborate international code is required. While these are admirable objectives, the absence of such ideal conditions should not be allowed to confuse the issue of whether crimes against humanity were retroactive in 1944 or not. The actions impugned as crimes against humanity had their own solid foundation.

As regards crimes against humanity, I prefer the reasoning of writers such as Schwarzenberger, *supra,* who have emphasized that the strongest source in international law for crimes against humanity was the common domestic prohibitions of civilized nations. The conduct listed under crimes against humanity was of the sort that no modern civilized nation was able to sanction:

enslavement, extermination, and other inhumane acts directed at civilian populations or identifiable groups. These types of actions have been so widely banned in societies that they can truly be said to fall to the level of acts that are *mala in se*. Even Bassiouni, *supra*, at p. 168, observes that the "historical evolution demonstrates that what became known as `crimes against humanity' existed as part of `general principles of law recognized by civilized nations' long before the Charter's formulation in 1945".

The drafters of our *Charter* realized that those with impoverished views of international law might argue that enforcing the contents of international law could be retroactive. Thus, s. 11(*g*) specifically refers to the permissibility of conviction on the basis of international law or the general principles of law recognized by the community of nations. A review of the drafting history of this provision reveals that one of the factors motivating the terms of the provision was the concern about preventing prosecution of war criminals or those charged with crimes against humanity; see the Deschênes Commission Report, *supra*, at pp. 137-48, especially at pp. 144-46; *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada* Issue no. 47, (January 28, 1981), at pp. 47:57-47:59, and Issue no. 41, (January 20, 1981), at p. 41:99.

For these reasons, I think it clear that the *Code* provisions do not violate s. 11(*g*) as being retroactive.

Does Section 7(3.71) Read with Section 7(3.76) Violate Section 7 of the Charter by Reason of Vagueness?

The respondent argues that the legislation in respect of the charges he faces is unconstitutional because it is too vague. This, of course, relates to the generality of the definitions of war crimes and crimes against humanity. Again the simple answer is that the offence with which the accused is charged and for which he will be punished is the domestic offence in the 1927 *Criminal Code*, and it is readily apparent that the cross-appeal is not concerned with arguing that these standard *Code* provisions are unconstitutionally vague.

To the extent that arguments of vagueness apply to the jurisdiction section, as I have outlined earlier, I consider this to be based first of all on a limited view of the nature and content of international law. As Williams and de Mestral, *supra*, at p. 12, note, even though there is no comprehensive codification, international law can nevertheless be determined. Given our common law tradition, we should be used to finding the law in a number of disparate sources. The definition section (s. 7(3.76)) instructs us that a war crime is partly defined under customary or conventional international law, and a crime against humanity, under customary or conventional international law, or under the general principles observed by civilized nations.

As noted earlier, the requirements of international law in 1944 in relation to war crimes are seen to be quite elaborate and detailed. And in relation to crimes against humanity, while somewhat more difficult, the reference to the national laws of most civilized nations at the time would indicate that such conduct would be excluded under the national laws. Finally, as already explained, much of this conduct is illegal under international law because it is considered so obviously morally culpable that it verges on being *malum in se*.

The standard for unconstitutional vagueness has been discussed by this Court in several cases. In *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, Gonthier J., at p. 643, thus summed up the standard of vagueness: "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate". In *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, McLachlin J. for the majority wrote, at p. 930:

> The union cites the principle that there must be no crime or punishment except in accordance with fixed, pre-determined law. But the absence of codification does not mean that a law violates this principle. For many centuries, most of our crimes were uncodified and were not viewed as violating this fundamental rule. Nor, conversely, is codification a guarantee that all is made manifest in the *Code*. Definition of elements of codified crimes not infrequently requires recourse to common law concepts: see *R. v. Jobidon*, [1991] 2 S.C.R. 714, where the majority of this Court, *per* Gonthier J., noted the important role the common law continues to play in the criminal law.

In my view, the contents of the customary, conventional and comparative sources provide enough specificity to meet these standards for vagueness.

Did the Pre-Trial Delay Violate Sections 7, 11(b) and 11(d) of the Charter?

The respondent also attempts to argue that the 45-odd years that have elapsed between the alleged commission of the offences and the charging of Mr. Finta constitutes a violation of his *Charter* guarantees. This contention has no merit. This Court has already held that pre-charge delay, at most, may in certain circumstances have an influence on the assessment of whether post-charge delay is unreasonable but of itself is not counted in determining the delay; see *R. v. Morin*, [1992] 1 S.C.R. 771, at p. 789. More commonly, pre-charge delay is not given any weight in this assessment; see *R. v. Kalanj*, [1989] 1 S.C.R. 1594. The

Charter does not insulate accused persons from prosecution solely on the basis of the time that has elapsed between the commission of the offence and the laying of the charge; see *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091, at p. 1100. As the respondent does not seem to complain about any post-charge delay, this ground of cross-appeal must be dismissed.

Does Section 7(3.71) Violate Sections 7 and 15 of the Charter by Applying Only to Acts Committed Outside Canada?

This ground assumes that s. 7(3.71) of the *Code* creates the new offences of war crimes and crimes against humanity. As has been discussed above, this provision is a jurisdictional one and creates no new offences. Whether impugned conduct is committed abroad or in Canada, the accused would be charged with the same offence, be it murder, robbery, kidnapping or forcible confinement, as in this case, and subject to the same penalty, if convicted. In fact, any difference in treatment favours the extraterritorial perpetrator of the relevant act or omission. Whereas the local perpetrator can only be convicted upon the jury's finding of both *actus reus* and *mens rea* and that no domestic defence avails, the conviction of the extraterritorial perpetrator requires, in addition to the surmounting of those same hurdles, the jury's rejection of any applicable international justification, excuse or defence and the trial judge's finding that the requirements of war crime or crime against humanity have been met. In this way, the extraterritorial offender actually benefits from double protection as a result of s. 7(3.71).

Conclusion and Disposition

Before concluding I should refer to a further technical question. The indictment alleged two counts each of unlawful confinement, robbery, kidnapping and manslaughter; each of these offences alleged, in separate counts, a war crime or a crime against humanity. From what I have stated earlier, it will be obvious that I agree with Tarnopolsky J.A. that it was unnecessary to charge each of the underlying offences twice, once as constituting a crime against humanity and once as a war crime. To give jurisdiction to Canadian courts, it is sufficient that the act charged constituted a crime against humanity or a war crime, so there were in essence four counts and not eight as framed.

I would allow the appeal on the basis of the first and second grounds of appeal, set aside the judgment of the trial judge and the Court of Appeal and order a new trial on four counts, one each of unlawful confinement, robbery, kidnapping and manslaughter, each count alternatively constituting a war crime or crime against humanity. I would dismiss the cross-appeal on the *Charter* issues.

The judgment of Gonthier, Cory and Major JJ. was delivered by

CORY J. -- How should the section of the *Criminal Code* dealing with war crimes and crimes against humanity be interpreted? That is the fundamental issue to be resolved in this appeal.

I. Historical and Factual Background

Some facts, well known to all must be set out. In September 1939, the Second World War began in Europe. It ended on that continent with the surrender

of Germany on May 8, 1945. Canada, as one of the allied powers, was at war with the axis countries (Germany and Italy) during the war. Hungary joined the axis powers in 1940, and was officially in armed conflict with Canada between December 7, 1941 and January 20, 1945.

Throughout the war Germany was led by Adolf Hitler and the National Socialist German Workers' Party (the Nazi Party). The German government pursued a cruel and vicious policy directed against Jewish people. When the war broke out, this same cruel policy was extended to all the areas under German influence and occupation, including Hungary. The implementation of the "final solution" by the German government meant that Jews were deprived of all means of earning an income, of their property, and eventually were deported to camps in eastern Europe, where they provided forced labour for the German war effort. In these dreadful camps many were put to death.

In Hungary, between 1941 and 1944 a series of anti-Jewish laws were passed. They culminated in the promulgation of a law containing a formula for the identification of Jews and requiring them to wear the yellow star. The Jews were therefore an identifiable group for the purposes of Hungarian law.

In March 1944, German troops invaded Hungary. The existing government was removed and an even more servile pro-German puppet government was installed. After the invasion, although Hungary appeared to exist as a sovereign state, it was in fact an occupied country. In order to obtain complete control over Hungary's economic and military resources, the German government established a command structure which flowed directly from Heinrich Himmler,

the Reichsführer SS and chief of German police, through the German-appointed Higher SS and police leader for Hungary in Budapest, and thence to the various German police and SS units that were stationed throughout the country, and from there to the Royal Hungarian Gendarmerie and the Hungarian police force.

The Royal Hungarian Gendarmerie was an armed paramilitary public security organization. It provided police services in rural areas and acted as a political police force. The German forces occupying Hungary were instructed not to disarm the Gendarmerie as it was in the process of being restructured so that it would be available to the Hungarian Higher SS and the Police Leader. Following the German occupation the new puppet government quickly passed a series of anti-Jewish laws and decrees. A plan for the purging of Jews from Hungary was incorporated in Ministry of Interior Order 6163/44, dated April 7, 1944. This was the infamous Baky Order. It was the only "authority" for the confinement of all Hungarian Jews, the confiscation of their property and their deportation.

It was the Baky Order which provided the master plan for the implementation of the final solution, which was to take place in six phases, namely: Isolation, Expropriation, Ghettoization, Concentration, Entrainment and Deportation. To carry out this plan, Hungary was divided into six zones under the command of the Royal Hungarian Gendarmerie. The City of Szeged was designated as one of seven concentration centres in Zone 4. The Baky Order was addressed to a number of officials, including all Gendarme District Commands, all Commanding Officers of the Gendarme (Detective) Subdivisions and the Central Detective Headquarters of the Royal Hungarian Gendarmerie. It placed

responsibility for carrying out the plan on the Royal Hungarian Gendarmerie and certain local police forces.

Shortly after the issuance of the Baky Order the six phases of the final solution were put into effect in Szeged. The Jewish people of the city were rounded up and forced into a fenced-in ghetto. Usually the Jews remained in the ghetto for a couple of weeks. They were then either transferred directly to a brickyard, or first to a sports field and then a few days later to the brickyard. By June 20, 1944, 8,617 Jews had been collected in the brickyard.

The brickyard was filthy, with grossly inadequate sanitary facilities. It consisted of a large open area containing an enormous kiln, a chimney and several buildings used for drying bricks. Jewish men, women and children were crowded together. They slept on the ground in the drying sheds, which had roofs but no walls. The compound was surrounded by a fence and guarded by gendarmes.

Announcements were repeatedly made over the loudspeaker ordering the Jews to surrender their remaining valuables, gold or jewellery. When the Jews were gathered for these announcements, a basket or hamper was presented for the collection of the valuables and the people were told that anyone who failed to comply with the orders would be executed.

In the days between June 24 and 30, 1944, the Jews in the brickyard were marched by the gendarmes to the Rokus train station. There they were forced

into box cars on three trains which took them from their homes in Hungary to the stark horror of the concentration camps.

Some 70 to 90 Jews together with their luggage were forced into each boxcar. These cars measured roughly eight metres by two metres. There was no artificial lighting in them. The crowding was so intense that most were forced to remain standing throughout the dreadful journey. The doors on the boxcars were padlocked shut. The only openings for air were small windows with grilles located in each of the four upper corners of the boxcar.

Usually the boxcars contained two buckets, one for water and the other for toilet facilities. However, during the journey the toilet buckets quickly overflowed with human excrement. The crowding was so bad that the buckets were inaccessible to many of the prisoners who were forced to relieve themselves where they stood or sat.

As a result of the intolerable conditions in the boxcars, some of the Jews, particularly the elderly, died during the journey. Neither the gendarmes nor the German guards permitted the bodies to be removed prior to the train's reaching its destination. The stench of decaying flesh was added to that of human excrement. Truly, these were nightmare journeys into hell.

Imre Finta was born on September 2, 1912 in the town of Kolozsvar. He studied law at the university in Szeged in the 1930s. In 1935 he enrolled at the Royal Hungarian Military Academy, and on January 1, 1939 was commissioned as a second lieutenant in the Royal Hungarian Gendarmerie. On April 5, 1942, he

was promoted to the rank of captain. He was transferred to Szeged as the commander of an investigative unit of the Gendarmerie.

In the post-war confusion Finta left Hungary. In 1947-48, he was tried *in absentia* in the People's Tribunal of Szeged and convicted of "crimes against the people". He was sentenced to five years of forced labour (later commuted to five years' imprisonment), confiscation of property, loss of employment and loss of the right to political participation for ten years. In 1951, Finta emigrated to Canada, and in 1956 became a Canadian citizen.

On January 27, 1958, as a result of a statutory limitation that existed under Hungarian law, the punishment of Finta in that country became statute-barred. In 1970, the Presidential Council of the Hungarian People's Council issued a general amnesty which, by its terms, applied to Finta. In Canada, the trial judge found that the general amnesty did not, either in its own terms or by operation of Hungarian law, constitute a pardon. Further, he found that the Hungarian trial and conviction were nullities under Canadian law. As a result, he concluded that Finta was not entitled to plead *autrefois convict* or pardon.

II. The Evidence

Expert Evidence as to the Validity of the Baky Order

Dr. Revesz testified that the Baky Order was manifestly illegal. He also stated that members of the Gendarmerie were involved in the conduct of criminal investigations. They were thus required to have a thorough training in Hungarian

law and procedure. Dr. Revesz concluded that, given a gendarme's knowledge of the law and the decrees published prior to the Baky Order, such an officer would have known that the Baky Order was beyond the prerogative of the Under Secretary of State and contained at least 14 violations of Hungarian law.

The trial judge directed the jury that the Baky Order was unlawful as violating Hungarian law, including a number of principles of the Hungarian Constitution.

Evidence Pertaining to Finta's Involvement in Events at Szeged

Finta was charged with unlawful confinement, robbery, kidnapping and manslaughter under the *Criminal Code*, R.S.C. 1927, c. 36, as amended. There are in effect four pairs of alternate counts. For example, count one describes the forcible confinement of 8,617 Jews as a crime against humanity, whereas count two characterizes that same forceable confinement as a war crime. The indictment alleges that in May and June of 1944 Finta forcibly confined 8,617 Jews in the brickyard at Szeged where he robbed them of their personal effects and valuables. It further alleges that in June 1944 at the Rokus railway station he kidnapped 8,617 Jews and caused the deaths of some of those persons.

The Crown's case depended in large measure on the testimony of 19 witnesses who had been interned in the brickyard and deported on one of the three trains. Some gave *viva voce* evidence before the jury. Others were examined by way of commission evidence taken in Israel and Hungary and their evidence was then presented at trial on videotape. Additionally, the trial judge at the request of

the defence, directed that the videotape of commission evidence of two other survivors be placed before the jury.

The evidence of the survivors fell into four general groups. Six witnesses who knew Finta before the events in issue testified as to things said and done by him at the brickyard and at the train station. A second group consisting of three witnesses who did not know Finta beforehand identified him as having said or done certain things at the brickyard and at the station. A third group consisting of three witnesses who did not know Finta beforehand also testified as to things said and done at the brickyard and at the station. However, this last group based their identification of Finta on statements made to them by others. The fourth group, consisting of eight witnesses who did not know Finta beforehand and did not identify him, gave evidence as to events at the brickyard and the train station.

Of the six witnesses who testified that they knew Finta before their imprisonment in the brickyard, four testified that Finta was in charge of the brickyard and one testified that everyone referred to Finta as the commander of the brickyard. Two of these six witnesses testified that Finta made the daily announcements in the brickyard demanding that the prisoners relinquish all their valuables on pain of death. Three of them testified that he supervised the confiscation of the detainees' valuables. Two of them testified that Finta was at the train station supervising the loading of the prisoners into the boxcars.

Among the second group of witnesses, one witness testified that, as Finta was in charge of the brickyard, all the announcements made or commands

given in the brickyard were issued by him or on his behalf and that he supervised the confiscations. This witness testified further that Finta commanded the gendarmes when the Jews were escorted from the ghetto to the brickyard and that he supervised their loading by the gendarmes at the train station. Another witness in this group testified that Finta broke the silver handle off her mother's cane and confiscated it.

Several witnesses who identified Finta on the basis of what had been said by others gave testimony to the effect that Finta was in charge of the brickyard and supervised the confiscations. One of these witnesses testified that she saw a person identified to her as Finta give the announcements for the surrender of valuables and that, from her observations, that person was in charge at the railway station. Three other witnesses in this group testified that they were told by others that the person making the announcements, and in one case, the person in charge at the railway station, was Finta. The trial judge instructed the jury that they could not rely on the identification of Finta by these witnesses in so far as it depended on what others had told them as to the identity of the person they believed to be Finta.

