McGILL UNIVERSITY, MONTREAL, CANADA

NUREMBERG FORTY YEARS LATER

WAR CRIMES - AN AUSTRALIAN UPDATE

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Justice Michael Kirby AC CMG

NEW WAR CRIMES LEGISLATION

Following the Symposium in 1987, there have been a number of important developments affecting war crimes in Australia. And also affecting the associated topic which I chose to consider, namely the apparent conflict between the belated prosecution of alleged war criminals and the fundamental right to a fair and speedy trial.

The *War Crimes Amendment Act* 1988 (Cth) which came into force in 1989 almost entirely repealed and replaced the *War Crimes Act* 1945 (Cth). As amended, the Act contained a new Preamble reciting concern which had 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"; a determination that it was appropriate that such persons should be brought to trial "in the ordinary criminal courts in Australia"; and the acceptance that:

> *"[I]t 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."*

Following the passage of the foregoing amendments to the *War Crimes Act*, the first prosecution was initiated. It involved Mr Ivan Polyukhovich, an Australian citizen and a resident of South Australia. It was alleged that between 1942 and 1943 he had committed war crimes in the Ukraine, then in the Soviet Union under German occupation. Mr Polyukhovich was charged on 25 January 1990 with nine offences under the Act. Subsequently, the information was amended and a total of thirteen charges were laid. They alleged the commission of war crimes involving the wilful killing of approximately twenty-five people some being Jewish and others Ukrainian. Most of the victims came from the village of Serniki. Others came from a nearby village of Alexandrove. Mr Polyukhovich was also charged with war crimes alleging that he was knowingly concerned in the wilful killing of approximately 850 people known as "the Jews of Serniki".

Virtually immediately Mr Polyukhovich brought proceedings in the High Court of Australia (the highest Court in Australia) claiming a declaration, binding on the Federal authorities, that the *War Crimes Amendment Act* 1988 (Cth) was invalid or that specified provisions of the 1945 Act were invalid, as amended. The Chief Justice of Australia (Mason CJ) referred to the Full Court of the High Court of Australia the question whether the Act, as amended, was invalid in its application to the information laid against Mr Polyukhovich.

WAR CRIMES LEGISLATION UPHELD

On 14 August 1991, in a decision of very considerable constitutional importance beyond the issues of war crimes, the High Court of Australia upheld the constitutional validity of the amended Federal legislation. See *Polyukhovich v The Commonwealth of Australia & Anor.*[1] The majority (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ) held that, to the extent that the amending legislation operated upon conduct which took place outside Australia and at a time when Australian legislation was not in force as later enacted, making such conduct a criminal offence in Australia at the time it was charged, the law was nonetheless one with respect to Australia's "external affairs". Under s 51(xxix) of the *Australian Constitution* the Federal Parliament may make laws with respect to "external affairs". The majority held that the fact that the law operated on the past conduct of persons who, at the time of the commission of that conduct had no connection with Australia, did not in any way detract from its character as a law with respect to Australia's "external affairs" at the time it was enacted. Various arguments were rejected by differing combinations of judges of the Court. Thus, the argument that the amendment usurped the exercise of the judicial power of the Commonwealth was dismissed. So was the argument that the retrospectivity of the operation of the amendment was unconstitutional. Nevertheless, the judges warned that the separation of powers inherent in the *Australian Constitution* would invalidate a law which inflicted punishment upon specified persons without a judicial trial, because such a law would involve the usurpation by Parliament of the judicial power reserved to the courts.

In a short note such as this, it is impossible to do justice to the complexity of the arguments and issues raised by Mr Polyukhovich in objection to the legislation under which he was charged. It is sufficient to note that (with Brennan J alone dissenting) the Act, as amended, was held to be valid. Accordingly, the prosecution of Mr Polyukhovich, and later other persons charged, went ahead.

PROSECUTIONS UNDER THE ACT

Committal proceedings against Mr Polyukhovich commenced in the Adelaide Magistrates' Court in South Australia on 28 October 1991. The taking of evidence concluded on 20 May 1992. During the hearing a total of forty-seven witnesses were called by the prosecution to give evidence. Of these, thirty-six came from overseas countries including the Ukraine, Israel, the United States, Canada, Germany, Russia and Czechoslovakia.

Following completion of the evidence, the prosecution further amended

a number of its charges. With respect to five charges as laid, the prosecution no longer sought committal because relevant witnesses had been unable to attend. Some of them had died after the commencement of the proceedings. Some were too ill to travel the long distance to Adelaide. In one instance, the sole witness gave evidence significantly inconsistent with the information which he had previously given to the Federal Director of Public Prosecutions. These charges were dropped.

