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A Summary of the History of Nazi War Crime Trials in Australia

Acknowledgements

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This paper merely gives a summary overview of the proceedings brought against the three individuals to whom I refer from the point of view of a prosecutor. The prosecution of Polyukhovich has been the subject of a most detailed report by David Bevan in his text “A Case to Answer”. That report was compiled both from the transcript and Mr Bevan’s constant attendances at the committal and at the trial. The background and the more detailed political history underlying the investigations and prosecutions has been chronicled by Mr Mark Aarons in the book to which I have referred War Criminals Welcome - Australia, a Sanctuary for Fugitive War Criminals since 1945. I commend both of those to the researcher who might like to consider in far more detail that I can deal with in this paper the history and circumstances of the Australian Nazi war crimes prosecutions.

At the close of the Second World War the Australian government enacted the War Crimes Act 1945 to provide for the trial and punishment of war criminals. That Act provided for military courts for the trial of war crimes under military law, of persons who were at any time resident in Australia, in respect of war crimes, wherever committed. Military law so far as it related to field general courts martial was applied to the procedure of those courts. Persons convicted of such crimes were liable to the death penalty or any lesser penalty. After the disruption in Europe occasioned by the war Australia accepted a mass of immigrants. As is recorded in the text published by Mark Aarons to which I have referred in my acknowledgement, amongst those migrating to Australia were a number of persons who had been involved in their respective countries, in the commission of war crimes whether as principals themselves or in aid of Nazi occupying forces. In his book “War Criminals Welcome”, Mark Aarons sets out in detail the political history of the amendment to the War Crimes Act 1945. The amended act prescribed for those arrested in Australia for war crimes and crimes against humanity as defined in that Act, a regime involving trials under Australian domestic criminal law in the courts of the States in which they resided in Australia.

That amendment had occurred because of a community awareness of the prospect that former Nazi war criminals were obtaining effective sanctuary in Australia which had been generated following Mark Aarons production of a television documentary put to air by the Australian Broadcasting Commission. Prior to that community awareness being aroused, there had been a number of Commonwealth police investigations that had identified persons reasonably suspected of having been such war criminals. In addition a number of reports had been received from the Soviet Union in particular, referring to such persons and in some cases seeking extradition.

Until that community awareness was aroused, the post war Australian coalition governments had refused to prosecute such persons, it being considered that the 1945 War Crimes Act was unsuitable and had refused extradition requests. However during the 1960’s and 70’s, various immigrants to Australia with a possible history of involvement in war crimes had been identified by investigators.

In 1979 the United States announced intensified efforts to deport accused war criminals from that country, and established the Office of Special Investigations to conduct enquiries. Simon Weisenthal and the Australian group, Research Services, had disclosed to appropriate Australian Security instrumentalities and various bureaucrats, persons who might be suspected of war crimes. In April 1985
the United States Justice Department drew attention to the lack of action against suspected Nazi war criminals in Australia. In May 1986 the documentary series to which I have referred "Nazi's in Australia" was broadcast on ABC Radio National. Following that in early June 1986, the newly elected Labor Government decided to hold an "informal inquiry into Nazi war criminals". A senior bureaucrat, Andrew Menzies was appointed to conduct a review of material relating to the entry of suspected war criminals into Australia. Much material was provided by Mr Aarons and other investigators to him. On 28 November 1986 he reported to the Hawke Government that it appeared that "it is more likely than not that a significant number of persons who committed serious war crimes in World War II entered Australia; certainly the likelihood of this is such that some action needs to be taken."

Notwithstanding that, in 1961 the then Attorney-General Barwick had announced that Australia had officially closed investigations into whether suspected war criminals had emigrated to Australia, the new government in 1987 determined to amend the 1945 War Crimes Act to provide for the new legislative regime to which I have referred and to set up investigatory and prosecution agencies. The purpose of the amendment was set out in the Act.

"WAR CRIMES ACT 1945
Reprinted as at 30 April 1990
An Act to provide for the Trial and Punishment of War Criminals

Preamble
WHEREAS:
(a) concern has arisen that a significant number of persons who committed serious war crimes in Europe during World War II may since have entered Australia and became Australian citizens or residents;
(b) it is appropriate that persons accused of such war crimes be brought to trial in the ordinary criminal courts in Australia; and
(c) it is also essential in the interests of justice that persons so accused be given a fair trial with all the safeguards for accused persons in trials in those courts, having particular regard to matters such as the gravity of the allegations and the lapse of time since the alleged crimes."

