

A Historian's View: The War Crimes Debate Down Under

Konrad Kwiet

This account, based both on historical research and personal memory, depicts the belated and unsuccessful efforts made in Australia to trace and prosecute Nazi criminals. The author, chief historian of the Australian War Commission, surveys the war crimes debate in his country, including personal vignettes from his life and work.

Not long ago I asked Yehuda Bauer, a doyen of Holocaust scholarship, whether he is considering writing his memoirs. Bauer, aged 82, replied: "Never!" Adding with a smile: "When historians have nothing to say any more, they start talking about themselves."

I am going to talk about myself and specifically about a chapter in my career which is now closed and, as such, the subject of historical discourse: my Australian Nazi war crimes experience.¹ I will attempt to depict the changing historical landscape within which efforts were made, albeit belatedly and unsuccessfully,² to trace and prosecute Nazi perpetrators: not one conviction was recorded. However, as I will argue, experienced Australian war crimes prosecutors and investigators played a vital role in the swift establishment and successful functioning of the UN War Crimes Tribunal for the Former Yugoslavia in The Hague. This helped create a new co-operative legal

1 This article is a modified version of a paper presented at the conference *War Crimes: Retrospectives and Prospects* held by the Institute of Advanced Legal Studies, University of London, 19th-21st February 2009. I would like to thank Graham Blewitt, Mark Aarons, Peter Wertheim, Colin Tatz, Lucy Davy and my beloved wife Jane Sydenham-Kwiet for their help in preparation of the paper.

2 See Konrad Kwiet, "'Am Ende war dann doch alles umsonst'. Anmerkungen zur späten Strafverfolgung von NS-Kriegsverbrechern in Australien", in *Universalgeschichte und Nationalgeschichten*, eds. Gangolf Hübinger, Jürgen Osterhammel, Erich Pelzer. (Freiburg: Rombach Verlag, 1994), pp. 317-32, and Konrad Kwiet "Unerwünschte Gäste? The Australian War Crimes Investigations Unit und die eingewanderten Handlanger des NS-Regimes," *Zeitschrift für Geschichtswissenschaft* 4 (2002), pp. 322-29.

framework that permitted the prosecution of war criminals. Australia's poor record in dealing with war crimes, crimes against humanity and genocide was somewhat ameliorated in 2002 by its ratification of the Rome Statute and the introduction into Australia's criminal code of provisions expressly outlawing genocide, crimes against humanity, war crimes and crimes against the administration of justice of the International Criminal Court. And yet, there is to date no political will in Australia to set up a specialist war crimes unit.

My account is a historian's view and will combine historical findings with personal memoir. My historical narrative is based on information scattered throughout the literature. I also rely on the results of a small scale opinion poll which I have been conducting at regular intervals at the University of Sydney and the Sydney Jewish Museum, aimed at measuring the impact of the war crimes debate upon public awareness and memory.

The data collected clearly show that the short-lived sensation surrounding the bringing of Nazi murderers to justice, in the late 1980s and early 1990s, has had little, if any, impact on Holocaust awareness among the general public. Today there is hardly a single Australian who recalls either the name of Australia's Nazi War Crimes Commission, the Special Investigations Unit (SIU) or the time and location of the criminal proceedings, let alone the names of the accused and the crimes they allegedly committed. My personal insights are based on recollections, in particular my experiences as former chief historian of the SIU, as a historical consultant to other war crimes offices and as an expert witness in trials conducted in Australia, Canada and the United States. Though I find it hard to believe in lessons of history, I personally learnt some important lessons while working closely together over a period of ten years with representatives of both the legal and law enforcement communities and engaging with defense lawyers and judges in courtrooms.