Upon the remaining charges, on 5 June 1992, the Magistrate in Adelaide committed Mr Polyukhovich to stand trial but only upon two counts. Those counts alleged the killing of a total of six persons. On the remaining charges, except for one, Mr Polyukhovich was discharged. Those charges included the charges alleging his complicity in the murder of the Jews of Serniki. With regard to the remaining charge, the Magistrate made no orders of committal. This was a charge in the alternative to the individual charges on which orders had been made committing the accused to stand his trial.

On 5 July 1992, the Federal Director of Public Prosecutions, as entitled to under his statute, filed an *ex officio* indictment in the Supreme Court of South Australia. Notwithstanding the committal by the Magistrate, the indictment alleged five counts against Mr Polyukhovich and required that he be brought to trial upon those counts. They included the two counts on which he was committed and added counts alleging his complicity in the murder of the Jews of Serniki.

On 27 July 1992, Mr Polyukhovich was arraigned before the Supreme Court of South Australia. He pleaded not guilty to all five counts of the indictment presented against him. The conduct of the trial was delayed because Mr Polyukhovich instituted proceedings in the Supreme Court of South Australia to have the indictment quashed and the proceedings permanently stayed. His application in that regard has been set down for hearing in that Court on 30 November 1992.

OTHER PROSECUTIONS AND THEIR OUTCOME

Two other persons have been prosecuted under the amended war crimes legislation. Mr Mikolay Berezowski, also a resident of South Australia, was arrested and charged on 5 September 1991 with a war crime alleging that he was knowingly concerned in the wilful killing of approximately 102 Jewish people described as the "Jews of Gnivan". Gnivan is a town in the Ukraine. It was alleged that Mr Berezowski's offences occurred between 1 March 1942 and 31 July 1942. The committal proceedings concerning him commenced in the Adelaide Magistrates' Court on 22 June 1992. They concluded a month later. The Magistrate discharged Mr Berezowski. A total of twenty-five witnesses were called by the prosecution to give evidence. Twenty-two of them came from overseas countries, including the Ukraine and the United Kingdom. It is open to the Director of Public Prosecutions, notwithstanding the order of discharge, to file an *ex officio* indictment requiring that Mr Berezowski be brought to trial. That right has been upheld by the High Court of Australia.[2] However, it does not appear that such an *ex officio* indictment will be laid. The Berezowski case appears to be closed.

The third prosecution in the series involves a Mr Heinrich Wagner,

again a resident of South Australia. He was arrested and charged in September 1991. His offences were alleged to have been committed between May and July 1942 and to have involved the wilful killing of approximately 104 Jewish adults and the further wilful killing of approximately 19 Jewish children. The victims came from the village of Izraylovka in the Ukraine. Mr Wagner was further charged with a war crime involving the murder of a Ukranian construction worker. This was alleged to have occurred near the village of Ustinovka in the Ukraine in 1943.

The committal proceedings concerning Mr Wagner commenced in the Adelaide Magistrates' Court in June 1992. Proceedings have continued over many months. They have involved the calling of thirty-seven witnesses of whom twenty-seven came from overseas countries including the Ukraine, the United States, the United Kingdom, Germany, Austria, France and Russia. The evidence of one overseas prosecution witness, an historian, was given by way of satellite link between Australia and the United States. The proceedings concerning Mr Wagner are part-heard at the time of this note. Thus, after massive litigation, reaching to the highest courts, only two persons are presently under active prosecution. One has been arraigned to stand trial. The other is still before the committal inquiry.

RIGHT TO FAIR TRIAL UPHELD

Australia has no constitutional guarantee of a speedy trial of criminal charges. Nevertheless, the common law provides certain guarantees against delay in the prosecution of alleged criminal offences. The issue of whether the common law stepped into the silences of the constitution and statutes to provide an effective right to speedy trial was considered in my own Court (the Court of Appeal of New South Wales) in *Jago v The District Court of New South Wales & Ors.*[3] This was also a decision delivered after the McGill Symposium. By majority (Samuels JA and myself) it was held that there was no common law right to a speedy trial, although there was a common law right to a fair trial. Fairness would include consideration of any undue delay in a prosecution. One of the judges of the Court (McHugh JA) who was later elevated to the High Court of Australia, held that the common law did provide, in Australia, a right to a speedy trial.