In February of 1987 the Special Investigations Unit within the Attorney-General’s Department was set up to investigate and recommend possible prosecutions to the Director of Public Prosecutions. The Unit was headed by the late Robert Greenwood QC and Graham Blewitt, who later, after replacing Greenwood as the head of that Unit, on the cessation of Australian War Crimes prosecutions became the Deputy Prosecutor at the ICTY.

Mr Grant Niemann, one of the Deputy Directors and I were retained by the Director of Public Prosecutions to advise on and prosecute charges against persons referred to the Director by the Special Investigation Unit and in particular to prosecute the charges against Ivan Polyukhovich and Heinrich Wagner. A third person Mikolay Berezowsky was charged but the committing Magistrate did not commit him for trial. Legal aid was granted by the government to allow all three accused the highest level of legal representation.

Under the amended War Crimes Act the ambit of matters that might be brought before the Australian courts as war crimes was narrowly defined. The Act only applied to the War in Europe between 1 September 1939 and 8 May 1945. War crimes were defined as serious crimes as defined in section 6 having the further features required by section 7.

"Serious crimes
6. (1) An act is a serious crime if it was done in a part of Australia and was, under the law when in force in that part, an offence, being:
(a) murder;
(b) manslaughter;
(c) causing grievous bodily harm;
(d) wounding;
(e) rape;
(f) indecent assault;
(g) abduction, or procuring, for immoral purposes;
(h) an offence (in this paragraph called the "variant offence") that would be referred to in a preceding paragraph if that paragraph contained a reference to:
   (i) a particular intention or state of mind on the offender's part; or
   (ii) particular circumstances of aggravation; necessary to constitute the variant offence;
   (j) an offence whose elements are substantially the same as the elements of an offence referred to in any of paragraphs (a) to (h), inclusive; or

(2) In determining for the purposes of subsection (1) whether or not an act was, under the law in force at a particular time in a part of Australia, an offence of a particular kind, regard shall be had to any defence under that law that could have been established in a proceeding for the offence.

(3) An act is a serious crime if:
   (a) it was done at a particular time outside Australia; and
   (b) the law in force at that time in some part of Australia was such that the act would, had it been done at that time in that part, be a serious crime by virtue of subsection (1).

(4) The deportation of a person to, or the internment of a person in, a death camp, a slave labour camp, or a place where persons are subjected to treatment similar to that undergone in a death camp or slave labour camp, is a serious crime.

(5) Each of the following is a serious crime:
   (a) attempting or conspiring to deport or intern a person as mentioned in subsection (4);
   (b) aiding, abetting, counselling or procuring the deportation or internment of a person as so mentioned;
   (c) being, by act or omission, in any way, directly or indirectly, knowingly concerned in, or party to, the deportation or internment of a person as so mentioned.

(6) For the purposes of subsections (3), (4) and (5), the fact that the doing of an act was required or permitted by the law in force when and where the act was done shall be disregarded.

War crimes
7. (1) A serious crime is a war crime if it was committed:
   (a) in the course of hostilities in a war;
   (b) in the course of an occupation;
   (c) in pursuing a policy associated with the conduct of a war or with an occupation;
   or
   (d) on behalf of, or in the interests of, a power conducting a war or engaged in an occupation.

(2) For the purposes of subsection (1), a serious crime was not committed:
   (a) in the course of hostilities in a war; OR
   (b) in the course of an occupation;
   merely because the serious crime had with the hostilities or occupation a connection
(whether in time, in time and place, or otherwise) that was only incidental or remote.

(3) A serious crime is a war crime if it was:
   (a) committed:
       (i) in the course of political, racial or religious persecution; or
       (ii) with intent to destroy in whole or in part a national, ethnic, racial or religious group,
as such; and
(b) committed in the territory of a country when the country was involved in a war or when territory of the country was subject to an occupation.

(4) Two or more serious crimes together constitute a war crime if:
(a) they are of the same or a similar character;
(b) they form, or are part of, a single transaction or event; and
(c) each of them is also a war crime by virtue of either or both of subsections (1) and (3)."

The Act provided that such crimes might be prosecuted whenever they had been committed. The Act provided similarly to the Nuremberg Charter that superior orders did not constitute a defence but that if the doing by the defendant of the relevant act was permitted by the laws, customs and usages of war and was not under international law a crime against humanity that would amount to a defence. The Act in addition limited the circumstances in which persons accused of war crimes might be extradited.