The eight witnesses who did not identify Finta described the conditions in the brickyard, the deportation from Szeged and the conditions in the boxcars.

In addition to the evidence of the survivors, the Crown relied on photographs, handwriting and fingerprint evidence to identify Finta as a captain in the Gendarmerie at Szeged at the relevant time.

Expert and documentary evidence was tendered to establish the historical context of the evidence, the relevant command structure in place in Hungary in 1944 and the state of international law in 1944.

III. Decisions Below

Pre-Trial Motions (Callaghan A.C.J.H.C.)

Including pre-trial motions, the trial lasted eight months. On one of these pre-trial motions, Callaghan A.C.J.H.C., as he then was, upheld the constitutional validity of the war crimes provisions in the *Criminal Code*. This decision has now been reported (*R. v. Finta* (1989), 69 O.R. (2d) 557).

Trial (Campbell J. Sitting With a Jury)

At trial, the Crown contended that Finta was the senior officer of the Gendarmerie at the Szeged concentration centre and had effective control over the operation and guarding of the centre, thus committing the acts in question. Alternatively it was said that through his supervisory role, he procured, aided or abetted others who actually performed the acts alleged. Though acknowledging his presence at the time and place of the alleged offences, Finta denied that he was in a position of authority at the brickyard and stated that he was subject at the time to the command of the German SS. He denied responsibility for the alleged offences.

During the trial, the Crown called 43 witnesses, including 19 eyewitnesses. The trial judge, on behalf of the defence, called the evidence of two eyewitnesses, Ballo and Kemeny. The statement and minutes of a third witness, Dallos, whose testimony was given at Finta's Hungarian trial, were also admitted. Mr. Dallos, a survivor of the brickyard who died in 1963, gave evidence of the existence of a Lieutenant Bodolay, who might have been in charge of the confinement and deportation of the Jews at the brickyard. Campbell J. ruled that, although the evidence was of a hearsay nature, it was admissible. He also stated that, together with other evidence, it "could leave the jury with a reasonable doubt about the responsibility of Finta for confinement and brickyard conditions." The trial judge warned the jury in his charge about the hearsay nature of the evidence.

The jury acquitted Finta on all counts.

Ontario Court of Appeal (1992), 92 D.L.R. (4th) 1, 73 C.C.C. (3d) 65, 14 C.R. (4th) 1, 53 O.A.C. 1, 9 C.R.R. (2d) 91, (Arbour, Osborne and Doherty JJ.A.; Dubin C.J. and Tarnopolsky J.A. dissenting)

A summary of the Court of Appeal's position on the principal issues and their final disposition is set out below.

(i) <u>The Evidentiary Issue</u>

The majority of the Court of Appeal (Arbour, Osborne and Doherty JJ.A.) found the evidence of Dallos called by the trial judge to be admissible, despite its hearsay, and in one instance, double-hearsay nature. The majority affirmed the reasons given by the trial judge, both with respect to the unique

features of the trial, and the principles underlying the exceptions to the hearsay rule relating to reliability, necessity and fairness.

However, the majority concluded that the trial judge erred in introducing this evidence himself before the defence had elected whether or not to call evidence. Though the majority observed that parts of the defence's final address were improper, they concluded that the trial judge's directions pertaining to the address negated any prejudice that might have resulted.

The substance of the judge's error, in their view, was to deprive the Crown of its statutory right to address the jury last. However, the majority could not conclude that, had the trial judge not called the evidence in question, the verdict of the jury might well have been different. The majority therefore ruled that this error did not occasion a substantial wrong or miscarriage of justice which would require that the jury's acquittal of Finta be reversed.

Like the majority, Dubin C.J. found that the trial judge erred in the manner in which he admitted the evidence on behalf of the defence. He noted that the entire defence theory rested on the impugned evidence. As a result of the trial judge's calling the evidence rather than the defence, the defence retained the right to address the jury last. In his view, at p. 37, this "inflammatory address tainted the trial" and served to aggravate the error. Dubin C.J. concluded that it could not be said that no substantial wrong or miscarriage of justice resulted from the cumulative effect of the trial judge's error.

Tarnopolsky J.A. concurred with the reasons and disposition of Dubin C.J. with respect to the evidentiary question.

(ii) The Interpretation of Section 7(3.71) and the *Mens Rea* Issue

The following passage, at pp. 104-5, summarizes the majority's approach with respect to the legislation in question:

> In our opinion, s. 7(3.71) speaks not to the jurisdiction of the court but to the territorial scope of the offences referred to in that section. It does so by expanding the territorial reach of the criminal law beyond Canada to the rest of the world whenever the acts or omissions in question meet the dual criminality requirement of the section.
>
> For example, to establish the commission of a "normal" charge of robbery the Crown must prove that the robbery occurred in Canada. Where the Crown alleges robbery contrary to s. 7(3.71), instead of proving that the robbery occurred in Canada, the Crown must prove that:
>
> -- had the act occurred in Canada, it would have amounted to robbery under the then operative *Criminal Code*, and
>
> -- the act amounted to a war crime or a crime against humanity.

As for the standard of *mens rea* to be applied by the jury, the majority approved of the charge given by the trial judge, which directed the jury to convict the accused of a war crime or a crime against humanity only if "the accused knew that his acts had the factual quality that made them war crimes", or if he knew his acts had a factual quality that "raised them up from the level of an ordinary crime to the international level of a crime against humanity".

In Dubin C.J.'s view, both the trial judge and the majority of the Court of Appeal misconstrued the purpose of s. 7(3.71) when they determined that the

effect of this legislation was to create two new offences under the *Criminal Code*. He stated at p. 20:

> In my opinion, that subsection does not create two new offences, namely, a crime against humanity and a war crime, nor does it define the essential elements of the offences with which the respondent was charged.... Section 7(3.71) provides a mechanism for persons to be convicted for violating the *Criminal Code* of Canada for acts or omissions committed abroad if those acts or omissions are deemed to have been committed in Canada and thus subject to the *Criminal Code* of Canada. Forcible confinement, robbery, kidnapping and manslaughter, contrary to the provisions of the 1927 *Criminal Code*, were the only offences for which the respondent stood trial.

He also rejected the proposition that the legislation alters the jurisdiction over a person or the territorial jurisdiction of a court; rather, he viewed the section simply as concerning the culpability in Canada for conduct outside Canada.

Therefore, he held that it was within the power of the trial judge to determine whether the acts alleged, if committed in Canada, would have violated the *Criminal Code*, and to determine, as a matter of law, whether such acts constituted a war crime or a crime against humanity. It then remained for the jury to assess whether the acts were in fact committed. With respect to the *mens rea* requirement of this section, Dubin C.J. at p. 29 concurred with Tarnopolsky J.A. that the test was an objective one: "... it is quite irrelevant whether the respondent knew that those acts fell within the legal definition of a crime against humanity or whether he believed such acts to be inhumane".

Tarnopolsky J.A. was of the view that the Crown does not have to prove that the accused knew he was committing a war crime or a crime against humanity in order to convict him under s. 7(3.71).

Like Dubin C.J., Tarnopolsky J.A. contended that s. 7(3.71) does not create new substantive *Criminal Code* offences; rather, he stated at p. 53 that the section is:

> ... merely *procedural* in nature, in that it confers jurisdiction on Canadian courts with respect to acts committed outside Canada, which would have been offences against Canadian law in force at the time of their occurrence, by deeming such acts to have occurred in Canada. [Emphasis in original.]

(iii) Jurisdiction and the Role of Judge and Jury

The majority determined that s. 7(3.71) sets out the elements of the offence. Those elements require that the act committed be a war crime or a crime against humanity. It follows that it is for the jury to decide whether the acts in question are war crimes or crimes against humanity.

Dubin C.J. found that pursuant to s. 7(3.71) of the *Code*, it is for the trial judge to determine first, whether the alleged acts would constitute, as a matter of law, a war crime or a crime against humanity, if the accused committed such acts outside Canada. The trial judge also must decide whether, as a matter of law, the alleged acts constitute an offence under the provisions of the *Code* then in force. It remains for the jury to decide if the accused did in fact commit the alleged acts. After reviewing the facts of this case, Dubin C.J. concluded at p. 29:

> In my view, the trial judge in this case would have no difficulty in concluding, as a matter of law, that, if the respondent had confined the victims in the manner alleged in the evidence, such conduct would constitute a crime against humanity.

> In this case, I do not think that a trial judge should have had any doubt that such acts, if committed, would constitute the offence of forcible confinement.

Tarnopolsky J.A. found that the determination of whether an accused's acts constituted a war crime or a crime against humanity (characterized as a "jurisdictional fact" by the trial judge, in that it had to be proven before the court could assume jurisdiction to try the accused) should properly rest with the trial judge as it is a question of law. It was, therefore, a misdirection for the trial judge to instruct the jury that the Crown had to prove beyond a reasonable doubt that the accused must have knowledge of the mental element in relation to "jurisdictional facts".

(iv) Constitutionality of s. 7(3.71)

The majority judgment of the Court of Appeal affirmed the reasons of Callaghan A.C.J.H.C. in ruling that the war crimes provisions in the *Code* do not violate the *Canadian Charter of Rights and Freedoms*. However, the majority took issue with the characterization of the section as not giving rise to new offences under the *Code*. This departure from the findings of Callaghan A.C.J.H.C., however, did not affect the ruling with respect to the constitutionality of s. 7(3.71).

Dubin C.J. also agreed with the reasons of Callaghan A.C.J.H.C. in upholding the constitutionality of the war crimes provisions.

Finally, Tarnopolsky agreed with the rest of the Court of Appeal in affirming Callaghan A.C.J.H.C.'s pre-trial judgment that the war crimes provisions in the *Code* did not violate the *Charter*.

(v) Disposition

In the result, the majority of the Court of Appeal dismissed the Crown's appeal from the acquittal of Finta.

Dubin C.J. concluded that the jury was misdirected with respect to the *mens rea* requirement, and that the trial judge erred in determining what "jurisdictional facts" had to be proven to the jury. On these grounds, and for the other reasons set out, he would order a new trial.

On the basis of the trial judge's rulings concerning jurisdictional facts and the proof required of the essential elements of the war crimes offences, Tarnopolsky J.A. would also order a new trial.

IV. Relevant Legislation

Criminal Code, R.S.C., 1985, c. C-46, as amended by R.S.C., 1985, c. 30 (3rd Supp.), s. 1:

> **7.** ...
>
> (3.71) 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 of the act 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) the 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.

(3.72) Any proceedings with respect to an act or omission referred to in subsection (3.71) shall be conducted in accordance with the laws of evidence and procedure in force at the time of the proceedings.

...

(3.74) Notwithstanding subsection (3.73) and section 15, a person may be convicted of an offence in respect of an act or omission referred to in subsection (3.71) even if the act or omission is committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

...

(3.76) ...

"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 of 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.

15. No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs.

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(*a*) as a private person,

(*b*) as a peace officer or public officer,

(*c*) in aid of a peace officer or public officer, or

(*d*) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

(3) Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.

(4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner. [Emphasis added.]

Canadian Charter of Rights and Freedoms

11. 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 according to the general principles of law recognized by the community of nations;

V. Points in Issue

The Appeal

Did the Court of Appeal err in law in holding that:

(1) s. 7(3.71) of the *Criminal Code*, is not merely jurisdictional in nature, but rather creates two new offences, a crime against humanity and a war crime, and defines the essential elements of the offences charged, such that it is necessary for the jury to decide beyond a reasonable doubt, not only whether the respondent is guilty of the *1927 Criminal Code* offences charged, but also whether his acts constituted crimes against humanity and/or war crimes as defined by ss. 7(3.71) and 7(3.76);

(2) the trial judge did not misdirect the jury as to the requisite *mens rea* for each offence by requiring the Crown prove not only that the respondent intended to commit the *1927 Criminal Code* offences charged, but also that he knew that his acts constituted war crimes and/or crimes against humanity as defined in s. 7(3.76);

[3] (a) the trial judge did not err in putting the "peace officer defence" embodied in s. 25 of the *Criminal Code*, the "military orders defence" and the issue of mistake of fact to the jury; and

(b) the trial judge did not misdirect the jury in the manner in which he defined those defences;

[4] the trial judge's instructions to the jury adequately corrected defence counsel's inflammatory and improper jury address so as to overcome the prejudice to the Crown and not deprive it of a fair trial;

[5] the DALLOS "evidence" (police statement and deposition) was admissible and, in particular, in finding that even though it did not fall within any of the recognized exceptions to the hearsay rule:

(i) it was admissible on the basis that it had circumstantial indicia of reliability;

(ii) there was a necessity to introduce it;

(iii) its admission was necessary to ensure a fair trial and to prevent a miscarriage of justice; and

(iv) it was admissible for the defence even though it would not be admissible for the Crown.

[6] the trial judge's error in calling the DALLOS evidence and the videotaped commission evidence of the witnesses KEMENY and BALLO as his own evidence, thereby denying the Crown of its statutory right to address the jury last, did not result in a substantial wrong or miscarriage of justice; and

[7] the trial judge's instructions to the jury relating to the Crown's identification evidence were appropriate and in not finding that he misdirected the jury on the issue of identification ...

The Cross Appeal

[8] Does s. 7(3.74) [and s. 7(3.76)] of the *Criminal Code* violate ss. 7, 11(*a*), 11(*b*), 11(*d*), 11(*g*), 12 or 15 of the *Canadian Charter of Rights and Freedoms*?

[9] If the answer to the question is in the affirmative, [are] ss. 7(3.74) [and 7(3.76)] of the *Criminal Code* ... reasonable limit[s] in a free and democratic society [justifiable] under s. 1 of the *Canadian Charter of Rights and Freedoms*?

VI. Analysis

(1) *Jurisdiction*

The jurisdiction of Canadian courts is, in part, limited by the principle of territoriality. That is, Canadian courts, as a rule, may only prosecute those crimes which have been committed within Canadian territory. Section 6(2) of the *Criminal Code* provides that:

> **6.** ...
>
> (2) Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 736 of an offence committed outside Canada.

This rule reflects the principle of sovereign integrity, which dictates that a state has exclusive sovereignty over all persons, citizens or aliens, and all property, real or personal, within its own territory. Indeed, the Permanent Court of International Justice has confirmed that:

> ... the first and foremost restriction imposed by international law upon a State is that ... it may not exercise its power[s] in any form in the territory of another State.
>
> (*The Case of the S.S. "Lotus"* (1927), P.C.I.J., Ser. A, No. 10, at p. 18.)

However, there are exceptions to the principle of territoriality. Professor Ian Brownlie has identified several other bases of jurisdiction in his work *Principles of Public International Law* (4th ed. 1990). According to Gillian Triggs, in "Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?" (1987), 16 *M.U.L.R.* 382, at p. 389:

> [the] principle [of universality] permits the exercise of jurisdiction by a state in respect of criminal acts committed by non-nationals against non-nationals wherever they take place. Jurisdiction is based upon the accused's attack upon the international order as a whole and is of common concern to all mankind as a sort of international public policy. Historically, the universality principle has been employed to prosecute piracy and, more recently, hijacking. Under the principle of universality the criminal act is a violation of national law. International law merely gives states a liberty to punish but it does not itself declare the act illegal.
>
> By contrast, some acts are crimes under international law. They may be punished by any state which has custody of the accused. Examples of this ... basis of jurisdiction include breaches of the laws

> of war included in the Hague Convention of 1907 and the four Geneva `Red Cross' Conventions of 1949, torture, apartheid, attacks on diplomatic agents, drug trafficking and terrorism.

Section 11(*g*) of the *Charter* allows customary international law to form a basis for the prosecution of war criminals who have violated general principles of law recognized by the community of nations regardless of when or where the criminal act or omission took place. The use of international legal principles to ground jurisdiction for criminal activity committed outside of Canada has thus been constitutionally permissible since 1982. On February 7, 1985, Order in Council P.C. 1985-348 established the Commission of Inquiry on War Criminals (the Deschênes Commission). In its report, the Commission, headed by the Honourable Jules Deschênes, recommended that the *Criminal Code* be used as the vehicle for the prosecution of "war criminals in Canada". (See *Commission of Inquiry on War Criminals Report*.) In response to these recommendations, the *Code* was amended to include ss. 7(3.71) to (3.77). These provisions constitute an exception to the principle of territoriality found in s. 6(2) of the *Code*.

However, the jurisdiction of Canadian courts to try offences under ss. 7(3.71) - (3.77) is carefully circumscribed. It is only when the following conditions are fulfilled that offences under s. 7(3.71) may be prosecuted in Canada: (1) the act or omission was committed outside the territorial boundaries of Canada; (2) the act or omission constitutes a crime against humanity or a war crime; (3) the act or omission, had it been committed in Canada, would have constituted an offence against the laws of Canada in force at the time; and (4) in the words of the section at the time of the act or omission,

> **7.** . . .
>
> (3.71) . . .
>
> (i) [the accused] 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) the 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 ... [Emphasis added.]