The decision in *Jago* went on appeal to the High Court of Australia. That Court in *Jago v The District Court of New South Wales & Ors*[4] laid down the rule now binding in Australia. Although expressed in terms of New South Wales circumstances, the State from which the appeal came, the principle would appear to apply throughout the Commonwealth. The High Court held that there was no common law right to the speedy trial of a criminal charge separate from the right to a fair trial which is protected by such remedies as relief against abuse of process.

All of the Justices of the High Court of Australia emphasised the high significance of delay in bringing a criminal charge to trial, in determining whether the trial would, or would not be, fair. The Court reaffirmed the power of the judicial branch of government, in defence of the integrity of its own processes, to provide a permanent stay where a belated prosecution would amount to an abuse of legal process. In short, whilst the executive branch of government, in the form of the Director of Public Prosecutions or otherwise, might, in

the name of the Crown, prosecute offenders, the judicial branch reserves to itself the inherent right to stay such prosecutions if they could not take place without relevant unfairness to the person accused. Obviously, long delay, the loss of vital witnesses, lapse of memory and other such considerations pertinent to war crimes prosecutions would be relevant to the determination of a stay application. Clearly, the decision in *Jago* will be at the forefront of the pending application in South Australia to have a permanent stay provided against the prosecution of Mr Polyukhovich in 1992 for offences in which he was allegedly involved fifty years earlier and of which he was not charged for another forty-eight years. The outcome of the stay application remains to be determined.

ABANDONMENT OF PROSECUTIONS

Australia, like Canada and other countries, is going through a period of severe economic difficulty. Pressure is exerted upon governments at every level to cut expenditures deemed inessential. In June 1992 it was publicly announced that the Federal Attorney General (Mr Michael Duffy) had decided to close down the War Crimes Special Investigation Unit as from 30 June 1992. From that date, approximately twenty of the original fifty staff members of the Unit were transferred to a so-called War Crimes Prosecutions Support Unit. The Federal Director of Public Prosecutions in Australia understands that the responsibility of this smaller Unit is to provide the support necessary for the conclusion of the war crimes prosecutions presently being conducted, viz those against Mr Polyukhovich and Mr Wagner. The Unit, so diminished, is not to have an investigative rôle. In accordance with public announcements, the current prosecutions will be concluded but no further prosecutions will be initiated.

This announcement has been the subject of public criticism most especially by, but not confined to, representatives of the Jewish community in Australia. Nevertheless, the decision appears irreversible.

In a sense the decision reflects the particular difficulty in a democracy governed by the rule of law in pursuing, so belatedly, such major war crimes prosecutions. Consistently with modern perceptions of procedural fairness, it is incumbent upon society itself to provide the best possible legal assistance to those accused. It is necessary to bring witnesses, at very considerable expense, from distant corners of the world. Alternatively, it is necessary to establish expensive telecommunications links. The array of counsel in cases up to the highest court of the country and in protracted committal and interlocutory proceedings demonstrates the special problem of bringing such proceedings to a successful conclusion. In the end, the large Unit of staff members, the very small number of identified offenders, the great costs and the apparently limited success persuaded the politicians that there were, on balance, more important targets for the scarce resources available to them.

The war crimes saga has not concluded in Australia. Even the legal principles resulting from the prosecutions may be still further elaborated. But a further five years on, not a single war criminal has been convicted under Australia's amended legislation. Huge public funds have been expended. A large Unit of prosecuting lawyers and support staff has been kept very busy. Witnesses have flown a

million miles and more. Public attention has lapsed.

There are some who will say that the rule of law has been vindicated by these proceedings. Important constitutional decisions have been laid down. A principle has been held up for the future. War criminals are beyond immunity and cannot escape vindicating justice. Others will say that it would have been better to have spent the money on the famine victims in Somalia or perhaps built a hospital in the Ukraine to help the children who are victims of Chernobyl as a more enduring memorial to those who suffered in war crimes. Each reader must decide.

FOOTNOTES

1. (1991) 172 CLR 501.
2. See *Director of Public Prosecutions* Act 1983 (Cth), s 6(2D) and s 6(2E). See also *Kolalich v Director of Public Prosecutions (NSW)* (1991) 66 ALJR 25 (HC), 27; *R v Duffield & Dellapatrona*, Court of Criminal Appeal (NSW), unreported, 1 October 1992 where the adverse comment on this practice, as it has developed in Canada, was noted. See editorial "Indictment" (1986) 28 Cr L Q 129, 130.
3. (1988) 12 NSWLR 558 (CA).
4. (1989) 168 CLR 23.