The intent of the Act was to provide a trial regime at least as fair as that for criminal trials generally in Australia, with special protections for the accused. On 25 January 1990 Ivan Polyukhovich was arrested and charged the following morning in the Adelaide Magistrates Court with a number of counts, including having been party to the murder of 24 people and having taken part in the mass killing of about 850 people in the village of Serniki, now located in modern Ukraine, formally in an area of the former Poland subject initially to Soviet-, and then later, to Nazi-occupation.

The following chronology is of assistance:

• 27 June 1990 after service on his lawyers of the mass of prosecution material, Polyukhovich withdrew consent for the committal proceedings to take evidence outside Australia.
• 29 July 1990, Mr Polyukhovich shot himself, not fatally. His committal hearing had been set to begin the following morning.
• 3 September 1990 the High Court of Australia commenced hearing a challenge brought by him against the constitutional validity of the war crimes legislation. Pending the determination of that challenge, the proceedings against him were deferred.
• 14 August 1991 the High Court upheld substantially the validity of the war crimes legislation.
• 5 September 1991 Mikolay Berezowsky and Heinrich Wagner were charged with various war crimes.
• 28 October the committal proceedings against Polyukhovich commenced and were resumed for two weeks in November. Thereafter they continued in March 1992 until on 5 June 1992 the Magistrate committed Polyukhovich for trial on charges of six murders, dismissing the balance of the charges. Notwithstanding and in accordance with Australian law, the Director of Public Prosecutions decided to charge Polyukhovich himself with involvement in the mass execution.
• 19 July 1992 the Magistrate held that there was insufficient evidence to warrant Berezowsky being put on trial.
• 22 December 1992 as a result of a pre-trial application in the Supreme Court of South Australia an attempt to have the proceedings against Polyukhovich permanently stayed as an abuse of process because of the long lapse of time since the events, was dismissed. Numerous other substantially unsuccessful similar applications were later made to stop the trial.
• The trial of Polyukhovich began on 18 March 1993 and three months later on 18 June 1993 he was acquitted of all charges.
• 10 December 1993 the Director of Public Prosecutions withdrew the proceedings against Heinrich Wagner due to his ill health.

It is useful to set out some history by way of background to the three cases. All related to allegations of war crimes committed in the European summers of 1942 and 1943 in various parts of Ukraine. In June of 1941 in Operation Barbarossa, Germany invaded Russia. The Ukraine was conquered very quickly. With and behind the German army special extermination squads operated killing the Jewish population. In 1942, in particular, a more systematic policy of extermination was implemented. All three of the cases involved similar techniques applied in particular areas to implement that policy. The
local men were required to dig large pits outside a particular town or village to assist with the logistics of rounding up the Jewish inhabitants; they were marched to the pits and shot by a German execution squad. The locals were again enlisted to fill in the pit.

In all three cases the accused were charged with being persons who assisted in the carrying out of those executions. Polyukhovich and Berezowsky were alleged to be persons who had enrolled in the Schutzmannschaft or were Heifer, ie. helpers. It was alleged by the prosecution that both Polyukhovich and Berezowsky assisted extermination on the days of the killing or themselves participated in certain killings incidental to the mass executions. Wagner was an ethnic German who became a member of the Gendarmarie. In particular it was alleged against him that following the mass killing he and others in a unit of the Gendarmarie killed a number of babies who had not been killed during the earlier mass execution.

The Polyukhovich Trial

Ivan Polyukhovich had lived in the village of Serniki which is in the vicinity of the Pripjet Marshes in Ukraine. Under the Nazi regime, he became one of the local police and a forester. It was alleged against him that he had participated in partisan war against those partisans, who had taken refuge in the Marshes, and had assisted in the extermination of the Jewish population of Serniki. Following the Nazi occupation, the Jews of that village were placed in a ghetto and the adult men killed in an early action. Subsequently in September 1942, a number of local Ukrainians were ordered to dig a pit on the outskirts of the village, the Jews of the village rounded up, marched to the pit and executed.

The night prior to that execution a number of local Ukrainians assisted a large number of the Jews to escape. Those persons eventually went to live in Canada, the United States and Israel and gave evidence at the committal and trial.

From the chronology that I have given it can be seen that not only before charge, but after charge there was a considerable lapse of time. Due to that many witnesses had died and some had become unfit to give evidence, it was remarkable that the Special Investigation Unit was able to locate and obtain the testimony of as many witnesses as it did.