(5) at the time of the act or omission, Canada, in conformity with international law, could have exercised 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.

Thus, there are a number of jurisdictional hurdles which must be cleared before Canadian courts may prosecute offences under s. 7(3.71). How then are these jurisdictional issues to be determined?

This Court considered the issue of jurisdiction and the respective roles of the judge and the jury in determining jurisdictional questions in the case of *Balcombe v. The Queen*, [1954] S.C.R. 303. In that case, at p. 304, the indictment alleged that the accused committed murder "... at the County of Dundas in the province of Ontario". He was tried and convicted in Ontario by a court composed of a judge and jury. At trial, he sought a directed verdict, arguing that the homicide had occurred in Quebec. The trial judge dismissed the motion and the Court of Appeal affirmed his ruling. In their application for leave to appeal to this Court, defence counsel argued that the question of the situs of the offence was one

for the jury to decide, and that the trial judge should have directed them that they had to be satisfied beyond a reasonable doubt that the offence was committed within the province of Ontario. This Court dismissed the application for leave to appeal. Fauteux J. stated at p. 305:

> The question of jurisdiction is a question of law -- consequently, for the presiding Judge -- even if, to its determination, consideration of the evidence is needed. It is a question strictly beyond the field of these matters which under the law and particularly under the terms of their oath, the jury have to consider. They are concerned only with the guilt or innocence of the prisoner at the bar. Indeed the lawful fulfilment of their duties rests on the assumed existence of the jurisdiction of the Court to try, at the place where it is held, the accused for the crime charged.

The trial judge in the present case distinguished *Balcombe* on the basis that the questions of fact raised by some of the jurisdictional requirements in s. 7(3.71) go to the very heart of the moral culpability of Finta's alleged actions. The trial judge put it in this way:

> Although *Balcombe* decided that jurisdictional facts such as situs are decided by the judge and not the jury, the court noted in *Balcombe* that the facts in issue there did not go to the guilt or innocence of the accused. This is therefore not a case like *Balcombe*. In this case situs is not in issue. In this case the jurisdictional facts such as enslavement, deportation, persecution or the commission of any other inhumane act by the accused are facts that go to his very guilt or innocence. Such questions are for the jury. They go in this case to the very root of the principle of trial by jury.
>
> This is particularly so when an adverse determination of those jurisdictional facts deprives the accused of important legal rights including *Charter* rights, special pleas, and the very significant defence of obedience to de facto law.
>
> To take these crucial issues of jurisdictional fact away from the jury would deprive both him and the community of the right to have a jury decide all the facts that go to the guilt or innocence of the accused. Those facts will therefore be decided by the jury.

I agree with this position. There is an important distinction to be made between the jurisdictional issue of situs, which a judge is entitled to determine on consideration of the facts, and the jurisdictional issue as to whether the essential elements of an offence have been proven. The latter must be left to the jury. As Lamer J. (as he then was) stated in *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, the presumption of innocence demands that the prosecution prove beyond a reasonable doubt the existence of all of the essential elements of the offence -- whether specified in the legislation enacting the offence or constitutionally mandated by s. 7 of the *Charter*. In subsequent decisions of this Court the requirement of proof beyond a reasonable doubt was extended to cover collateral factors, excuses and defences. (See *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. Keegstra*, [1990] 3 S.C.R. 697.) Thus, it matters not whether the additional international elements involved in the offences of crimes against humanity and war crimes constitute jurisdictional factors or excuses. The essential question is not how the elements are characterized, but rather, whether the jury would be forced to convict in spite of having a reasonable doubt as to whether the offences constituted a war crime or a crime against humanity.

It is the appellant's position that the trial judge would be called upon to make determinations on the balance of probabilities on issues such as whether the accused was responsible for the confinement of 8,716 Jews, whether he was responsible for loading these people into the boxcars and whether the actions were inhumane in the sense that they constituted acts of persecution or discrimination against an identifiable group. The trial judge would also be required to make a decision with respect to the mental element of these offences. It would remain for a jury only to decide whether the accused committed the *actus reus* and had the

requisite mental element required for the acts committed to constitute offences under the Canadian *Criminal Code*.

This cannot be correct. It is readily apparent that the jury could find that the accused was guilty of manslaughter and yet have reasonable doubts as to whether his actions and state of mind were such that his actions amounted to crimes against humanity or war crimes. If the appellant's submission were accepted, the jury would nonetheless be forced to convict. This would result in a denial both of the accused's right to have the essential element of the charges against him proven beyond a reasonable doubt and of his right to have his guilt or innocence determined by a jury.

(i) Summary of Jurisdiction

Canadian courts have jurisdiction to try individuals living in Canada for crimes which they allegedly committed on foreign soil only when the conditions specified in s. 7(3.71) are satisfied. The most important of those requirements, for the purposes of the present case, is that the alleged crime must constitute a war crime or a crime against humanity. It is thus the nature of the act committed that is of crucial importance in the determination of jurisdiction. Canadian courts may not prosecute an ordinary offence that has occurred in a foreign jurisdiction. The only reason Canadian courts can prosecute individuals such as Imre Finta is because the acts he is alleged to have committed are viewed as being war crimes or crimes against humanity. As Cherif Bassiouni has very properly observed, a war crime or a crime against humanity is not the same as a domestic offence. (See M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*

(1992).) There are fundamentally important additional elements involved in a war crime or a crime against humanity.

(2) *The Requisite Elements of the Crime Described by Section 7(3.71)*

(i) The Physical Elements or *Actus Reus*

The operative part of s. 7(3.71) is as follows:

> **7.** ...
>
> (3.71) 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

It can be seen that the accused, in order to be convicted, must have committed an act that constituted a war crime or a crime against humanity and that the same act would constitute an offence against the laws of Canada in force at the time the act was committed. An integral part of the crime and an essential element of the offence is that it constitutes a crime against humanity. In the mind of the public those persons indicted for having committed crimes against humanity or war crimes stand charged with committing offences so grave that they shock the conscience of all right-thinking people. The stigma that must attach to a conviction for such a crime is overwhelming. Society simply cannot tolerate the commission of such crimes. As well, the nature of the penalty for committing a

crime against humanity must be more severe than would be the punishment for an act of robbery, confinement or manslaughter committed in Canada.

What are the additional elements of a crime against humanity or a war crime that distinguish these crimes from other domestic offences such as manslaughter or robbery? Part of the answer to this question is found in the definition of the two terms in s. 7(3.76) of the *Criminal Code*. They are as follows:

> **7.** ...
>
> (3.76) . . .
>
> "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 of 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. [Emphasis added.]

Thus, with respect to crimes against humanity the additional element is that the inhumane acts were based on discrimination against or the persecution of an identifiable group of people. With respect to war crimes, the additional element is that the actions constitute a violation of the laws of armed conflict. These elements must be established both in order for a Canadian court to have the jurisdiction to try the accused and in order to convict the accused of the offence.

(ii) The Mental Element or *Mens Rea*

The "international element" of the s. 7(3.71) offences is not comprised solely of the *actus reus* or of the physical quality of the actions. Canada acquires jurisdiction over actions performed in foreign territory only when those actions reach the level of an international crime or when they are "criminal" according to the general principles of international law. A crime is comprised of both a physical and a mental element. As was noted by the majority of the Court of Appeal in the present case, the definitions of war crimes and crimes against humanity found in s. 7(3.76) do not expressly define the mental state which must accompany the facts or circumstances that bring an act within the definition of a war crime or a crime against humanity. Thus, a mental element must be read into those definitions. Indeed, it is now trite law that *mens rea* has been elevated from a presumed element in offences (*R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299), to a constitutionally required element (*R. v. Vaillancourt, supra*). Proof of this mental element is an integral part of determining whether the offences committed amount to a war crime or a crime against humanity and thus, whether the court has jurisdiction to try the case.

The appellant contends that the deeming mechanism in the *Code* provision presently under consideration is such that an accused charged under s. 7(3.71) may be found guilty not of "war crimes" or "crimes against humanity" but of "ordinary" *Code* offences such as manslaughter, confinement or robbery. It is further argued that proof of the *mens rea* with respect to the domestic offences provides the element of personal fault required for offences under s. 7(3.71). Thus, it is submitted, proof of further moral culpability is not required, since once the

necessary *mens rea* to confine forcibly, rob or commit manslaughter has been proved, it becomes impossible to maintain that the accused was morally innocent.

I cannot accept that argument. What distinguishes a crime against humanity from any other criminal offence under the Canadian *Criminal Code* is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race. With respect to war crimes, the distinguishing feature is that the terrible actions constituted a violation of the laws of war. Although the term laws of war may appear to be an oxymoron, such laws do exist. War crimes, like crimes against humanity, shock the conscience of all right-thinking people. The offences described in s. 7(3.71) are thus very different from and far more grievous than any of the underlying offences.

For example, it cannot be denied that the crimes against humanity alleged in this case, which resulted in the cruel killing of thousands of people, are far more grievous than occasioning the death of a single person by an act which constitutes manslaughter in Canada. To be involved in the confinement, robbing and killing of thousands of people belonging to an identifiable group must, in any view of morality or criminality, be more serious than even the commission of an act which would constitute murder in Canada.

Therefore, while the underlying offences may constitute a base level of moral culpability, Parliament has added a further measure of blameworthiness by requiring that the act or omission constitute a crime against humanity or a war crime. If the jury is not satisfied that this additional element of culpability has

been established beyond a reasonable doubt, then the accused cannot be found guilty of a war crime or a crime against humanity.

In *R. v. Vaillancourt*, *supra*, this Court held that there are certain crimes where, because of the special nature of the available penalties or of the stigma attached to a conviction, the principles of fundamental justice require a mental blameworthiness or a *mens rea* reflecting the particular nature of that crime. It follows that the question which must be answered is not simply whether the accused is morally innocent, but rather, whether the conduct is sufficiently blameworthy to merit the punishment and stigma that will ensue upon conviction for that particular offence. In the present case there must be taken into account not only the stigma and punishment that will result upon a conviction for the domestic offence, but also the additional stigma and opprobrium that will be suffered by an individual whose conduct has been held to constitute crimes against humanity or war crimes. In reality, upon conviction, the accused will be labelled a war criminal and will suffer the particularly heavy public opprobrium that is reserved for these offences. Further the sentence which will follow upon conviction will reflect the high degree of moral outrage that society very properly feels toward those convicted of these crimes.

In *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, I suggested the contextual approach for the determination of the appropriate level of fault required for a given offence. The offence must be viewed in the context of the objectives which Parliament attempted to achieve in enacting the provision as well as the competing interests of the individual accused. I think that the context in

which the offence or offences are committed must also be taken into account in assigning the appropriate *mens rea* or mental element to the offence.

What was the aim of Parliament in passing the section? It was passed following the receipt of the Deschênes Commission Report. In the Parliamentary debates following the tabling of the report, the Minister of Justice observed that Canadians would never be satisfied with the notion that individuals guilty of war crimes during World War II should find a safe haven in Canada.

There can be no doubt that Canadians were revolted by the suffering inflicted upon millions of innocent people. It seems that the section was passed to bring to trial those who inflicted death and cruel suffering in a knowing, pre-meditated, calculated way. The essential quality of a war crime or a crime against humanity is that the accused must be aware of or wilfully blind to the fact that he or she is inflicting untold misery on his victims.

The requisite mental element of a war crime or a crime against humanity should be based on a subjective test. I reach this conclusion for a number of reasons. First, the crime itself must be considered in context. Such crimes are usually committed during a time of war. Wars are concerned with death and destruction. Sweet reason is often among the first victims. The manipulation of emotions, often by the dissemination of false information and propaganda, is part and parcel of the terrible tapestry of war. False information and slanted reporting is so predominant that it cannot be automatically assumed that persons in units such as the Gendarmerie would really know that they were part of a plot to exterminate an entire race of people.

It cannot be forgotten that the Hungarian people were loyal to the axis cause. There was strong pro-German sentiment throughout the country. This was a time of great stress and anxiety as the Russian advance pushed back the German armies towards the borders of Hungary. A newspaper report of the time presented at the trial may give some indication of the feelings of the Hungarian people:

> With the war, the front line nearing our borders, the Jewish problem is becoming more and more acute.... this country, girding itself for self-defence, possibly with German help, the internal situation of eight to nine hundred thousand Jews of basically hostile attitude to our military objectives demands new and effective measures....
>
> In his policy-making speech, the Prime Minister expressively stated that the only way open to us in solving the Jewish problem is the deportation.
>
> (*Szegedi uj Nemzedék*, April 9, 1944.)

Section 7(3.71) cannot be aimed at those who killed in the heat of battle or in the defence of their country. It is aimed at those who inflicted immense suffering with foresight and calculated malevolence.

What then is the nature of a war crime or inhumane act? In addition to the definition provided by the *Code* itself, the trial judge in this case gave the following definition of an inhumane act to the jury:

> Inhumane. Inhuman, uncivilized. Not humane; destitute of compassion for suffering.
>
> Inhumanity. The quality of being inhuman or inhumane; want of human feeling; brutality; barbarous cruelty.
>
> Inhuman. Not having the qualities proper or natural to a human being; especially destitute of natural kindness or pity; brutal, unfeeling.
>
> Brutal; barbarous; cruel.

The trial judge added to his comments that "Inhumanity in this context means some kind of treatment that is unnecessarily harsh in the circumstances". He explained to the jury that one of the ways that the domestic offences of kidnapping, confinement, and robbery could achieve the level of a crime against humanity was if the acts could be considered to be inhumane.

In my view, this is an appropriate characterization which emphasizes that for example robbery, without the additional component of barbarous cruelty is not a crime against humanity. It cannot be inferred that someone who robs civilians of their valuables during a war has thereby committed a crime against humanity. To convict someone of an offence when it has not been established beyond a 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 or robbery. It follows that the accused must be aware of the conditions which render his or her actions more blameworthy than the domestic offence.

I find support for this position in decisions of this Court relating to the constitutional requirements for *mens rea*. In *R. v. Martineau*, [1990] 2 S.C.R. 633, the Court struck down s. 213(*a*) of the *Criminal Code*, R.S.C. 1970, c. C-34. This section provided that the offence of murder would be committed in circumstances where a person caused the death of another while committing or attempting to commit certain named offences, and meant to cause bodily harm for the purpose of committing the underlying offence or to facilitate flight after committing the

offence. Murder was deemed to have been committed regardless of whether the person meant to cause death and regardless of whether that person knew that death was likely to result from his or her actions. The majority of the Court (*per* Lamer C.J.) affirmed that in order to secure a conviction for murder, the principles of fundamental justice required subjective foresight of the consequences of death. As was noted in *R. v. DeSousa*, [1992] 2 S.C.R. 944, while it is not a principle of fundamental justice that fault or *mens rea* must be proved as to each separate element of the offence, there must be a meaningful mental element demonstrated relating to a culpable aspect of the *actus reus*. See also: *R. v. Hess*, [1990] 2 S.C.R. 906.

These cases make it clear that in order to constitute a crime against humanity or a war crime, there must be an element of subjective knowledge on the part of the accused of the factual conditions which render the actions a crime against humanity.

Thus, for all of the reasons set out earlier, I am in agreement with the majority of the Court of Appeal's assessment that the mental element of a crime against humanity must involve an awareness of the facts or circumstances which would bring the acts within the definition of a crime against humanity. However, I emphasize it is not necessary to establish that the accused knew that his or her actions were inhumane. As the majority stated at p. 116:

> ... if the jury accepted the evidence of the various witnesses who described the conditions in the boxcars which transported the Jews away from Szeged, the jury would have no difficulty concluding that the treatment was "inhumane" within the definition of that word supplied by the trial judge. The jury would then have to determine whether Finta was aware of those conditions. If the jury decided that

> he was aware of the relevant conditions, the knowledge requirement was established regardless of whether Finta believed those conditions to be inhumane.

Similarly, for war crimes, the Crown would have to establish that the accused knew or was aware of the facts or circumstances that brought his or her actions within the definition of a war crime. That is to say the accused would have to be aware that the facts or circumstances of his or her actions were such that, viewed objectively, they would shock the conscience of all right-thinking people.

Alternatively, the *mens rea* requirement of both crimes against humanity and war crimes would be met if it were established that the accused was wilfully blind to the facts or circumstances that would bring his or her actions within the provisions of these offences.

