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O'Neil, Glenn. (1991). Prosecuting war criminal in australia. Legal Service Bulletin, 16(1), 20-22.

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Prosecuting war criminals in Australia

Glenn O'Neil

The question of war crimes trials has sparked an emotive debate in the community since the issue was raised in 1986.

The constitutional challenge to Australia's war crimes legislation before the High Court in late 1990 is a further twist in the attempt by Australia to bring alleged war criminals to trial. The High Court challenge has been brought by the first person to be charged under the Act.

Under the *War Crimes Amendment Act* 1988, Ivan Timjofeyevich Polyukhovich, 74, an Adelaide pensioner appeared in the Adelaide Magistrates Court during February 1990 charged with eight counts of murder involving 24 people and one count of knowingly being concerned in the murder of a further 850 people. The charges relate to crimes that are alleged to have taken place in the Rovno district of the Ukraine between August 1941 and May 1943.

Ivan Polyukhovich may never stand trial for the alleged crimes. This not just because of the High Court challenge. Just before the beginning of the proceedings, Ivan Polyukhovich was shot, although not fatally. The case before the Adelaide Magistrates Court has now been deferred.

New allegations regarding war criminals

Although renewed interest in war crimes was sparked in 1986, under the 1945 War Crimes Act nearly 300 war crimes trials were conducted up until 1951, most of them in Northern Australia and the Pacific region involving crimes committed by Japanese troops.¹ Why then is it necessary to conduct further war crimes trials nearly 40 years later?

The change in government policy can be credited to a number of factors. In 1986 an ABC radio series called 'Nazis in Australia' and a television program entitled 'Don't Mention the War' appeared. Both programs alleged that significant numbers of Nazi war criminals had entered Australia at the end of Second World War.

The revision of policy also follows the lead provided by Israel, Canada, France, West Germany and the Soviet Union in conducting war crimes trials in recent years.

The Australian Government established an inquiry to investigate the allegations raised by the media programs. The inquiry was headed by a former Deputy Secretary of the Attorney-General's Department, Andrew Menzies. In 1988 Andrew Menzies concluded that significant numbers of war criminals had entered Australia. Included in his report was a confidential list of about 70 named people who were Australian citizens or residents in Australia who are alleged to have committed serious war crimes.²

On receiving the report, the then Attorney General, Lionel Bowen, established the Special Investigations Unit (SIU) and was responsible for the *War Crimes Amendment Act* 1988 which effectively replaces the *War Crimes Act* of 1945.

The War Crimes Amendment Act 1988

Under the new Act, a person can be charged with an offence if he or she is an Australian citizen or resident (s.11). The legislation applies only to war crimes committed 'on or after 1 September 1939 and on or before 8 May 1945' (s.5). War is defined as meaning a war, whether declared or not, any other armed conflict between countries or a civil war or similar armed conflict in so far as it occurred in Europe during the relevant period (s.9).

War crimes are defined by reference to domestic rather than international law. The legislation applies to acts committed outside Australia which would have been serious crimes had they been committed within Australia at the relevant time. A serious crime includes the following offences: murder, manslaughter, causing grievous bodily harm, wounding, rape and indecent assault (s.6). In addition a serious crime is also constituted by 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 subject to treatment similar to that undergone in a death camp or slave labour camp' (s.6(4)). Once it is established that the relevant act falls within the definition of a 'serious crime', it is then determined whether it is a war crime for the purpose of the legislation. There are two categories of war crimes:

- a serious crime committed in the course of or associated with hostilities, or occupation or on behalf of a power conducting a war;
- a serious crime involving political, racial or religious persecution, or destruction (in whole or in part), of a national, ethnic, racial or religious group (s.7).

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Basically, the Act is limited so that it only applies to crimes committed in Europe during the Second World War. The Australian Government has argued that the legislation is limited because it is a direct response to a particular concern as expressed in the media programs and the consequent inquiry by Menzies. The more obvious reasons are the objections from sections of the community that a wider application to the Pacific and Asian theatres could open the possibility of Australian servicemen and women facing charges on war crimes. However it is still possible, though unlikely, that charges could be brought against Australians who served in Europe, as the drafters of the legislation were eager to ensure that the Act did not appear to be discriminatory.

Over a two-year period the SIU investigated 650 people alleged to have committed war crimes living in Australia and at least 12 cases are now alleged to be in an advanced stage.³ Their future may hinge on the outcome of Ivan Polyukhovich's various legal actions.

The first case

Why Ivan Polyukhovich was chosen as the first case to proceed raises some interesting issues. Although the SIU did undertake extensive independent research, it is claimed that the alleged crimes of this man were first brought to Australia's attention by a Soviet news agency in 1989. According to newspaper reports, Novosti, (one of the USSR's biggest news organisations) wired the *Adelaide Advertiser* and the *Australian* informing them that Ivan Polyukhovich had been involved in the murder of hundreds of Jews during the Nazi occupation of the Ukraine in the Second World War.