A number of the charges at committal could not be sustained due to those effects of that lapse of time particularly the death of witnesses. At trial the charges included that relating to Polyukhovich’s involvement with the pit killing and his escorting three people to the pit and shooting them personally. Eyewitness evidence was called as to Polyukhovich’s presence at the pit. However, by the time of trial only one eyewitness was left alive able to testify to Polyukhovich’s actions at the pit.

The important issue that arose at trial was whether the eye witness had accurately identified Polyukhovich at the time as having been the person who performed those actions. There was no doubt on both the prosecution and defence case that the man charged, Ivan Polyukhovich, who had emigrated to Adelaide in 1949, was the man who had lived in Serniki and had been a forester. The witnesses brought to Australia to give evidence from the village clearly knew him and indeed some were related to him. The Special Investigation Unit had not only interviewed the witnesses to whom I had referred but in addition had exhumed the execution site and obtained scientific and ballistic evidence to establish the precise time and nature of the mass killing and the pathological evidence of the cause of death in the case of a large number of the deceased.

Historians gave evidence at the committal and the trial in particular as to the circumstances of the Nazi onslaught against the Jews and the implementation of Nazi policy in Serniki, in order to prove that the killings had been committed in pursuance of a policy associated with the conduct of the war or with the occupation, a necessary requisite under section 7 of the War Crimes Act.

Further, historical evidence was called as to the role of members of the Schutzmannschaft and the foresters. A mass of archival and documentary material was put into evidence through experts who could explain the significance of that documentation as relating to the Nazi policy and Mr Polyukhovich personally.

Under Australian law, Polyukhovich had, and exercised the right to give no evidence. He remained mute. He had originally on his arrest denied to police that he had committed any offences.
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The defence relied upon the evidence of Polyukhovich's first wife who still lived in the village. She was unable to come to Australia. She was prepared to give evidence that Polyukhovich had not assisted the Germans as one of the witnesses most important to the prosecution case, had said that he had. In order that her evidence might properly be taken, the court, that is counsel and the judge went to Serniki, recorded her evidence, including full examination in chief and cross examination on video, which video was played in evidence to the jury when the court returned from Serniki. As pointed out by Judge Michael David QC who appeared for the accused, the case threw up very difficult problems. He refers to these problems as follows:

1. The first problem was the difficulty of time. Half a century was really just too long. In saying that, I must admit that many of the witnesses were very good and their memories of these events were very good. However, just the effect on the jury that a person was thinking back fifty years caused its own difficulties.

2. Another problem was the Ukrainian witnesses' total unfamiliarity with our system. This really caused the greatest problems. This, combined with the difficulty of language and interpreting, made cross-examination, for instance, very difficult. It also made it difficult for the witnesses to tell their story. Let me give you some examples. When the Ukrainian witnesses were first interviewed by the Australian authorities who went over to the Ukraine, the statements were in fact video taped and the defence were provided with those video tapes before trial. Trying to cross-examine them about an inconsistent statement from those video tapes, bearing in mind there was an interpreter at the video taping and an interpreter in Court, was almost impossible.

3. Another problem was that some of the Ukrainian witnesses, before the Australian authorities spoke to them, had spoken to Russian procurators about the allegations. These statements, of course, were provided to the defence. The Russian procurators, not knowing our system, often took statements which did not have the necessary accuracy that was needed in such an investigation. Consequently, there were many exaggerations and, indeed, some statements came close to being mere policy statements. Cross-examination on these original statements allowed the defence to dent the credibility of these witnesses.

4. Of course, the Ukrainian witnesses were also totally unused to the experience of cross-examination. I suppose what I am saying in setting out those difficulties is that our present system, in certain areas, struggled to cope with this type of trial. However, it was thought that, despite those difficulties, it was better off to have the safeguards of our criminal system and the strict rules of evidence rather than another system.

The Case against Heinrich Wagner

It was alleged against Wagner that in the summer of 1942 he had helped escort adult Jews to a pit killing near the village of Ustinovka, near Kirovograd. It was alleged that 20 children of Jewish fathers and Ukrainian mothers who had not been caught up in the original execution, coming from the town of Isralyovka, had been, in the presence of their mothers, put into a cart driven by a Mr Davyborsch, taken to the site of the earlier execution and were there shot by Wagner and others. At this time Wagner was a 19 year old Volksdeutscher. His German background had permitted him to join the Gendarmarie.