(iii) Summary of the Elements of the Offence Described in s. 7(3.71): The Integral Aspects of the Section

The wording of the section, the stigma and consequences that would flow from a conviction all indicate that the Crown must establish that the accused committed a war crime or a crime against humanity. This is an integral and essential aspect of the offence. It is not sufficient simply to prove that the offence committed in Canada would constitute robbery, forcible confinement or manslaughter. An added element of inhumanity must be demonstrated to warrant a conviction under this section. The mental element required to be proven to constitute a crime against humanity is that the accused was aware of or wilfully blind to facts or circumstances which would bring his or her acts within the definition of a crime against humanity. However it would not be necessary to

establish that the accused knew that his or her actions were inhumane. For example, if the jury was satisfied that Finta was aware of the conditions within the boxcars, that would be sufficient to convict him of crimes against humanity even though he did not know that his actions in loading the people into those boxcars were inhumane.

Similarly for war crimes the Crown would have to establish that the accused knew or was aware of facts that brought his or her action within the definition of war crimes, or was wilfully blind to those facts. It would not be necessary to prove that the accused actually knew that his or her acts constituted war crimes. Those then are the requisite elements of the offence and the mental element required to establish it.

(iv) Did the Trial Judge Err in his Charge Regarding the Requisite Mental Element?

The appellant concedes that the trial judge correctly instructed the jury on the mental element of the offences at various points in his charge. However it is contended that these instructions were negated by the frequent occasions in the course of his charge when his words could have conveyed the notion that the Crown must prove that the respondent actually knew his conduct constituted a crime against humanity or a war crime or amounted to an act which came within the definition of a crime against humanity or a war crime.

It is apparent that the trial judge made comments during the course of his very lengthy and complex charge which could have been construed as requiring the Crown to prove that the accused knew that his conduct was inhumane.

However the charge included several clear directions as to the correct approach. When the charge is looked at as a whole, it is clear that the trial judge did not misdirect the jury on the issue of *mens rea*. For example, he stated:

> The next item is heading No. 9, the mental element for crimes against humanity and simply the Crown has the duty to beyond a reasonable doubt [*sic*] that the particular offences; robbery, kidnapping, confinement, manslaughter, to the knowledge of the accused had those factual qualities that raise them up to a crime against humanity.
>
> The Crown doesn't have to prove the accused is an international scholar, that he knows the pigeon holes or nooks and crannies of international law. It is sufficient to prove the accused knew his acts had the factual quality of enslavement or persecutorial deportation or racial or religious persecution or inhumanity that raised them up from the level of an ordinary crime to the international level of a crime against humanity.

With respect to proof of the mental element for crimes against humanity, the trial judge instructed the jury that:

> The Crown also has to prove the physical and mental element of war crimes and crimes against humanity beyond a reasonable doubt and that knowledge has to be brought home personally to the accused as a factual quality that what he does is a war crime or crime against humanity, that it has those factual qualities.
>
> Again, he doesn't have to know the nooks and crannies of international law, just has to know what he is doing has the nature and quality factually that makes it a war crime or crime against humanity. Does he know it is deportation for racial persecution? Does he know it is an inhumane act? Does he know it is ill treatment of the civilian population? In the manner I described.

Here again the trial judge made it clear to the jury that the accused simply needed to be aware of the surrounding factual circumstances and the

actions which came within the definition of war crimes. The trial judge correctly instructed the jury that the accused need not know that his actions constituted a crime at international law.

The trial judge on several occasion stressed that the test to be applied was an objective one. For example with regard to deportation he stated:

> As to the necessary mental element; the accused must intend to deport within the meaning I gave you for a crime against humanity. Apply to this count the issues as I reviewed them. Is the deportation a reasonable temporary measure for public safety, with the bedding and furniture and so forth stored safely for their return; might the accused honestly think so on reasonable grounds. Or would it be clear to any reasonable person that they were being deported because they were Jews or they were being persecuted under inhumane conditions.

With regard to the taking of property he said this:

> The second part of that branch is as I have read it before, has the Crown proved beyond a reasonable doubt any reasonable person in the position of the accused would know that the taking had the factual quality of a crime against humanity (see 5) below and the accused personally as a principal or aider or abettor used violence or threats of violence.

The charge made it very clear that the jury had to decide whether Finta was aware of the circumstances that rendered his actions either a crime against humanity or a war crime, and whether he had the requisite mental element for the domestic offences. The jury must have known that, in order to convict, they had to find that Finta knowingly participated in conduct that reached the level of a war crime or a crime against humanity, and that his level of awareness was such that he could be held personally responsible for the crimes that were committed in

Hungary at that time. The trial judge stressed that it was not sufficient that the jurors thought that what had happened constituted a violation of the laws of war or were crimes against humanity. Finta himself had to be aware of those conditions and factual circumstances that raised the crimes to the level of crimes against humanity or war crimes.

It should also be noted that the trial judge instructed the jury that they must find that Finta knew or was aware that he was assisting in a policy of persecution. This is part of the factual circumstances that Finta would be required to have known in order for his actions to fall within the definition of crimes against humanity. Although the *Code* does not stipulate that crimes against humanity must contain an element of state action or policy of persecution/discrimination, the expert witness, M. Cherif Bassiouni, testified that at the time the offences were alleged to have been committed, "state action or policy" was a pre-requisite legal element of crimes against humanity. Thus, in my view, the trial judge properly instructed the jury that they had to be satisfied that Finta knew or was aware of the particular factual circumstance which rendered the acts he was alleged to have committed crimes against humanity. The trial judge properly distinguished this factor from motive which, he clearly indicated to the jury, the Crown did not have to establish.

The trial judge made every effort to give clear, well-organized instructions to the jury in this long, complex and difficult trial.

(3) *The Defences*

Since the integral aspect of the offence is that the crime be against humanity or a war crime, some special defences may be raised with regard to it.

The questions raised with regard to the defences available to the respondent at trial are essentially the following: (1) should the defence of obedience to military orders and the peace officer defence be available to persons accused of offences pursuant to s. 7(3.71); (2) was the trial judge justified in putting the defences of mistake of fact and obedience to superior orders to the jury?

It might be helpful to first consider the defences which may be employed by a person accused of an offence pursuant to s. 7(3.71).

Section 7(3.73) of the *Criminal Code* provides that those accused of crimes pursuant to s. 7(3.71) may avail themselves of all of the defences and excuses under domestic and international law. It reads as follows:

> **7.** ...
>
> (3.73) In any proceedings under this Act with respect to an act or omission referred to in subsection (3.71), notwithstanding that the act or omission is an offence under the laws of Canada in force at the time of the act or omission, the accused may, subject to subsection 607(6), rely on any justification, excuse or defence available under the laws of Canada or under international law at that time or at the time of the proceedings.

Section 607(6) provides that a person who is alleged to have committed an act or omission outside Canada that is an offence in Canada and in respect of which that person has been tried and convicted outside Canada, may not plead *autrefois convict* under certain specified conditions.

Section 7(3.74) states that a person may be convicted of an offence referred to in s. 7(3.71) even if the act was committed in obedience to or conformity with the law in force at the time and in the place of its commission.

Section 25 of the *Code* provides the accused with a justification for the use of as much force as is necessary to do anything in the administration or enforcement of a law, notwithstanding that the law is defective. It reads as follows:

> **25**. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (*a*) as a private person,
>
> (*b*) as a peace officer or public officer,
>
> (*c*) in aid of a peace officer or public officer, or
>
> (*d*) by virtue of his office,
>
> is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.
>
> (2) Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.
>
> (3) Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to

> cause death or grievous bodily harm unless he believes on reasonable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.
>
> (4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner. [Emphasis added.]

The peace officer defence, set out above, is similar to the defence of obedience to military orders. The latter defence is recognized by most systems of criminal law. (See, e.g., L. C. Green, "Superior Orders and Command Responsibility" (1989), 27 *Can. Y.B. Int'l L.* 167.) It is based on the well-recognized principle that in both the armed forces and police forces commands from superior officers must be obeyed. It follows that it is not fair to punish members of the military or police officers for obeying and carrying out orders unless the orders were manifestly unlawful. In this case, at the time the offences were allegedly committed this defence would have been available to the respondent and therefore, pursuant to s. 7(3.73) of the *Code*, it was available to him at trial.

The common law defence of mistake of fact is based on the concept that to have a guilty state of mind, the accused must have knowledge of the factual elements of the crime he is committing. In other words, although an accused may commit a prohibited act, he is generally not guilty of a criminal offence where he is ignorant of or mistaken as to a factual element of the offence. (See for example *R. v. Prue*, [1979] 2 S.C.R. 547.) An accused is deemed to have acted under the state of facts he or she honestly believed to exist when he or she did the act alleged

to be a criminal offence. (See *Beaver v. The Queen*, [1957] S.C.R. 531, and *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120.) The trial judge also instructed the jury that this defence was available to the respondent.

(A) Should the Defence of Obedience to Military Orders and the Peace Officer Defence be Available to an Accused Under Section 7(3.71)?

The appellant argues that neither the international law defence of obedience to superior orders nor the peace officer defence found in s. 25 of the Canadian *Criminal Code* should be available to persons charged with offences under s. 7(3.71). It is submitted that, by putting the peace officer and military orders defences to the jury based on Hungarian decrees and orders, the trial judge gave effect to the defence of obedience to the law in force at that time and place. This, it is said, is contrary to Parliament's intention in enacting s. 7(3.74), and contrary to the principle that an accused cannot plead the laws of the state to justify crimes against humanity and war crimes, when those crimes, by their very nature, must be state sponsored. With respect to s. 25 of the *Code* the appellant argues that the trial judge having directed the jury, as a matter of law, that the Baky Order, the anti-Jewish decrees and the train schedule document were unlawful, should have found that the s. 25 defence was inapplicable since the respondent's acts could not be said to be "required or authorized by law" as stipulated in s. 25.

Secondly, the appellant argues, the defence of mistake of fact should not have been put to the jury in conjunction with the defence of obedience to superior orders and the peace officer defence since the question of what the respondent believed is a separate issue going to *mens rea* and is irrelevant to a

"positive" defence. Additionally, the appellant contends that by putting the defence of mistake of fact to the jury, the trial judge was actually putting the defence of mistake of law to the jury. This, it is said, violates the presumption of knowledge of the law and requires the Crown to prove that the accused knew that his acts fell within the legal definition of the offence charged.

Finally, the appellant argues that the trial judge misdirected the jury in the manner in which he defined those defences. The trial judge incorporated the component elements of crimes against humanity and war crimes into the definition of the defences. This, the appellant argues, was incorrect.

At this stage it may be appropriate to consider the history of the defence of obedience to superior orders. Whether obedience to superior orders can shield an offender has been a concern of legal writers for centuries. (See for example: L. C. Green, "Superior Orders and the Reasonable Man", in *Essays on the Modern Law of War* (1985), at pp. 43 and 49.)

(i) *Historical Analysis of the Defence of Obedience to Superior Orders*

Our principles of criminal law often cannot readily be applied to the military. Our ideas of criminal law have evolved slowly. They involve a concept of equality before and under the law. Everyone is entitled to respect, dignity and the integrity of his or her body. Gradually it became accepted that an accused charged with assault was to be held personally responsible for violating the integrity of another human being. It is difficult if not impossible to apply that concept to the military.

The whole concept of military organization is dependent upon instant, unquestioning obedience to the orders of those in authority. Let us accept that the military is designed to protect the physical integrity of a nation, its borders and its people. The orders of the commander in chief must be carried out through the chain of command. The division commanders must carry out the orders of the army commanders. The regimental commanders must carry out the orders of the divisional commanders, the company commanders those of the battalion commanders, and the men in the platoons those of the lieutenant in charge. This requirement of instant obedience to superior order applies right down to the smallest military unit. Military tradition and a prime object of military training is to inculcate in every recruit the necessity to obey orders instantly and unhesitatingly. This is in reality the only way in which a military unit can effectively operate. To enforce the instant carrying out of orders, military discipline is directed at punishing those who fail to comply with the orders they have received. In action, the lives of every member of a unit may depend upon the instantaneous compliance with orders even though those orders may later, on quiet reflection, appear to have been unnecessarily harsh.

The absolute necessity for the military to rely upon subordinates carrying out orders has, through the centuries, led to the concept that acts done in obedience to military orders will exonerate those who carry them out. The same recognition of the need for soldiers to obey the orders of their commanders has led to the principle that it is the commander who gives the orders who must accept responsibility for the consequences that flow from the carrying out of his or her orders.

Cherif Bassiouni, *supra*, has written on the subject of obedience of the military to orders that they receive in this vein at p. 399:

> ... throughout the history of military law, obedience to superior orders has been one of the highest duties for the subordinate. This obedience exonerates the subordinate from responsibility because of the command responsibility of the superior who issued the order.
>
> This criminal responsibility attaches to the decision-maker and not to the executor of the order who is exonerated. As a counterpart, the subordinate is expected to obey the orders of a superior. This approach to responsibility is predicated on the assumption that the superior can be deterred from wrongful conduct by the imposition of criminal responsibility for unlawful commands. But when this assumption fails, obviously, the overall approach must be reconsidered.

As the author correctly points out, the military leader's defence of obedience to superior orders has been brushed aside at various times throughout history. This has been done where the crimes committed in obedience to superior orders during hostilities were so atrocious that they exceeded the limits of acceptable military conduct, and shocked the conscience of society.

Both Green (in "Superior Orders and Command Responsibility", *supra*, at p. 173) and Bassiouni (*supra*, at p. 416) report that one of the first people to assert the defence of superior orders before a tribunal, Peter von Hagenbach, was denied the protection of command responsibility.

Bassiouni, *supra*, writes at p. 416:

> Perhaps the first person to assert the defense of superior orders before a tribunal was Peter von Hagenbach in the year 1474. Charles, the Duke of Burgundy, appointed Hagenbach the Governor (*Landvogt*) of the Upper Rhine, including the fortified town of Breisach. At the behest of Charles, Hagenbach, with the aid of his henchmen, sought to

> reduce the populace of Breisach to a state of submission by committing such atrocities as murder, rape and illegal confiscation of property. Hagenbach was finally captured and accused of having "trampled under foot the laws of God and man". Hagenbach relied primarily on the defense of "obedience to superior orders". His counsel claimed that Hagenbach "had no right to question the order which he was charged to carry out, and it was his duty to obey. Is it not known that soldiers owe absolute obedience to their superiors?" The Tribunal refused to accept Hagenbach's defense, found him guilty, and sentenced him to death.

See also Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol. 2, (1968), at p. 465, and L. C. Green, "Superior Orders and Command Responsibility", *supra*, at p. 173.

In the United States, a significant case was tried during the War of 1812. There was then a divergence of opinion as to necessity of the war. In New England, the United States Navy was not very popular. One day while the ship *Independence* was docked in Boston Harbour, a passerby made some abusive remarks to a marine by the name of Bevans, who was standing guard on the ship. Bevans responded rather violently by driving his bayonet through the man. Bevans was charged with murder and pleaded the defence of obedience to superior orders, claiming that the marines on *Independence* had been ordered to bayonet whomever showed them disrespect. At trial Story J. instructed the jury that such an order was illegal and void, and if given and carried out, both the superior and subordinate would be guilty of murder. Bevans was convicted (*United States v. Bevans*, 24 Fed. Cas. 1138 (C.C.D. Mass. 1816) (No. 14,589), although his conviction was later reversed by the U.S. Supreme Court on jurisdictional grounds in *United States v. Bevans*, 3 Wheat. 336 (1818)).

Green (in "Superior Orders and Command Responsibility", *supra*, at pp. 174-75) states that the decision of Solomon J. in *R. v. Smith* (1900), 17 S.C. 561 (Cape of Good Hope), established the English position. In that case a soldier acting on the orders of his superior during the Boer War, killed a native for not performing a menial task. Although the court acquitted the soldier, it introduced the "manifest illegality" test, stating at pp. 567-68:

> ... it is monstrous to suppose that a soldier would be protected where the order is grossly illegal. [That he] is responsible if he obeys an order [that is] not strictly legal ... is an extreme proposition which the Court cannot accept.... [E]specially in time of war immediate obedience ... is required.... I think it is a safe rule to lay down that if a soldier honestly believes he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer.