It is reported that the *Advertiser* ran the story, not revealing his name, but publishing a picture of his house and naming the suburb he lived in. The *Australian* refused to run with the story; the Foreign Editor later allegedly commented that the paper had no independent means of establishing the credibility of the allegations.⁴

In support of the doubts regarding evidence on Ivan Polyukhovich, he was not named in the book by Mark Aarons *Sanctuary-Nazi Fugitives in Australia*, nor was he among the group of alleged war criminals named in Parliament last year.⁵

The SIU has continually asserted that cases have been established based on independent research.⁶ It may be coincidental that information was supplied by a Soviet news agency but a conclusion about the original source of information on Polyukhovich cannot be reached in this article.

Evidence

Obtaining evidence in support of the accusations in these war crimes trials and having it accepted by the court could prove difficult. The Act states that a judge will be able to stop the trial if the defendant is unable to obtain evidence because of the lapse of time or for reasons beyond the defendant's control (s.13).

Before the Adelaide Magistrates Court, Ivan Polyukhovich has already exercised his right to insist that foreign witnesses be brought to Australia to testify. This overrides the decision taken by the Adelaide magistrate to preside at the taking of evidence in the Ukraine and elsewhere overseas to take evidence on commission. Consequently, the prosecution has organised witnesses from the Ukraine, Israel and the United States. If the proceedings produce a witness from the USSR or an allied country this could be a first. Proceedings in the United States regarding deportation of war criminals have so far failed to produce a single witness from the USSR or an allied country.⁷ As an alternative, written depositions were taken from witnesses overseas in US proceedings.

It appears that if or when the trial of Ivan Polyukhovich is heard, the emphasis will be placed on oral and not written evidence. This will hopefully allay the fears of Eastern European communities who maintain that evidence regarding allegations is falsified by the security organisations of the USSR and allied countries.⁸ The SIU has maintained that it is not relying on evidence from the USSR. The Unit contends that it has carried out independent research in the USSR and Lithuania. Information has also allegedly been obtained from the trials conducted in Germany and the Simon Wiesenthal Centre, a Jewish organisation set up to hunt Nazis.⁹ Only from the witnesses' statements at the trial will a clearer picture emerge as to the authenticity of the evidence being presented.

Features of the Act

The Act contains several interesting features. The defence of superior orders, that is that a superior ordered a subordinate to commit an act, is only relevant in determining the sentence given and cannot be used as a defence in the proceedings (s.16). The defendant is not entitled to rely upon the defence that the alleged offence was permitted by the laws of war and is not, under international law, a crime against humanity, unless there is 'evidence of the existence of the facts' constituting such a defence. If this is so, the onus of establishing this claim, beyond reasonable doubt, lies on the prosecution (s.17). In the hearing of the High Court challenge, one judge

commented that this defence is not consistent with the way it is available in other proceedings. For example, there is no necessity to produce evidence of the existence of facts to claim a defence of duress in criminal trials.¹⁰

The intentions of sections of the Act were further questioned by the judiciary in the hearing of the High Court challenge. One judge described the Act as being 'curiously drafted'. This was in regard to the construction of the Act in relation to local criminal law as discussed above.¹¹ Another judge commented that the Act could be interpreted in a way that a soldier wounding the enemy could be committing a war crime. The judge contended that the section which defines war crimes makes no obvious reference to the definition of war crimes under international law.¹² Therefore, without a knowledge of international law that applies during war, it could be assumed that basic military operations are illegal. In this instance, under international law, it is an established rule that soldiers can kill or injure enemy soldiers.¹³ The judge obviously knew this, but was pointing out that the obligatory reference to international law was not obvious.

However, the discussion on key sections at the High Court challenge raises another interesting question: if the highest court in Australia cannot clearly understand the intentions and wording of the Act, then how can it be enforced successfully?

High Court challenge

The future of the Act lies in the outcome of the High Court challenge. Counsel for the Government has told the Court that Parliament's power to create the Act is based on the external affairs power in s.51(29) of the Constitution and was consistent with international law. Through the Act, Australia was implementing recommendations and resolutions of the United Nations General Assembly and other international bodies.¹⁴ Counsel for Ivan Polyukhovich argued that the Act operates retroactively and conflicts with international human rights obligations Australia has accepted. Counsel argued further that the Act is unconstitutional as it is outside the scope of the external affairs power. It was argued that the appropriate course for Australia to take was the extradition of war criminals.¹⁵

Of course, if the High Court challenge is successful, the Australian Government could always introduce legislation covering war crimes that falls within the bounds of the High Court decision. Even if the High Court challenge is not successful, it is doubtful whether the trial of Ivan Polyukhovich will resume. His failing