Whenever I am asked to speak of my experiences as chief historian of the SIU, I recall in particular one episode that left an indelible mark on my memory. In 1992 I testified in the Polyukovych trial in Adelaide.³ During the four days I was in the witness-box I was frequently reminded by the Supreme Court Judge of the strict rules of evidence. At a certain point he said to me: "Professor Kwiet, you are not here to tell us the truth or what you perceive as historical truth. You are here to express an opinion, an opinion which has to comply with the rules of evidence operating in the state of

3 David Bevan, *A Case to Answer: The Story of Australia's First European War Crimes Prosecution*, (Adelaide: Wakefield Press, 1994), pp. 224-25. See also my interview with Vera Ranki, "History and the Law: Recent Trials Emerging Theories," *Cardozo Studies in Law and Literature* 9:1 (Spring-Summer, 1997), pp. 33-35.

South Australia.” Our dialogue continued: “Are these strict limits in which I have to answer?” I asked. He replied: “Yes.” I responded: “Even If I disagree?” His answer: “Yes, you probably do disagree. You probably think the evidence shows more than that.” “That’s correct,” I said.

Following this exchange my answers during cross-examination were more or less reduced to “yes” or “no.” Relevant sections of my affidavit were declared non-admissible, in particular parts which documented the participation of forestry officials as a group in the murder of Jews, as the accused had once served as a forest warden under Nazi rule.

It also soon became apparent to me that national and political interests determine the enactment of war crimes legislation. Not historical, but rather technical legal considerations determine the progress of investigations and trials. Lawyers, rather than historians, set the tone. Furthermore, Nazi war crimes trials were conducted neither to confirm the historical truth of the Holocaust nor to combat the antisemitic views of Holocaust deniers, but rather to hand down verdicts on the guilt or innocence of the defendants. Finally, I do not share the view of many of my colleagues, who believe that courtrooms serve as tools for Holocaust and genocide awareness and education.⁴ There are exceptions, such as the historic Eichmann trial in Jerusalem in 1961 and the Irving versus Lipstadt libel trial in the United Kingdom in 2000. Examples in Australia include the recent Federal Court decisions to convict Frederick Toben and Olga Scully – two vicious antisemites and professional Holocaust deniers from the Adelaide Institute – of race hatred offences.⁵

4 Amongst the growing literature, see especially Lawrence Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust* (New Haven & London: Yale University Press, 2001); Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001); Richard J Evans, *Lying About Hitler: History, Holocaust and the David Irving Trial* (New York: Basic Books, 2001); Norbert Ehrenfreund, *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Course of History* (Basingstoke: Macmillan, 2007); *Atrocities on Trial. Historical Perspectives on the Politics of Prosecuting War Criminals*, eds. Patricia Heberer & Jürgen Matthäus (City: University of Nebraska Press, 2007).

5 FCAF Jones v. Scully 137 (27.6.2003); FCAF 158 Jones v. Toben (21.5.2002); FCA 427 Jones v. Toben (13.5.2009). In May 2009 Dr. Frederick Toben, director of the Adelaide Institute and an Australian Holocaust denier of international stature, was sentenced to three months imprisonment for contempt of court.

Australia and Immigration

Let me go back into history. Since the beginning of the European settlement in Australia in 1788, and the subsequent dispossession of the Aborigines, the native Australians, Australia has always been a country of migration – first as a British convict and settler society, then as an outpost of the British Commonwealth, marked by its white Australia policy, and ultimately, following World War Two, as a multicultural society. What the Australian historian Geoffrey Blainey termed “the tyranny of distance”⁶ has in fact provided a sanctuary for both perpetrators and victims of European persecution, and in more recent times, for those fleeing from persecution worldwide.

During the Holocaust, Australia, like other countries of the free world, adopted the position of a bystander nation.⁷ News of the plight of European Jewry filtered through, not only via top secret diplomatic cables or media coverage, but also in messages sent by Jews incarcerated in ghettos or camps to relatives and friends. Initially these were private letters, then censored Red Cross cards that permitted the transmission of up to twenty five words only. The Allies responded after considerable delay, with declamatory gestures against the genocidal campaigns unleashed in Europe. On 17th December 1942 the famous Joint Allied Declaration was issued, for the first time condemning the Nazi “bestial policy of cold-blooded extermination” and warning that “those responsible for these crimes shall not escape retribution.”⁸ Australia, as a loyal partner of the Allies, expressed its “whole-hearted support of the declaration.” Nothing further was requested; nothing further was offered.