Bassiouni, *supra*, at pp. 419-21, recounts:

> The issue of "obedience to superior orders" first gained contemporary international significance during the war crimes trials that followed World War I. By virtue of Article 228 of the Treaty of Versailles, Germany submitted to the Allied Powers' right to try alleged war criminals. Although the Treaty originally provided that the trials would be administered by the state against whose nationals the alleged crimes were committed, it was subsequently agreed that the German *Reichsgericht* (Supreme Court) sitting at Leipzig would be the court to preside over these cases. The two most notable cases involving the issue of "obedience to superior orders" during the Leipzig Trials were the *Dover Castle* and the *Llandovery Castle*.
>
> In *Dover Castle*, the defendant, Lieutenant Captain Karl Neuman [*sic*], the commander of a German submarine, was charged with torpedoing the *Dover Castle*, a British hospital ship. The defendant claimed that he was acting pursuant to "superior orders", which were issued by his naval superiors who claimed that they believed that Allied hospital ships were being used for military purposes in violation of the laws of war. The Leipzig Court, acquitted the commander holding:
>
> > It is a military principle that the subordinate is bound to obey the orders of his superiors ... (w)hen the execution of a service order

> involves an offence against the criminal law, the superior giving the order is alone responsible. This is in accordance with the terms of the German law, § 47, para. 1 of the Military Penal Code ....
>
> According to § 47 of the Military Penal Code No. 2, a subordinate who acts in conformity with orders is ... liable to punishment as an accomplice, when he knows that his superiors have ordered him to do acts which involve a civil or military crime or misdemeanour. There has been no case of this here. The memoranda of the German Government about the misuse of enemy hospital ships were known to the accused .... He was therefore of the opinion that the measures taken by the German Admiralty against enemy hospital ships were not contrary to international law, but were legitimate reprisals .... The accused ... cannot, therefore, be punished for his conduct.

In the subsequent *Llandovery Castle* case, the same court did not so readily grant the accused a defense of "obedience to superior orders". In that case, also involving a German submarine attack upon a British hospital ship, the submarine commander ordered his subordinates to open fire on the survivors of the torpedoed *Llandovery Castle* who had managed to get into lifeboats. The officers who carried out the order, First Lieutenants Ludwig Dithmar and John Boldt, were charged with the killings and pleaded that they followed the orders of their commander, Helmut Patzik (whom the German authorities failed to apprehend after the war). The court, however, rejected this defense and stated:

> The firing on the boats was an offence against the law of nations .... The rule of international law, which is here involved, is simple and is universally known. No possible applicability .... (The commander's) order does not free the accused from guilt. It is true that according to para. 47 of the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation the superior giving the order is alone responsible. However, the subordinate obeying such an order is liable to punishment if it was known to him that the order of the superior involved the infringement of civil or military law. This applies in the case of the accused. It is certainly to be urged in favor of the military subordinates, that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law.

Nonetheless, the court acknowledged that the defence of obedience to superior orders was a mitigating factor to be taken into account in determining the appropriate penalty, and sentenced the accused to only four years' imprisonment.

Professor Yoram Dinstein, in *The Defence of `Obedience to Superior Orders' in International Law* (1965), analyzed the use of the defence of "obedience to superior orders" at the Leipzig trials and correctly concluded, at p. 19, that:

> (I) As a general rule, a subordinate committing a criminal act pursuant to an order should not incur responsibility for it.
>
> (2) This rule is inapplicable if the subordinate knew that the order entailed the commission of a crime, and obeyed it nonetheless.
>
> (3) To determine whether the subordinate was aware of the fact that he had been ordered to perform a criminal act, the Court may use the auxiliary test of manifest illegality.

The later cases, particularly those involving the hospital ships, reflect the increasing difficulties in determining when the defence of carrying out the order of a superior may be properly considered. In *Dover Castle*, 16 A.J.I.L. 704 (1921), it would at first blush have been unthinkable that the defence could be utilized in the sinking of a hospital ship. Yet when the evidence established that the German High Command and members of the German Forces believed that hospital ships were being used for purely military purposes, perhaps as troop ships, the defence became one that not only was considered but also properly proved successful at trial. On the other hand the machine gunning and shelling of the survivors in the lifeboats in *Llandovery Castle*, 16 A.J.I.L. 708 (1921), was such an atrocious act and so adverse to all traditions and law of the sea that it was on its face manifestly unreasonable. As a result, the defence was unacceptable and the conviction correctly resulted. These cases also are an example of the necessity to consider the context in which the acts were committed. They cannot be viewed in any other way. The actions are the product of their times.

The manifest illegality test has received a wide measure of international acceptance. Military orders can and must be obeyed unless they are manifestly unlawful. When is an order from a superior manifestly unlawful? It must be one that offends the conscience of every reasonable, right-thinking person; it must be an order which is obviously and flagrantly wrong. The order cannot be in a grey area or be merely questionable; rather it must patently and obviously be wrong. For example the order of King Herod to kill babies under two years of age would offend and shock the conscience of the most hardened soldier. A very helpful discussion as to when an order is manifestly unlawful can be found in the decision of the Israel District Military Court in the case of *Ofer v. Chief Military Prosecutor* (the *Kafr Qassem* case) [Appeal 279-283/58, *Psakim* (Judgments of the District Courts of Israel), vol. 44, at p. 362], cited in appeal before the Military Court of Appeal, *Pal. Y.B. Int'l L.* (1985), vol. 2, p. 69, at p. 108, and also cited in Green "Superior Orders and Command Responsibility", *supra*, at p. 169, note 8:

> The identifying mark of a `manifestly unlawful' order must wave like a black flag above the order given, as a warning saying: `forbidden'. It is not formal unlawfulness, hidden or half-hidden, not unlawfulness that is detectable only by legal experts, that is the important issue here, but an overt and salient violation of the law, a certain and obvious unlawfulness that stems from the order itself, the criminal character of the order itself or of the acts it demands to be committed, an unlawfulness that pierces and agitates the heart, if the eye be not blind nor the heart closed or corrupt. That is the degree of `manifest' illegality required in order to annul the soldier's duty to obey and render him criminally responsible for his actions.

The most significant decisions which dealt with the superior order defence were rendered by the International Military Tribunal at Nuremberg. There, for the first time a rule was set down which addressed the superior orders defence. Article 8 of the *Charter of the International Military Tribunal*, provides:

> **Article 8.** The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that Justice so requires.

In interpreting and justifying this provision, the Tribunal stated that:

> The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible. [Emphasis added.]
>
> (*Trial of the Major War Criminals before the International Military Tribunal*, vol. 22, (1946) (Official Text in the English Language), at p. 466.)

(ii) *The "Moral Choice" Test, Coercion and Necessity*

The "moral choice" test used by the International Military Tribunal has been criticized as undermining Art. 8, which effectively requires a subordinate to ignore a manifestly illegal order regardless of the consequences. (See for example: Morris Greenspan, *The Modern Law of Land Warfare* (1959), at p. 493.) However, other international legal scholars such as Professors Bassiouni (*supra*, at p. 427) and Dinstein (in *The Defence of `Obedience to Superior Orders' in International Law*, *supra*, at p. 152) assert that the moral choice test as enunciated by the International Military Tribunal "was meant to complement the provision of Article 8 and not to

undermine its foundations". According to this interpretation, Bassiouni, *supra*, notes at p. 437 that

> `obedience to superior orders' is not a defense ... to an international crime when the order is patently illegal and when the subordinate has a moral choice with respect to obeying or refusing to obey the order. But, if the subordinate is coerced or compelled to carry out the order, the norms for the defense of coercion (compulsion) should apply. In such cases, the issue is not justification, but excuse or mitigation of punishment.

A person may be compelled to obey superior orders either because of natural causes which place the individual in a condition of danger (necessity) or because of pressure which is brought to bear on him or her by another person (coercion). Bassiouni, *supra*, at p. 439, explains:

> The two sources of compulsion though different may lead a person to harm another in order to avoid a greater or equal personal harm. Both are a concession to the instinct of human survival, but both are limited for policy and moral-ethical reasons, by positive and natural law.

The defence of obedience to superior orders based on compulsion is limited to "imminent, real, and inevitable" threats to the subordinate's life (*The Einsatzgruppen Case*, 4 Trials of War Criminals 470 (1948)). As Jeanne L. Bakker has pointed out in "The Defense of Obedience to Superior Orders: The Mens Rea Requirement" (1989), 17 *Am. J. Crim. L.* 55, the problem is to determine when threats become so imminent, real, and inevitable that they rise to the level of compulsion that disables a subordinate from forming a culpable state of mind.

I agree with Bakker, when she states, at pp. 72 and 73:

> ... a moral choice is available where subordinates have the freedom to choose between right and wrong courses of conduct without suffering detrimental consequences. Subordinates who choose to obey an illegal order when they could have disobeyed without suffering adverse consequences are guilty of criminal action.
>
> ...
>
> Otto Ohlendorf, commanding officer of one of the notorious *Einsatzgruppen* (death wagons) [*sic*], executed more than 90,000 "undesirable elements composed of Russians, gypsies, Jews and others" on the basis of an order that he recognized as "wrong", although he refused to consider "whether it was moral or immoral"(.) In view of his acknowledged unwillingness to exercise moral judgment, the tribunal refused him a plea of obedience to superior orders.

Bakker suggests that it is only when the soldier faces an imminent, real and inevitable threat to his or her life that the defence of compulsion may be used as a defence to the killing of innocent people. "Stern punishment" or demotion would not be sufficient. She states at p. 74:

> Whether a subordinate's belief in the existence of an imminent, real and inevitable threat to his life is justified should be a function of circumstances surrounding the subordinate faced with an illegal order. A number of circumstances may be considered including age, education, intelligence, general conditions in which subordinates find themselves, length of time spent in action, nature of the hostilities, the type of enemy confronted, and opposing methods of warfare.
>
> Circumstances that go directly to the state of mind of the offender confronted with a moral choice include the announced penalty for disobeying orders, the probable penalty for disobedience, the typical subordinate's reasonable beliefs about the penalty, the subordinate's belief as to what the penalty is, and any alternatives available to the subordinate to escape execution of the penalty.

The element of moral choice was, I believe, added to the superior orders defence for those cases where, although it can readily be established that the orders were manifestly illegal and that the subordinate was aware of their illegality, nonetheless, due to circumstances such as compulsion, there was no choice for the

accused but to comply with the orders. In those circumstances the accused would not have the requisite culpable intent.

I would add this to the comments of the text writers. The lower the rank of the recipient of an order the greater will be the sense of compulsion that will exist and the less will be the likelihood that the individual will experience any real moral choice. It cannot be forgotten that the whole concept of the military is to a certain extent coercive. Orders must be obeyed. The question of moral choice will arise far less in the case of a private accused of a war crime or a crime against humanity than in the case of a general or other high ranking officer.

(iii) *Obedience to Superior Orders Constituting Just Another Factual Element to be Taken into Account in Determining Mens Rea*

Some writers have concluded that the requirement to obey superior orders should not be characterized as a defence. Rather it is simply one of the many factual circumstances which must be examined in determining whether the accused had the guilty mind required for a conviction.

Professor Dinstein, at p. 88, states that:

> ... obedience to orders constitutes not a defence *per se* but only a factual element that may be taken into account in conjunction with the other circumstances of the given case within the compass of a defence based on lack of *mens rea*, that is, mistake of law or fact or compulsion.

Professor, later Sir, Hersch Lauterpacht expressed the same view in "The Law of Nations and the Punishment of War Crimes" (1944), 21 *Brit. Y.B. Int'l L.* 58, stating at p. 73:

> ... it is necessary to approach the subject of superior orders on the basis of general principles of criminal law, namely, as an element in ascertaining the existence of *mens rea* as a condition of accountability.

Bakker, *supra*, at p. 79, also argued, that "obedience to superior orders should be just another *factual* finding in the search for evidence indicative of the actor's state of mind when carrying out orders." (Emphasis in original.)

(iv) *The Canadian Context*

Section 7(3.74) of the Canadian *Criminal Code* provides that:

> **7.** ...
>
> (3.74) Notwithstanding subsection (3.73) and section 15, a person may be convicted of an offence in respect of an act or omission referred to in subsection (3.71) even if the act or omission is committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

Section 15 of the *Criminal Code* provides a defence against conviction when the accused acted "in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs".

It is apparent that s. 7(3.74) was enacted to provide judicial discretion to deny a defence of reliance on laws such as the Baky Order. The section reflects the internationally recognized exception to the rule of international law which provides that states have a duty to refrain from intervention in the international or external affairs of other states. (See Brownlie, *supra,* at p. 291.) Without this exception, countries such as World War II Germany, whose state policy of persecution was enshrined in national legislation, could effectively claim that the matter was one of domestic concern and that the principle of sovereign integrity prevented other states from interfering with their citizens who carried out their laws which constituted crimes against humanity.

In the absence of this exception, even Hitler could have defended charges against him by claiming that he was merely obeying the law of the country. As a German citizen he too was subject to the laws of the state, and was required to comply with the legislation mandating the "Final Solution". If obedience to *de facto* law were permitted to be used as an automatic defence then not even the most despotic tyrant, the author and enforcer of the most insidious laws against humanity, could be convicted for the crimes committed under his regime. This would be an unacceptable result. Hence, Canadian courts have the discretion to convict a person of a war crime or a crime against humanity notwithstanding the existence of laws in the country where the offence was committed which justified or even required such conduct.

The defence of obedience to *de facto* law is not the same as obedience to superior orders. Although at times, the superior orders which a soldier receives may become part of the domestic legal system, this would not change the nature

of the order as far as the soldier was concerned. He or she would still be obliged to follow the order unless it were manifestly unlawful. Thus, the removal of the automatic right to claim obedience to *de facto* law does not affect the defence of obedience to superior orders.

It follows that the trial judge was correct in putting the defence of obedience to military orders to the jury. In so doing he was not permitting the respondent to plead obedience to the laws of Hungary in effect at the time of the alleged actions. He reminded the jury of the expert testimony to the effect that the respondent, as a Captain of the Gendarmerie, would have been subject to the orders of General Baky. Then he instructed the jury that the Baky Order was unconstitutional according to Hungarian law, but that their task was to determine whether a reasonable person in the respondent's position would have found that the order was manifestly illegal and whether the respondent would have had a choice to obey the order or not. The trial judge did not characterize the defence as being obedience to laws of Hungary in existence at the time of the alleged offences. Rather, it was properly characterized as obedience to military orders.

I can find no fault in these instructions. Once again the situation must be considered in its context. This was a time of war. The Russian armies were approaching the borders of Hungary. Hungary was in effect an occupied state. German forces were in command and in control of the country. No matter how unlawful the Baky Order was, it was open to the jury to find that it would be difficult to expect a Captain of the Gendarmerie to disobey that order and that to the accused the Baky Order was a military order. It was in that light that his defence of obeying an order from a superior had to be considered.

The appellant argues that the effect of s. 7(3.74), which limits the accused's right to plead obedience to *de facto* law, is to preclude the use of the peace officer defence under s. 25 of the *Criminal Code*. The thrust of this argument is that s. 25(2), which permits the accused to rely on the law notwithstanding the fact that the law may be defective, is contrary to the purpose of s. 7(3.74). However, I am of the view that the trial judge correctly interpreted the application of the peace officer defence in the context of a war crime and a crime against humanity. The purpose of s. 25(2) is to provide legal protection to a police officer, who, acting in good faith and on a reasonable belief that his or her actions are justified by law, later finds out that those actions were not authorized because the law was found to be defective.

Section 25 is akin to the defence of mistake of fact. Unless, the law is manifestly illegal, the police officer must obey and implement that law. Police officers cannot be expected to undertake a comprehensive legal analysis of every order or law that they are charged with enforcing before taking action. Therefore, if it turns out that they have followed an illegal order they may plead the peace officer defence just as the military officer may properly put forward the defence of obedience to superior orders under certain limited conditions. The qualification is that the military officer must act in good faith and must have reasonable grounds for believing that the actions taken were justified. An officer acting pursuant to a manifestly unlawful order or law would not be able to defend his or her actions on the grounds they were justified under s. 25 of the *Criminal Code*.

In the case at bar, the trial judge clearly instructed the jury that if the law was manifestly illegal, in the sense that its provisions were such that it had the

factual qualities of a crime against humanity or a war crime, then the accused could not rely on the peace officer defence under s. 25 of the *Code*. The written instructions provided to the jury make it clear that the peace officer defence would not be available if a reasonable person in the accused's position would know that his or her actions had the factual quality of a crime against humanity or a war crime. The peace officer defence would be available only if the law or orders were not manifestly illegal and if the accused honestly, and on reasonable grounds, believed his actions to be justified. For example, the following instructions given to the jury were, in my view, entirely appropriate.

> So it is very important to judge a policeman or soldier, anyone subject to military discipline with the test of whether they acted honestly and reasonably in all the circumstances at that time and in that place.
>
> These defences are limited. They depend on honesty, they depend on reasonable conduct, they depend on not using excessive force. They aren't a licence to commit a crime. They aren't a licence if some government or some deputy minister or some under secretary of state goes off the rails and tells the policeman or soldier to do something that is clearly illegal. These defences are no licence to commit obvious crimes in the name of the government.

These instructions did not permit the accused to plead obedience to the laws of his country.