Witnesses against him included a fellow member of the Gendarmarie, Ivan Zhilun who gave evidence that he had accompanied Wagner in escorting the adult Jews to the execution scene and gave evidence of the rounding up and execution of the 20 children. He had been found guilty by a Russian court, sentenced to 25 years in Siberia and released after eight years. The cart driver, Davyborsch who had been press-ganged to taking the children to the pit also gave video evidence. Certain of the survivors of the mothers were available to give evidence.

Heinrich Wagner was committed for trial to the Supreme Court of South Australia. Prior to the trial an application was made to the Trial Judge to stay the proceedings. Counsel and the judge went to the Ukraine to take evidence on that application. Zhilun had given evidence in person at the committal but when cross examined some inconsistencies appeared between his testimony and the statements made by him to the Russian court in 1947. Zhilun denied that the record of the Russian court was accurate.
However the interrogators and members of the Russian court had died during the interim. In order to ascertain whether the record was likely to be accurate and to examine its integrity, evidence was taken in Russian from the person in charge of the district and of the court proceedings in 1947. That evidence was videotaped to be used at the trial.

The defence relying on that evidence contended that it was almost impossible to exploit any inconsistent statements that had been made some 50 years earlier. However the application for stay was not successful.

After he had been indicted but prior to the trial commencing, on 10 December 1993, Wagner suffered a heart attack. Evidence was given that a trial would put his life at risk. It was determined by the then Director of Public Prosecutions having had him examined by an independent medical specialist, that the proceedings against him would be withdrawn. Consequently, the allegations against him were never publicly aired at trial.

**Mikolay Berezowsky**

It was asserted against Berezowsky that he had been one of the leaders of the Schutzmannschaft in Gnivan near Vinnitsa in the Ukraine who had taken part in a pit killing in which some 100 people had been executed. There were a number of eye witnesses who had claimed to identify him as having assisted in the round up of the Jews and marching them to execution. However it became apparent on committal that Berezowsky’s case was that he was not there. Contemporary documentation became available from Russian archives during the proceedings including a day-to-day list of the personnel of the Schutzmannschaft at Gnivan which did not show him as present, but did indicate that he was one of the people scheduled at that time to be at a training course at another town far away. The eyewitness evidence was entirely unsatisfactory and in the light of this the committing Magistrate ruled the case was not of sufficient strength to warrant Berezowsky being put to trial.

Although there remained at that time a number of other matters that might have warranted prosecution including of persons suspected of involvement in open air shootings and gas van operations in and around Minsk and in mass killings in Latvia, the Commonwealth government determined to commit no further resources to the trials and prosecutions and terminated the investigations then underway, notwithstanding that, throughout the 1990’s successful Nazi war crimes trials had been brought in the United States, Britain, France, Italy and Croatia. Even then however Australian concerns did not entirely die.

In 1944 Kommrads Kalejs was deported to Australia from the United States. Publicity given to that matter resulted in a reconsideration of the prospects of his being prosecuted. Concern was also aroused concerning another person who had been under investigation prior to the withdrawal of resources, one Karlis Ozols who later died in 2001. The cases of both men were referred back to the Australian Federal Police who drew attention to the cost of further investigating and determined not to continue any inquiries. Kalejs died in Melbourne in 2003 during a bitter legal contest over an attempt to extradite him for trial in Latvia.

There was a deal of media interest when the likelihood of extradition of Kommrad Kalejs was raised, and there remains current in Australia, media interest about the proposed extradition from Australia of a man alleged by the Wiesenthal Centre to have been involved in a murder in Hungary as a member of the then Nazi aligned Hungarian Army, but no further action has been taken or proposed in Australia to prosecute alleged war criminals here.

Unfortunately the acquittal of Polyukhovich, the failure of attempts to prosecute Wagner and Berezowsky resulted in a failure of government will and the termination of any further action.

It is apparent that the attempt to use the standards and requirements of Australian domestic laws was unsuccessful particularly due to the age and death of necessary witnesses. It is clear that the delays were substantially due to original government opposition to prosecuting war criminals so that the later government commitment proved ineffectual. The failure of Australian governments to take action earlier is with hindsight deplorable.
Eine Zusammenfassung der Geschichte der Nazi-Kriegsverbrecherprozesse in Australien


Unter den Immigranten, die sich in Australien niederelassen hatten, befanden sich auch eine Reihe von Nazis und deren Anhänger. Die Ermittlungen der Commonwealth Polizei sowie die Beschwerden der Sowjetunion hatten zu ihrer Aufdeckung geführt, wobei die Fernsehdokumentation nun einige dieser Personen bekannt gab.