At this time I was two years old, living in a remote village in Germany, the sixth child of a so called privileged mixed marriage, with a Jewish mother and a Christian father.⁹ According to the Nuremberg Race Laws I was classified as a *Mischling ersten Grades* – a half-cast of the first degree, colloquially known as “Jew Bastard”.

6 Geoffrey Blainey, *The Tyranny of Distance: How Distance Shaped Australia's History* (Melbourne: Sun Books, 1977).

7 Paul Bartrop, *Australia and the Holocaust, 1933-1945* (Melbourne: Australia Scholarly Publishing, 1994).

8 National Archives Australia (NAA), ACT CRS A 981, Germany 37 part 2. Joint Allied Declaration, 17.12.1942, published in *Sydney Morning Herald*, 18.12.1942; see Konrad Kwiet, “Responses of Australian Jewry's Leadership to the Holocaust,” in *Jews in the Sixth Continent*, ed. W. D Rubinstein (Sydney, London & Boston: Allen & Unwin, 1987), p. 208.

9 For the history of “*Mischlinge*” and “*Mischehen*” under Nazi rule, see the pioneering study by Beate Meyer, “*Jüdische Mischlinge*”: *Rassenpolitik und Verfolgungserfahrung 1933-1945* (Hamburg: Dölling & Galitz Verlag, 1999).

According to Jewish law I can claim to be a Jew, even as a confirmed disbeliever. As with so many mixed marriages, my parents marriage ended in divorce in 1945, once the threat of deportation and extermination had passed. In Hamburg the divorce rate among mixed couples reached twenty percent. I still vividly remember the end of the war, sitting in a cellar, hearing the noise of aircraft and the nearby detonation of bombs and, afterwards, picking my way through a landscape of ruins and rubble, littered with the bodies of the dead and the injured.

The end of the war brought with it the liberation of the concentrations camps and the widespread publication of details and photographic images of the heinous crimes, unprecedented in history, which had been perpetrated by the National Socialists and their collaborators. Bergen-Belsen, emerging as the symbol of Nazi butchery,¹⁰ and the first war crimes trials in 1946, made headlines in Australia, as they did throughout the world. Although in early 1945 the War Crimes Commission of the United Nations,¹¹ under the chairmanship of its Australian representative, had propagated the idea of establishing a special war crimes court under the auspices of the UN, the victorious powers took over the task of prosecuting war criminals themselves, introducing legal codes regarded as landmarks in the history of international law. Australia was amongst the nineteen signatories to the Nuremberg Charter in October 1945, although it did not play a significant role in the trials themselves.

Yet Australia did actively participate in the International Military Tribunal for the Far East. In October 1945, Australia also introduced its own War Crimes Act, thoroughly prepared by military, political and legal authorities since 1942. This first War Crimes Act provided the legal basis for the prosecution of Japanese war criminals.¹² Up till 1951, 296 Military tribunals were conducted. Of the 924 accused, 644 were convicted, 148 were executed. Today only a few older Australians and war veterans remember this first chapter of the war crimes debate.

The end of the war also marked the beginning of a new migration policy in Australia. National interests demanded that population growth be achieved through a massive intake of immigrants. They were recruited from the masses of displaced

10 *Belsen 1945. New Historical Perspectives*, eds. Suzanne Bardgett & David Cesarani (London & Portland OR: Vallentine Mitchell, 2006).

11 *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: United Nations War Crimes Commission, 1948).