It is worth noting that s. 7(3.74) is permissive. It provides that a person <u>may</u> be convicted of an offence under s. 7(3.71) even if the actions were taken in conformity with *de facto* law. Thus, the existence of a law which is not manifestly unlawful and which appears to justify the conduct of the accused may, under certain conditions, be a factor to be considered in determining whether in acting

under those laws the officer had the requisite guilty mind. More will be said on this issue when the constitutionality of the provisions is considered.

(B) Whether Mistake of Fact Should Have Been Put to the Jury in Conjunction With the Other Defences and With the Other Elements of the Offences

(i) *Whether Mistake of Fact Can be Combined With the Military Orders and Peace Officer Defences*

The appellant argues here that the trial judge improperly combined the military orders and peace officer defences with an issue going to *mens rea*, that is, mistake of fact. The appellant argues that, in effect, the trial judge put mistake of law to the jury. The appellant further argues that the trial judge erred in incorporating into the definition of the defences, the component elements of crimes against humanity and war crimes.

I cannot accept these arguments. The trial judge correctly instructed the jury that the accused charged with an offence under s. 7(3.71) cannot claim that, although a reasonable person would in the circumstances have known that the actions allegedly performed had the factual quality of crimes against humanity or war crimes, he mistakenly thought that they were lawful and that therefore he was justified in following orders and performing the actions. If this were so then an accused could always claim the defence of obedience to military orders by stating that the illegality of the order simply did not occur to him or her at the time. This would be stretching the defence beyond all reasonable limits. If it were permitted it would require the Crown to establish that the accused knew the orders and his or her actions were manifestly unlawful.

Rather, it is sufficient if it is established that the accused was aware of the factual qualities of his or her actions, provided that the jury finds that those actions come within the definition of crimes against humanity or war crimes and that a reasonable person in his or her position would know that orders to perform such actions would be manifestly unlawful. Further, if it is established that the accused had a valid moral choice as to whether to obey the orders, the accused will not be able to avail him- or herself of the defence of obedience to superior orders regardless of what his or her personal thoughts were concerning the lawfulness of the actions. It is not a requirement that the accused knew or believed, according to his or her own moral code or knowledge of the law, that the orders and his or her actions were unlawful.

These same principles apply with respect to the peace officer defence. As the trial judge correctly stated:

> When the order is clearly unlawful in the sense I have described it [it clearly has the factual quality of a war crime or crime against humanity], there's no defence. No peace officer is required or authorized by law to do anything that is clearly a war crime or a crime against humanity.

He was also correct in instructing the jury that when the order or law is not manifestly unlawful and the peace officer or soldier acts on reasonable grounds, he is justified in using as much force as is required for the purpose even if it is later discovered that the law was defective. He properly told the jury that "[i]f the peace officer or soldier honestly believes the law or order is lawful domestically, he acts on reasonable grounds at the time, he has a right to be wrong even if it turns out later he was, in fact, wrong". In my view, this is a correct

instruction on the defence of mistake of fact in combination with the peace officer and military orders defences. Mistake of fact is applicable only in circumstances where the order (in the case of the superior orders defence) or law (in the case of the peace officer defence) is not manifestly unlawful.

In my opinion the trial judge did an admirable job of combining these defences with the elements of the crimes in such a way that the jury was able to follow a logical and legally correct process of reasoning when considering their verdict.

(ii) *Summary With Respect to Availability of Defences*

The defence of obedience to superior orders and the peace officer defence are available to members of the military or police forces in prosecutions for war crimes and crimes against humanity. Those defences are subject to the manifest illegality test. That is to say, the defences will not be available where the orders in question were manifestly unlawful. Even where the orders were manifestly unlawful, the defence of obedience to superior orders and the peace officer defence will be available in those circumstances where the accused had no moral choice as to whether to follow the orders. That is to say, there was such an air of compulsion and threat to the accused that the accused had no alternative but to obey the orders. As an example, the accused could be found to have been compelled to carry out the manifestly unlawful orders in circumstances where the accused would be shot if he or she failed to carry out the orders.

(iii) *Whether the Defences of Mistake of Fact and Obedience to Superior Orders Should Have Been Put to the Jury*

The appellant argues that the trial judge erred in putting the defences of mistake of fact and obedience to superior orders to the jury since there was no air of reality to these defences. It is said that because the accused did not testify, nor call any evidence, there was no evidence to support an inference that he mistakenly believed that the Hungarian decrees and orders, particularly the "Baky Order" and the "train schedule", authorized the actions he allegedly took. The appellant further argues that since the respondent's position was that he did not commit the offences, (with the exception of the acts of robbery which he admitted doing but claimed he believed he was authorized to perform) he could not then claim that if it was found that he had committed the offences in question, he was excused because he honestly believed his actions were lawful since he was obeying orders.

It is trite law that a trial judge must instruct the jury only upon those defences for which there is a real factual basis. A defence for which there is no evidentiary foundation should not be put to the jury (*Kelsey v. The Queen*, [1953] 1 S.C.R. 220). A defence should not be put to the jury if a reasonable jury, properly instructed, would have been unable to acquit on the evidence presented in support of that defence. However, if a reasonable jury properly instructed could acquit on the basis of the evidence giving rise to the defence, then the defence must be put to the jury. It is for the trial judge to decide whether the evidence is sufficient to give rise to the defence as this is a question of law (*Parnerkar v. The Queen*, [1974] S.C.R. 449; *Dunlop v. The Queen*, [1979] 2 S.C.R. 881). There is thus a two-stage process to be followed. The trial judge must look at all the evidence to consider its sufficiency. Then, if the evidence meets the threshold, it should be put before the jury which will weigh it and decide whether it raises a

reasonable doubt. See: *Wigmore on Evidence* (1983), vol. IA, at pp. 968-69; *R. v. Faid*, [1983] 1 S.C.R. 265, at p. 276. This is all that is meant by the requirement of sufficient evidence.

I cannot accept the appellant's contention that merely because the respondent chose not to testify at trial that the defences of mistake of fact and obedience to superior orders became unavailable to him. It matters not who put forward the evidence which supports the "air of reality" test; the crucial question is whether the evidence is sufficient to support an acquittal. In my view, the respondent has correctly noted that evidence of the following circumstances was entered at trial which gave the defences of mistake of fact and obedience to superior orders an air of reality:

(1) Finta's position in a para-military police organization;

(2) the existence of a war;

(3) an imminent invasion by Soviet forces;

(4) the Jewish sentiment in favour of the Allied forces;

(5) the general, publicly stated belief in newspapers in Hungary that the Jews were subversive and disloyal to the war efforts of Hungary;

(6) the universal public expression in the newspapers cited by one of the witnesses of approval of the deportation of Hungarian Jews;

(7) the organizational activity involving the whole Hungarian state together with their ally, Germany, in the internment and deportation;

(8) the open and public manner of the confiscations under an official, hierarchical sanction;

(9) the deposit of seized property with the National Treasury or in the Szeged synagogue.

The evidence of the state of the war, that the country was occupied by German forces, the existence of state-sanctioned conduct by police officers in a state of emergency, and the imminent invasion by the Soviet army which was but 100 km from Szeged was sufficient in my view to give an air of reality to the defence of obedience to superior orders. The evidence from the newspapers of public approval for the deportation, and the open manner in which the confiscations took place could have supported the defence of mistaken belief that the orders to undertake the actions which gave rise to the charges against the respondent were lawful.

Although the respondent only admitted to having taken the property of those people confined in the brickyard, the jury could have found that the respondent aided and abetted the deportation and internment. The fact that the respondent only admitted to confiscating the property did not mean that the jury would believe that that was all he did. Thus, the defenses were properly put to the jury on this basis. Additionally, a war crime and a crime against humanity may be committed by omission as well as by acts. If the jury found that the respondent

had committed a war crime or a crime against humanity by having knowledge of the unlawful confinement and kidnapping and doing nothing to stop it, the respondent would be entitled to have the defences put before the jury. Thus, 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.

(4) *Inflammatory Address*

The trial of this matter was long and complex. It raised issues of a highly emotional and deeply troubling nature. In this context it is perhaps understandable that both defence and Crown counsel made inappropriate remarks to the jury. Among these were suggestions by defence counsel that the jury should stop what was described as the application of "diabolical" legislation. However, in my view, the errors made by both lawyers were satisfactorily corrected by the trial judge in his charge to the jury. For example, in order to correct the suggestion made by defence counsel that the jury could choose to ignore the law the trial judge stated:

> If I make a mistake, it can and will be corrected. If you make a mistake it probably can't be corrected. That is why your task is so important.
>
> The defence counsel in his address predicted accurately I would say something like that. Defence counsel said something that needs to be corrected. He said that that position I just expressed to you is one that most people in hierarchies of command rely on. He said that position is similar to the military where a captain follows the order from a lieutenant-colonel, relying on his superiors, in public acts like the entrainment, and each of us relies on the government's judgment of authority, which might later on turn out to be wrong.

> Now, that wasn't a very helpful comparison. You make up your own mind whether a reasonable person in the position of the accused can honestly believe the Baky order or the train schedule order were lawful and did not involve racial or religious persecution or inhumane acts. Don't get the idea you are following orders or I am following orders. There is all the difference in the world between someone following government orders and someone like you and me who has a duty to apply the law in all due process and all the principles of fundamental justice and all the rights of the accused.
>
> You are not following orders in this case from anyone and neither am I. You are independent and so am I. You are judges. We do not follow any orders. We go wherever the path of the law takes us. No matter whether we think it will please someone in authority or displease someone in authority. Your sense of responsibility and [mine] come from our oaths, our knowledge that what we do is the right thing. None of us, you or I, are following government orders. We are going down the path of the law as interpreted by the independent courts of this country. It isn't helpful to draw a parallel between someone following government orders and independent judges like you and me.

With regard to defence counsel's descriptions of the *Code* provisions as "diabolical", the trial judge stated:

> Defence counsel called diabolical the law which you have a sworn duty to apply. He is entitled to his opinion but I am not sure how helpful his opinion is in the difficult duty you have to perform. It really isn't relevant to your judicial task what you think of the wisdom of the law. As to its fundamental fairness under our constitution, this court, in this case, has given this law a clean bill of health and has said it does comply with the principles of fundamental justice.
>
> You are here to judge the accused; you are not here to judge the law. Judges do judge the law in this country in a system with a lot of safeguards. In Canada courts do not leave it to the government or parliament to decide whether the law conforms with the principles of fundamental justice. I am not here to defend the law and I am not here to criticise the law. Because you heard it criticized as a diabolical law, I think you are entitled to know this court has ruled the law, which you took the oath to apply, the defence counsel calls diabolical, is constitutionally valid. This court in this case has ruled this law complies with the principles of fundamental justice and our higher courts provide a further safeguard to the accused on that issue.

The trial judge went on to correct the statements made by defence counsel that the jurors might at some point find themselves on trial for persecution of the accused. He spoke at some length, and in clear and unequivocal terms instructed the jury that they were not to take into consideration any other concerns. They were simply to determine whether the evidence established the accused's guilt beyond a reasonable doubt.

In further response to the inappropriate comments on the part of defence counsel he stated: "Your oath requires you to deliver a just and fair verdict on the law and the evidence and not to send a message to one side or the other in some dispute in this country or some other country about what policy should be followed in respect of the suspected war crimes or crimes against humanity". The trial judge's instructions to the jury were clear and unambiguous. They would have greatly assisted the jurors to focus on the task before them and to reach a verdict based solely on the evidence. He discounted any suggestions on the part of defence counsel that the jury ought to take any other improper considerations into account in making their decision.

He also commented on Crown counsel's treatment of some of the evidence in these terms:

> While I am on the subject of counsels' addresses, let me also say it didn't seem to me helpful for Crown counsel to refer to the degrading body searches carried out upon the women in the ghetto or other places, or to the cruel comments by that gendarme captain Dr. Uray at a meeting in Munkacs, that the accused did not attend, about putting 100 people in the boxcar packed like sardines and those who couldn't take it, would perish. There isn't a scrap of evidence here, the accused had anything to do with any body searches or he attended that meeting that Dr. Uray made that comment at or that he knew about the comment or heard about it or agreed with it or was even aware of it.

> It is most important in this case to separate in your minds the things the accused knew and the things he didn't know and not to attribute to him personally those things about which he personally knew nothing.

Unfortunate statements were indeed made by counsel for the respondent. They were unprofessional and prejudicial. Yet at the conclusion of the jury addresses the trial judge very carefully instructed the jury with regard to all the significant prejudicial statements made by counsel for the respondent. At the conclusion of a long, difficult, and emotional trial it is only natural that a jury would turn to a trial judge as the impartial arbiter for instructions and directions with regard to the case. In this case their trust was well placed. The jury received from the unbiased arbiter, clear, unequivocal directions pertaining to all the improper statements of counsel for the accused. It is those instructions that they would hear last and take with them to the jury room and rely upon during the course of their deliberations. The final instructions of the trial judge are rightly assumed to be of great significance to the jury. That is why these directions are carefully reviewed by appellate courts. Here those instructions were sufficient to rectify any prejudicial effect that may have been caused by the unfortunate statements of counsels in their addresses.

Neither counsel was a model of perfection in his address to the jury, although I hasten to add that the remarks of the counsel for the respondent were far more prejudicial. Nonetheless the directions given by the trial judge pertaining to the counsels' addresses remedied any prejudice that might have arisen.

(5) *Admissibility of the Evidence of Dallos*

The evidence of Dallos came in two forms. The first was a deposition given by him to the Hungarian state police in Szeged on January 16, 1947. On that occasion, Dallos was told of his obligation to tell the truth and advised that he might have to confirm his testimony by oath. Dallos testified that the Commandant of the Gendarmerie guarding the Jews confined in the brickyard was a man by the name of Bodolay. Captain Finta, he said, was in charge of those detained and the taking of their possessions.

The second was a statement made before the People's Tribunal of Szeged in the form of a deposition, in which he stated again that Bodolay was in charge of the brick factory along with another man by the name of Narai. Neither form of evidence was subject to cross-examination. Both contained hearsay. The majority of the Court of Appeal observed that there is an element of fairness arising from the right of confrontation implicit in the adversarial system. However, the majority held that the trial judge did not err in admitting the evidence in light of this Court's judgment in *R. v. Khan*, [1990] 2 S.C.R. 531. The majority determined that the requirement of necessity was clearly met in this case as the declarant was dead. It also determined that Dallos' statement had the requisite *indicia* of reliability. It noted, at p. 136:

> The statements were made on a solemn occasion, somewhat akin to a court proceeding, by a person adverse to the party seeking to tender the statement. They appear to have been made by a person having peculiar means of knowledge of the events described in the statement, and the statements themselves distinguish between events within Dallos' personal knowledge and events about which he had merely received information from others.

The majority also determined that the fact that the statements were officially recorded and preserved favoured their admissibility. It held that cross-examination could shed little light on the truth of what Dallos said since only he could testify to that. On this issue they observed, at p. 136:

> The cross-examination of which the Crown says it was deprived could only clarify what was said by Dallos. As in the case of a business record, there is little reason here to doubt the accuracy, as opposed to the truth, of what Dallos is reported to have said.

Finally, the majority held that the exception to the hearsay rule in the form of statements made against penal interest by a person who is unavailable could only be invoked by the defence. It concluded that it would be unfair to allow the Crown to prosecute an accused today with the assistance of evidence which had been in existence for some 46 years and which the accused was not given the opportunity to challenge.

In *R. v. Williams* (1985), 18 C.C.C. (3d) 356, Martin J.A. stated that there is a need for a flexible application of some rules of evidence in order to prevent a miscarriage of justice. He said at p. 378: "It seems to me that a court has a residual discretion to relax in favour of the accused a strict rule of evidence where it is necessary to prevent a miscarriage of justice and where the danger against which an exclusionary rule aims to safeguard does not exist." His words are particularly apposite to this case.

In *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, at p. 57, the Ontario Court of Appeal held that the rules of evidence were properly relaxed in order to permit

a question to be asked of a witness the answer to which constituted inadmissible hearsay. This was permitted because to do otherwise would have denied the accused the right to make full answer and defence, a right encompassed in the term "fundamental justice" now enshrined in s. 7 of the *Charter*.

In *R. v. Khan*, *supra,* this Court observed that in recent years courts have adopted a more flexible approach to the hearsay rule, rooted in the principles and the policies underlying the hearsay rule, rather than in the narrow strictures of the traditional exceptions. The requirements for the admission of hearsay evidence are that it be necessary and reliable. Necessity may be present where no other evidence is available. The testimony may be found to be reliable when the person making the statement is disinterested, and the statement is made before any litigation is undertaken. It is also helpful if the declarant is possessed of a peculiar or special means of knowledge of the event. See also *R. v. Smith,* [1992] 2 S.C.R. 915; *R. v. B. (K.G.),* [1993] 1 S.C.R. 740. The evidence of Dallos meets all these criteria and was therefore admissible.

I agree with the majority of the Court of Appeal that there was a firm foundation supporting the trial judge's ruling that the evidence of Dallos was admissible. The importance of putting all relevant and reliable evidence that is available before the trier of fact in order to provide the clearest possible picture of what happened at the time of the offences is indisputable. It would have been unfair to have deprived the respondent of the benefit of having all relevant, probative and reliable evidence before the jury. This is particularly true of evidence that could be considered to be helpful to his position.

(6) *Trial Judge's Calling Evidence of Dallos, Kemeny and Ballo Himself*

The trial judge found that the evidence of Dallos was essential to the narrative as he was in a unique position to observe directly the command structure in the brickyard.

With respect to the evidence of Ballo and Kemeny, the trial judge ruled that their evidence was essential to the unfolding of the narrative on which the prosecution was based. In his decision to call the evidence himself he also considered their evidence to be significant in relation to the confinement, to the question as to who was in command of the brickyard, and to the quality of evidence of the other survivors who testified that Finta was the commander. Additionally, he considered the fact that the evidence of Kemeny and Ballo could potentially support an inference quite different from that left by all the other survivors. Kemeny was the only living witness who, as one of the Jewish leaders, was involved in the administrative centre of the brickyard, including the preparation of the list of names of those who were to be deported from the brickyard. The transcript of her testimony at Finta's trial in Hungary revealed that she could not identify Finta as the commander of the brickyard. Indeed, she went further and said that she never heard his name. Ballo was the only witness who testified regarding the house in the area of the brickyard, guarded by a Gendarme, in which a German officer had his seat. This could have been viewed by a jury as strong evidence that the commander of the brickyard was a German officer.

The majority of the Court of Appeal held that the evidence of Dallos, Kemeny and Ballo should not have been called by the trial judge, as he was moved

to proceed in this way in order to preserve the right of the defence to address the jury last. With respect, I disagree. In a case such as this where the evidence of witnesses is based on events that occurred over 45 years ago, it is essential that all evidence which is relevant, probative and relatively reliable be admitted. The jury must have the benefit of all the testimony pertaining to events which occurred at the time of the alleged offences. Furthermore, it would have been manifestly unfair if the jury had returned a verdict of guilty without having considered the available evidence which suggested that Finta was not the commander of the brickyard. Since such a possibility existed, the trial judge correctly decided to call the evidence on his own behalf since both sides refused to call the evidence themselves. In my view, this was entirely appropriate. What happened to the Jewish people in Hungary was despicably cruel and inhumane. Yet those who are charged with those fearful crimes are entitled to a fair trial. It is the fundamental right of all who come before the courts in Canada. In order to ensure a fair trial for Finta, the evidence of these witnesses had to be presented to the jury.

The evidence was admissible. It was important in determining the outcome of this case. It was known to be available to the court. If a miscarriage of justice was to be avoided then the trial judge was bound to call this evidence. I can see no alternative to that decision. This is one of those rare cases where the residual discretion resting with a trial judge to call witnesses was properly exercised.

(i) Canadian and English Law

It has long been recognized in Canada and in England that in criminal cases a trial judge has a limited discretion to call witnesses without the consent of the parties. This step may be taken if, in the opinion of the trial judge it is necessary for the discovery of truth or in the interests of justice. This discretion is justified in criminal cases because "the liberty of the accused is at stake and the object of the proceedings is to see that justice be done as between the accused and the state" (Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), at p. 826).

The discretion should only be exercised rarely and then with extreme care, so as not to interfere with the adversarial nature of the trial procedure or prejudice the accused. It should not be exercised after the close of the defence case, unless the matter was one which could not have been foreseen. (See Sopinka, Lederman and Bryant, *supra*, at p. 826; Peter K. McWilliams, *Canadian Criminal Evidence* (3rd ed. 1988), at para. 27:10830 "Right of judge to call witnesses", at pp. 27-15 and 27-16; *Cross on Evidence* (7th ed. 1990), at pp. 266-68); *Phipson on Evidence* (14th ed. 1990), at pp. 219-20; Archbold, *Pleading, Evidence and Practice in Criminal Cases* (45th ed. 1993), at p. 1/555; see also annotation by Philip C. Stenning, "`One Blind Man To See Fair Play': The Judge's Right To Call Witnesses" (1974), 24 C.R.N.S. 49, and Michael Newark and Alec Samuels, "Let the Judge Call the Witness", [1969] *Crim. L. Rev.* 399.)

There is very little case law on how the discretion should be exercised. In his annotation, *supra*, Stenning enumerates seven propositions derived from

English case law. These propositions were cited with approval as correctly stating the Canadian law in *Campbell v. The Queen* (1982), 31 C.R. (3d) 166 (P.E.I.S.C.), at pp. 172-75, *per* Campbell J., and in *R. v. S. (P.R.)* (1987), 38 C.C.C. (3d) 109 (Ont H.C.), *per* McKinlay J. (as she then was), affirming decision of Kurisko Dist. Ct. J. A summary of these propositions is as follows:

1. The trial judge may call a witness not called by either the prosecution or the defence, and without the consent of either the prosecution or the defence, if in his opinion this course is necessary in the interest of justice: *R. v. Harris* (1927), 20 Cr. App. R. 86 at p. 89 (K.B.); *R. v. Holden* (1838), 8 Car. & P. 606, 173 E.R. 638; *R. v. Brown*, [1967] 3 C.C.C. 210, at p. 215, *per* Hyde J. (dissenting in part on another issue), at pp. 219-20 *per* Taschereau J. (for the majority); *R. v. Bouchard* (1973), 24 C.R.N.S. 31, (N.S. Co. Ct.), at p. 46; *Campbell v. The Queen*, *supra*, at pp. 172-75; *R. v. S. (P.R.)*, *supra*, at pp. 111, 119-24; *R. v. Black* (1990), 55 C.C.C. (3d) 421 (N.S.S.C.A.D.), at p. 425.

2. The right to call a witness after the close of the case of the defence should normally be limited to a case where a matter was one which could not have been foreseen.

3. A witness may be called after the close of the defence not in order to supplement the evidence of the prosecution but to ascertain the truth and put all the evidence before the jury.

4. The trial judge may not exercise his right to call a witness after the jury has retired, even at the request of the jury.

5. In a non-jury case, in the absence of special circumstances, it is wrong to allow new evidence to be called once a trial judge has retired, and probably after the defence has closed its case.

6. A judge ought not to exercise his discretion to call a witness if the defence would in no way be prejudiced by calling the witness. The defence should not be permitted in this way to use the judge to call their witness to give him a greater appearance of objectivity.

7. The calling of the witness after the defence has closed its case is a factor which may be taken into account on appeal.

None of these propositions is really helpful in deciding how the trial judge should have exercised his discretion in this case. In a number of reported decisions, trial judges have called witnesses themselves and either been upheld on appeal, or not appealed. For example in a murder trial, where three doctors examined the body of the deceased and had a difference of opinion, and only two of those doctors were called by the prosecution, the trial judge called the third doctor (*R. v. Holden*, *supra*). In a trial for "riot" and wounding with intent to cause grievous bodily harm, the trial judge called two eye witnesses (*R. v. Tregear*, [1967] 2 Q.B. 574 (C.A.)). In a trial for impaired driving the trial judge called a doctor who could provide the factual basis for earlier expert testimony given on the defence of automatism (*R. v. Bouchard*, *supra*). In a trial for indecent assault and

sexual assault the accused sought to adduce polygraph evidence and the crown called an expert to testify to the unreliability of such evidence. The accused could not afford an expert to support the opposing position. The trial judge called an expert on the reliability of polygraphs, so the court would have the benefit of hearing evidence on both sides of the issue (*R. v. S. (P.R.), supra*).

(ii) American Law

The American law is essentially the same as the Canadian and British law. A trial judge has the discretion to call witnesses whom the parties do not choose to present: *McCormick on Evidence* (4th ed. 1992), vol. 1, at pp. 23, 26; Annot., 67 A.L.R.2d 538; Annot., 53 A.L.R. Fed. 498. *United States v. Lutwak*, 195 F.2d 748 (7th Cir. 1952), at pp. 754-55, aff'd 344 U.S. 604 (1952), rehearing denied 345 U.S. 919 (1953), refers to the discretion in these words, at pp. 754-55:

> Indeed, it is generally recognized that where there is a witness to a crime for whose veracity and integrity the prosecuting attorney is not willing to vouch, he is not compelled to call the witness, but that the court, in its discretion, may do so and allow cross examination by both sides within proper bounds.

Another statement of the discretion is found in *United States v. Marzano*, 149 F.2d 923 (2nd Cir. 1945), at p. 925:

> It is permissible, though it is seldom very desirable, for a judge to call and examine a witness whom the parties do not wish to call.... A judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert.

A similar statement was made, *obiter*, in *United States v. Liddy*, 509 F.2d 428 (D.C. 1974), at p. 438, *certiorari* denied 420 U.S. 911 (1975):

> The precepts of fair trial and judicial objectivity do not require a judge to be inert. The trial judge is properly governed by the interest of justice and truth, and is not compelled to act as if he were merely presiding at a sporting match. He is not a "mere moderator". As Justice Frankfurter put it, "(f)ederal judges are not referees at prize-fights but functionaries of justice". ... A federal trial judge has inherent authority not only to comment on the evidence adduced by counsel, but also -- in appropriate instances -- to call or recall and question witnesses. He may do this when he believes the additional testimony will be helpful to the jurors in ascertaining the truth and discharging their fact-finding function.

Some other federal cases recognizing this discretion are: *Young v. United States*, 107 F.2d 490 (5th Cir. 1939); *Estrella-Ortega v. United States*, 423 F.2d 509 (9th Cir. 1970); *United States v. Pape*, 144 F.2d 778 (2nd Cir. 1944); *Steinberg v. United States*, 162 F.2d 120 (5th Cir. 1947); *United States v. Browne*, 313 F.2d 197 (2nd Cir. 1963).

It has been observed that appellate courts should be hesitant to interfere in the trial judge's exercise of his discretion:

> An appellate court should not interfere with the district court's performance of that sensitive task [exercising the discretion] absent a clear showing of an abuse of discretion, resulting in prejudice to the defendant.
>
> (*Estrella-Ortega v. United States*, *supra*, at p. 511.)

In the United States the trial judge's discretion to call witnesses exists both at common law, and under Rule 614(a) of the *Federal Rules of Evidence*,

which has been held to be declaratory of the pre-existing common law: *United States v. Ostrer*, 422 F.Supp. 93 (S.D.N.Y. 1976), at p. 103.

(iii) Summary as to the Discretion of the Trial Judge to Call Witnesses and the Exercise of that Discretion in this Case

In order to take this unusual and serious step of calling witnesses, the trial judge must believe it is essential to exercise the discretion in order to do justice in the case. In the case at bar, where the trial judge had decided that certain evidence was essential to the narrative it was a reasonable and proper exercise of the discretion to call the evidence if the Crown refused to do so. It is essential in a case where the events took place 45 years ago that all material evidence be put before the jury. With the passage of time it becomes increasingly difficult to get at the truth of events; witnesses die or cannot be located, memories fade, and evidence can be so easily forever lost. It is then essential that in such a case all available accounts are placed before the court. The majority of the Court of Appeal dismissed concerns about the problems of defending in this case by saying that all cases pose difficulties in presenting a defence. With respect, I think this fails to recognize that this case presents very real difficulties for the defence in getting at the truth which are not comparable to other cases due to the length of time that has elapsed since the events at issue occurred.

The Court of Appeal erred in holding that the trial judge was wrong to take into account the fact that if he did not call the evidence the defence would lose its right to address the jury last. In a case where the trial judge has found that the evidence in question should have been called by the Crown, the issue of who addresses the jury last is indeed relevant. If this were not so it would be open to

the Crown not to call certain evidence in order to force the defence to give up its right to address the jury last. I am certainly not suggesting the Crown acted for improper reasons in this case, but it seems to me that the opportunity for such abuse should not be left open. Further, I think the trial judge's concern for the order of addresses to the jury was secondary to his finding that the evidence was essential to the narrative, which was the principal reason for calling the evidence himself.

Finally, I do not think the appellant can be correct that the trial judge should have waited until after the defence had decided whether or not to call evidence before he called the evidence in question himself. The trial judge could not do that without risking offending the rule that a trial judge should not call evidence him- or herself after the close of the defence case unless the matter was unforeseeable. If the trial judge had waited, and the defence had elected not to call evidence, the trial judge would have been prevented from calling the evidence, as the matter was readily foreseeable, and calling it at that point would have been prejudicial to the defence.

(7) *Jury Instructions on the Identification Evidence*

The appellant argues that the trial judge improperly linked the Dallos evidence to the Crown's identification evidence of the respondent, and thereby called into question the Crown's *viva voce* evidence which identified the respondent as the commander of the brickyard. A witness by the name of Mrs. Fonyo testified that there was someone who looked like the respondent who was not in charge of the brickyard. She stated that Finta was in charge of the brickyard. The appellant

argues that the trial judge's linking of Mrs. Fonyo's evidence to that of the witness Dallos may have created a strong impression in the mind of the jury that Finta was the look-alike while a man by the name of Lieutenant Bodolay was the commander of the brickyard. The appellant argues that there was little evidence to support such an inference and the trial judge should have indicated this to the jury.

A reading of the trial judge's charge to the jury leads me to believe that his instructions on this point were satisfactory. He did not dwell on this connection, and his reference to it was preceded and followed by admonitions to be very cautious about the weight to be attached to the evidence. Furthermore, throughout his charge to the jury, the trial judge reminded the jury that they were the judges of the facts, and that they were free to disregard any inferences which he may have suggested that they make. In other words, they were free to disagree with his conclusions on the evidence and to draw their own inferences based on their perceptions of the strength of the witnesses' testimony and other factors. Thus, in my view, the jury was not misdirected on the identification issue.

Conclusion on the Appeal

For the reasons stated above, I am of the view that the appeal should be dismissed.

The Cross-Appeal (8) and (9)

Leave was granted to the respondent to cross-appeal. The Chief Justice stated the following constitutional questions:

1. Does s. 7(3.74) of the *Criminal Code* violate ss. 7, 11(*a*), 11(*b*), 11(*d*), 11(*g*), 12 or 15 of the *Canadian Charter of Rights and Freedoms*?

2. If the answer to this question is in the affirmative, is s. 7(3.74) of the *Criminal Code* a reasonable limit in a free and democratic society and justified under s. 1 of the *Canadian Charter of Rights and Freedoms*?

3. Does s. 7(3.71) read with s. 7(3.76) of the *Criminal Code* violate ss. 7, 11(*a*), 11(*b*), 11(*d*), 11(*g*), 12 or 15 of the *Canadian Charter of Rights and Freedoms*?

4. If the answer to this question is in the affirmative, is s. 7(3.71) read with s. 7(3.76) of the *Criminal Code* a reasonable limit in a free and democratic society and justified under s. 1 of the *Canadian Charter of Rights and Freedoms*?

(i) Do Sections 7(3.74) and (3.76) of the *Criminal Code* Violate Section 7 of the *Charter* Because These Purport to Remove the Protection of Section 15 of the *Criminal Code*?

(8) *Charter Violation*

The respondent argues that the removal of the defence of obedience to *de facto* law by operation of s. 7(3.74) of the *Criminal Code* constitutes a violation of the principles of fundamental justice. It is contended that it is reasonable to assume that because Finta acted in obedience to the law (the Baky Order), he did not have the guilty mind required to found a conviction for the offence. In other words, he might well have had an honest, though mistaken belief that the Baky Order was lawful and therefore, if he acted in obedience to the law, he cannot be faulted. I cannot agree.

It was noted earlier that s. 7(3.74) is permissive rather than mandatory. There may well be situations where the law is not manifestly unlawful, and as a

consequence the accused may be able to argue mistaken belief in the validity of the law successfully. The existence of a law which is unlawful but not manifestly so will not give rise to a defence of obedience to *de facto* law *per se*. Rather, it will be one of the factors that may be taken into account in determining whether the individual had the requisite guilty mind. However if the jury finds that the accused was aware of factual circumstances which would render his or her actions a crime against humanity or a war crime, it would be highly unlikely that a mistaken belief in the validity of a law could provide a defence to the commission of the inhumane acts. However, the removal of the defence of obedience to *de facto* law does not relieve the Crown of its obligation to prove the requisite *mens rea*. As well, the accused is entitled to raise any defence that may be appropriate, such as obedience to military orders. The issue was aptly dealt with in Smith and Hogan, *Criminal Law* (7th ed. 1992), at pp. 261-62, in this way:

> Though there is little authority on this question, it is safe to assert that it is not a defence for D merely to show that the act was done by him in obedience to the orders of a superior, whether military or civil.... The fact that D was acting under orders may, nevertheless, be very relevant. It may negative *mens rea* by, for example, showing that D was acting under a mistake of fact or that he had a claim of right to do as he did, where that is a defence; or, where the charge is one of negligence, it may show that he was acting reasonably.

I agree with Callaghan A.C.J.H.C. that s. 7(3.74) does not, by permitting the removal of this defence, result in a breach of fundamental justice. In *R. v. Holmes*, [1988] 1 S.C.R. 914, Dickson C.J. stated that Parliament may re-define the meaning of "excuse", by expanding or narrowing it to include only certain excuses. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Dickson C.J. explained the rationale for this at p. 70:

> The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions. When a defence is provided, especially a specifically-tailored defence to a particular charge, it is because the legislator has determined that the disapprobation of society is not warranted when the conditions of the defence are met.

When the *Criminal Code* provides that a defence is to be expressly excluded it is because Parliament has determined that the criminal act is of such a nature that not only is the disapprobation of society warranted, but also the act cannot be justified by the excluded defence. Such a legislative provision will not generally violate s. 7 when a defence is inconsistent with the offence proscribed in that it would excuse the very evil which the offence seeks to prohibit or punish. For example it would be illogical and senseless to permit an accused to rely on the laws of a sovereign state which violate international law by legislating the commission of crimes against humanity on the grounds that the laws themselves justify criminal conduct. In this case the expert testified that the accused's awareness of his country's directed policy of persecution or discrimination constituted the "international element" of crimes against humanity. Similarly the accused's awareness of his state's conduct of war is the international element of war crimes. The trial judge identified these as essential elements of the offences in question. It follows that just as it is not a violation of s. 7 to prevent drunkenness' being used as a defence to a charge of impaired driving (*R. v. Penno*, [1990] 2 S.C.R. 865) it is not a violation of s. 7 to limit the use that can be made of the defence of obedience to superior orders.

(ii) Do the Impugned Sections of the *Code* Violate the *Charter* by Reason of Vagueness?

The respondent argues that s. 7(3.71) and s. 7(3.76) of the *Criminal Code* violate the principle that there must be no crime or punishment except in accordance with fixed, predetermined law. That is to say the citizen must be able to ascertain beforehand how he or she stands with regard to the criminal law. If the citizen cannot determine the consequences of his or her actions due to the vagueness of the law then to punish the citizen for breach of that law would be purposeless cruelty. Specifically, the respondent argues that the state of international law prior to 1944 was such that it could not provide fair notice to the accused of the consequences of breaching the still evolving international law offences.

Secondly, the respondent argues that the definitions of "war crime" and "crime against humanity" constitute a standardless sweep authorizing imprisonment. He submits that the definition of "crimes against humanity" which includes "murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that ... 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" permits the inclusion of any act so long as it is seen by the jury to be "persecution" etc. An accused would have no notice that his or her acts were contrary to international law since the proscribed acts are not adequately defined.

At the outset it may be helpful to reiterate some of the major points which this Court has established with respect to the issue of vagueness. In the *Reference re ss. 193 and 195.1 (1)(c) of the Criminal Code (Man.) (Prostitution Reference*), [1990] 1 S.C.R. 1123, it was held that it is not fatal that a particular

legislative term is open to varying interpretations by courts. In *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, it was stated that the threshold for finding a law vague is relatively high. There Gonthier J. provided guidance for determining whether a provision is so vague that it violates the principle of legality in these words at p. 639:

> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion.

And later, at p. 643 he stated:

> The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague [only] if it so lacks in precision as not to give sufficient guidance for legal debate.

In my view, the fact that the entire body of international law is not codified and that reference must be made to opinions of experts and legal writing in interpreting it does not in itself make the legislation vague or uncertain. This material is often helpful in determining the proper interpretations to be given to a statute. Further, the fact that there may be differences of opinion among international law experts does not necessarily make the legislation vague. It is ultimately for the court to determine the interpretation that is to be given to a statute. That questions of law and of fact arise in the interpretation of these provisions and their application in specific circumstances does not render them vague or uncertain. In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, it was recognized at p. 983 that:

> Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard

> according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies.

Thus I agree with the following statement made by Tarnopolsky J.A. in this context, at pp. 64-65:

> The fact ... that reference may have had to be made to legal texts and even to the opinions of experts to determine, for purposes of jurisdiction, what constitutes a war crime or a crime against humanity, is not an issue concerning vagueness of a charge, any more than any other piece of new legislation may require legal research and analysis beyond the competence of some accused but not, presumably, that of a lawyer.

In *Nova Scotia Pharmaceutical, supra*, Gonthier J. distinguished between formal and substantive notice. Formal notice involved an acquaintance with the actual text of a statute. The substantive aspect of notice is described as an understanding that some conduct comes under the law. This is considered to be the "core concept of notice".

Gonthier J., at p. 634, set out an analysis of the concept of notice using the crime of homicide as an example which I think is apposite in this context:

> Let me take homicide as an example. The actual provisions of the *Criminal Code* dealing with homicide are numerous (comprising the core of ss. 222-240 and other related sections). When one completes the picture of the *Code* with case law, both substantive and constitutional, the result is a fairly intricate body of rules. Notwithstanding formal notice, it can hardly be expected of the average citizen that he know the law of homicide in detail. Yet no one would seriously argue that there is no substantive fair notice here, or that the law of homicide is vague. It can readily be seen why this is so. First

> of all, everyone (or sadly, should I say, almost everyone) has an inherent knowledge that taking the life of another human being is wrong. There is a deeply-rooted perception that homicide cannot be tolerated, whether one comes to this perception from a moral, religious or sociological stance. Therefore, it is expected that homicide will be punished by the State. Secondly, homicide is indeed punished by the State, and homicide trials and sentences receive a great deal of publicity.

The same principles must apply with respect to a war crime and a crime against humanity. The definitions of crimes against humanity and war crimes include the gravest, cruellest, most serious and heinous acts that can be perpetrated upon human beings. These crimes, which violate fundamental human values, are vehemently condemned by the citizens of all civilized nations. War crimes or crimes against humanity are so repulsive, so reprehensible, and so well understood that it simply cannot be argued that the definition of crimes against humanity and war crimes are vague or uncertain.

The same considerations apply with respect to the respondent's second argument. So long as the crimes are ones which any reasonable person in the position of the accused would know that they constituted a violation of basic human values or the laws of war, it cannot be said that the crimes constitute a "standardless sweep authorizing imprisonment". The standards which guide the determination and definition of crimes against humanity are the values that are known to all people and shared by all.

I am in agreement with the decision of the Court of Appeal, unanimous on this issue, that the law is not vague.

(iii) Do the Impugned Sections of the *Code* Violate Section 7 and Section 11(*g*) of the *Charter*?

The respondent's arguments with respect to ss. 7 and 11(*g*) relate to the allegedly retrospective character of the impugned provisions. Most nations recognize that a statute can neither retroactively make criminal an act which was lawful at the time it was done, nor impose a penalty for past acts which were not criminal when they were committed.

In an effort to avoid violating the principle against retroactivity, the provisions of the *Criminal Code* concerning a war crime and a crime against humanity were drafted in such a way that the accused is deemed to have committed Canadian *Criminal Code* offences which were in existence at the time the actions were alleged to have occurred. Perhaps the drafters hoped that by not creating new offences they could avoid violating the principle against retroactivity.

However, as I have indicated earlier the only constitutionally permissible way to interpret the provisions in question is to conclude that two new offences have been created, namely, crimes against humanity and war crimes. This however, does not result in a violation of the principle that actions cannot be retroactively made criminal.

There are two approaches which have generally been advanced in this debate. There are those who, like Robert H. Jackson J., Chief Counsel for the United States in the Nuremberg prosecution, believe that the humanitarian principles which form the basis of crimes against humanity evolved from the law of war which is itself over 7,000 years old. See Bassiouni, *supra*, at p. 150.

Jackson J., in his report to the President of the United States on June 6, 1945 stated: "These principles (crimes against humanity) have been assimilated as part of International Law at least since 1907" (quoted in Bassiouni at p. 168). Jackson J. thought that the recognition of "crimes against humanity" as constituting violations of the already existing conventional and customary international law was clearly demonstrated by the previous efforts of the international community to prohibit the same kind of conduct which was the subject of Article 6(*c*) of the *Charter of the International Military Tribunal*. (See also: Egon Schwelb, "Crimes Against Humanity" (1946), 23 *Brit. Y.B. Int'l L.* 178.)

The primary evidence of the prohibition of violations of the laws of humanity (or crimes against humanity) is found in the Preamble of the two Hague Conventions. The preamble to the *Convention Respecting the Laws and Customs of War on Land* (Hague Convention IV, 1907) contains a clause known as the Martens clause which states:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.

With regard to Hague Convention IV, the International Military Tribunal (IMT) at Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal*, *supra*, held at p. 497:

> The rules of land warfare expressed in the convention undoubtedly represented an advance over existing international law at the time of

> their adoption. But the convention expressly stated that it was an attempt "to revise the general laws and customs of war", which it thus recognized to be then existing, but by 1939 these rules laid down in the convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war....

In his article entitled "The Prosecution of War Criminals in Canada" (1989), 12 *Dalhousie L.J.* 256, W. J. Fenrick notes at p. 261 that "[a]lthough this statement is unsubstantiated in the judgment, it has been unchallenged since it was first uttered". In the German High Command Trial, a U.S. Military Tribunal sitting at Nuremberg in 1947-48 adopted at vol. 22, p. 497, the IMT position that Hague Convention IV of 1907 was binding as declaratory of international law and went on to outline how specific provisions of Hague Convention IV and of the 1929 Geneva Prisoners of War Convention (*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, 27 July 1929, 118 L.N.T.S. 303) were incorporated into customary law.

In 1946, the United Nations General Assembly passed, without dissent or abstention, a resolution reaffirming the principles of international law recognized by the *Charter of the International Military Tribunal* and the judgment of the Nuremberg Tribunal. David Matas in his book *Justice Delayed* (1987) expressed the view that this universal acceptance gave the Nuremberg trials an authoritative position in international law. Mr. Matas at p. 90 writes:

> Its pronouncements on the international law of war crimes and crimes against humanity must be regarded as authoritative. Any statement by a Tribunal whose judgment has been accepted by all nations of the world must carry more weight than any declaration on international law made by the courts of a single state.

The second approach to the problem of retrospectivity is that put forward by people such as Professors Kelsen and Schwarzenberger. Schwarzenberger rejected the argument that the International Military Tribunal's jurisdiction regarding "crimes against humanity" extended to crimes committed against German nationals, other nationals and stateless persons under German control, irrespective of whether such acts were lawful under any particular local law, so long as the war connection existed. He thought that the Nuremberg and Tokyo Charters were not declarative of already existing international law but were merely meant to punish the atrocious behaviour of the Nazi and Japanese regimes because their deeds could not go unpunished. Thus, he stated:

> ... the limited and qualified character of the rule on crimes against humanity as formulated in the Charters of the Nuremberg and Tokyo Tribunals militates against the rule being accepted as one declaratory of international customary law. This rudimentary legal system [of international law] does not know of distinctions as subtle as those between crimes against humanity which are connected with other types of war crime and, therefore, are to be treated as analogous to war crimes in the strict sense and other types of inhumane acts which are not so linked and, therefore, are beyond the pale of international law. The Four-Power Protocol of October 6, 1945, offers even more decisive evidence of the anxiety of the Contracting Parties to avoid any misinterpretation of their intentions as having codified a generally applicable rule of international customary law.
>
> [Schwartzenberger, *International Law as Applied by International Courts and Tribunals*, *supra*, at p. 498.]

Similarly, Professor Kelsen is of the view that the rules created by the *Charter of the International Military Tribunal* and applied by the Nuremberg Trial represented "a new law" (Hans Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?" (1947), 1 *Int'l L.Q.* 153; see also: Hans Kelsen, "The Rule Against *Ex Post Facto* Laws and the Prosecution of the

Axis War Criminals" (1945), 2:3 *Judge Advocate J.* 8). However, he proposed the following solution to the problem of retrospectivity in his article "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?", at p. 165:

> A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed, seems also to be an exception to the rule against ex post facto laws. The London Agreement is such a law. It is retroactive only in so far as it established individual criminal responsibility for acts which at the time they were committed constituted violations of existing international law, but for which this law has provided only collective responsibility. The rule against retroactive legislation is a principle of justice. Individual criminal responsibility represents certainly a higher degree of justice than collective responsibility, the typical technique of primitive law. Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the second World War may certainly be considered as more important than to comply with the rather relative rule against ex post facto laws, open to so many exceptions.

See also: Professor Julius Stone, *Legal Controls of International Conflict* (1974), at p. 359.

The approach of Professor Kelsen seems eminently sound and reasonable to me. I would adopt it as correct and apply it in reaching the conclusion that the provisions in question do not violate the principles of fundamental justice.

(iv) Did the Pre- and Post-Charge Delay Violate Sections 7, 11(*b*) and 11(*d*) of the *Charter*?

The respondent argues that this Court should extend the principles set out in *R. v. Askov*, [1990] 2 S.C.R. 1199, to the situation of pre-charge delay. He argues that since 45 years have elapsed between the date of the actions giving rise to the charges and the date of the trial, there is bound to be prejudice. However, in my view Callaghan A.C.J.H.C. was correct in deciding that the trial judge, after hearing all the evidence, would be in the best position to decide whether or not a s. 24(1) *Charter* remedy is available (*Mills v. The Queen*, [1986] 1 S.C.R. 863) and therefore that the legislation itself should not be struck down.

In the present case, I am unable to see any merit in the respondent's arguments that he suffered prejudice as a result of the pre-charge delay. Indeed, it is far more likely that the delay was more prejudicial to the Crown's case than it was that of the defence. Defence counsel was entitled to argue that the witnesses' memories had become blurred with the passage of 45 years. Further, the documentary and physical evidence that the respondent now complains is not available was probably destroyed during World War II. Thus it is difficult to accept the respondent's assertion that any documentary or physical evidence that would have been available within a few years after the war has since been lost. Additionally, any prejudice occasioned by the death of witnesses that could have helped the defence was substantially reduced by the admission of the Dallos statements.

With regard to the post-charge delay, less than a year passed from the time when the legislation was proclaimed in force to when the indictment was

preferred. In light of the amount of investigatory work that had to be done before any charges could be laid, this seems to be a minimal and very reasonable period of delay.

(v) Do the Impugned Sections of the *Code* Violate Sections 7 and 15 of the *Charter*?

The respondent argues that the legislation contravenes s. 15 of the *Charter* because it relates only to acts or omissions performed by individuals outside Canada. Thus, a Canadian who committed a crime against humanity in Canada, arising for example, from the internment of Japanese Canadians, could not be charged under the impugned provisions, whereas someone in the position of Finta who committed the offence outside of Canada could be charged.

In my view, the apparent difference in treatment is not based on a personal characteristic but on the location of the crime. In *R. v. Turpin*, [1989] 1 S.C.R. 1296, it was held that the determination of whether a group falls into an analogous category to those specifically enumerated in s. 15 is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. The question to be resolved is whether the group represents a discrete and insular minority which has suffered stereotyping, historical disadvantage or vulnerability to political and social prejudice. It was decided that in some circumstances the person's province of residence could be a personal characteristic. However, in this case I do not think that the group of persons who commit a war crime or a crime against humanity outside of Canada could be considered to be a discrete and insular minority.

The respondent's submission that it is contrary to the principles of fundamental justice to subject an individual to prosecution based on an extension of jurisdiction founded on alleged crimes for which Parliament does not make its own government members and its own people in Canada criminally liable cannot be accepted for the same reasons.

(vi) Do the Impugned Provisions violate Section 12 of the *Charter*?

No argument was made by the parties with respect to s. 12.

(9) *Section 1 of the Charter*

As I have concluded that ss. 7(3.74) and (3.76) of the *Criminal Code* do not violate ss. 7, 11(*a*), (*b*), (*d*) and (*g*), or 15 of the *Charter*, it is not necessary to consider the application of s. 1 of the *Charter*.

Conclusion on the Cross-Appeal

For the reasons set out above, I am of the view that Callaghan A.C.J.H.C. and the Court of Appeal, unanimous on this issue, were correct in their conclusion that the challenged provisions of the *Criminal Code* do not violate the *Charter*.

Appeal dismissed, LA FOREST, L'HEUREUX-DUBÉ *and* MCLACHLIN JJ. *dissenting*.

Cross-appeal dismissed. Sections 7(3.74) and 7(3.76) of the Criminal Code do not violate ss. 7, 11(a), (b), (d), (g), 12 or 15 of the Charter.

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