12 NAA Fact Sheet 61 – World War II. Record collections on war crimes. See also the manuscript by D. C. S. Sissions, *The Australian War Crimes Trials and Investigations (1942-1951)*; Caroline Pappas, *Law and Politics. Australia's war crimes trials in the Pacific, 1943-1961* (PhD. diss., Defence Force Academy, UNSW 1998).

persons throughout Central Europe. When in 1947 immigration quotas were lifted, Australia welcomed both perpetrators and survivors of the Holocaust. While no comparative statistics exist, a large number of immigrants entering Australia were Nazi killers: possibly four or five thousand found sanctuary in the Antipodes. Most came from Eastern Europe, in particular from Lithuania and Latvia, Belarus, the Ukraine and Yugoslavia (mainly Croats, but also a significant number of Serbs and Slovenes). They lied about their wartime activities during the screening process for entry, on official documents and in interviews. Most frequently they claimed to have been subjected to forced labor and deportation to Germany. In reality, many had actively and enthusiastically assisted the Nazis. Their claims concealed “police work,” military and *Waffen SS* service and participation in killing operations. As I later discovered in secret files, for reasons of political expediency, State Security and intelligence organizations on both sides of the Iron Curtain had no scruples about recruiting war criminals as intelligence agents for their operations during the Cold War. It is almost certain that some of those recruited by Australia and other Western countries were in fact Soviet double agents, a fitting price perhaps for so Faustian a bargain. I assume that Australia's practice of recruiting intelligence agents of doubtful loyalty from amongst war criminals in overseas conflicts continues to this very day.

Despite restrictions, bureaucratic delays and the shortage of migrant ships, more than 30,000 Holocaust survivors arrived in Australia. Most succeeded in rebuilding their shattered lives at the edge of the Diaspora.¹³ On a *pro rata* population basis, Australia's Jewish population contains more Holocaust survivors than any other country except Israel.

The arrival and acceptance of perpetrators and victims of Nazi terror sparked a heated, short-lived debate within both the Jewish and wider communities. Jewish

13 The best and most comprehensive overview on the history of Australian Jewry is provided by Suzanne D. Rutland, *Edge of the Diaspora: Two Centuries of Jewish Settlement in Australia*, (Sydney: Brandl & Schlesinger, 1997) and Suzanne D. Rutland, *The Jews in Australia* (Melbourne: Cambridge University Press, 2005). For the arrival, integration and acculturation of pre-War German-Jewish refugees and post-war Holocaust survivors, see Konrad Kwiet, “‘The Second Time Around’: Re-acculturation of German-Jewish Refugees in Australia,” *Journal of Holocaust Education* 10 (2001), pp. 34-49; Judith E. Berman, *Holocaust Remembrance in Australian Jewish Communities, 1945-2000*, (Crawley: University of Western Australia Press, 2001); *The Memory of the Holocaust in Australia*, eds. Tom Lawson & James Jordan, Special Issue of *Holocaust Studies. A Journal of Culture and History*, 13: 2-3 (Autumn/Winter, 2007); *Testifying to the Holocaust*, eds. Pam Maclean, Michele Langfield, Dvir Abramovich (Sydney: Australian Association of Jewish Studies, 2008).

communal leaders protested against the mass immigration of Germans and their collaborators. Their campaign was abandoned in the early 1950s. There was neither the political will nor the social drive to support what was widely regarded as a specifically Jewish cause. Consequently, the debate surrounding Germans, Nazis and war criminals evaporated, resurfacing only occasionally when allegations against suspected war criminals were made in parliament or in the media, or when foreign countries sought the extradition of former German nationals on war crimes charges. Responding to a Soviet request in 1961 the Attorney General, Sir Garfield Barwick, announced in the Australian Parliament that “the time has come to close the chapter” on war crimes.¹⁴

After my parents’ divorce, my father, a medical practitioner, re-married. The childless marriage ended some twenty years later when his wife left him, upon which my father committed suicide. In 1945 my mother resumed her interrupted medical career and moved in a circle of friends who had shared her experiences during the Holocaust. The well known post-war diary of Victor Klemperer contains lengthy entries about my mother and my siblings.¹⁵ I myself am mentioned only in passing, as “*Der Kleine*” (the little one). To lessen the enormous burden of my mother’s child-care responsibilities, I was sent to Holland, to the remaining relatives on my mothers’ side who had survived Auschwitz and life in hiding. Growing up in this traumatized German-Dutch-Jewish survivor milieu, and at the same time having to contend with the fierce anti-German sentiments displayed by post-war Dutch society, I was left with some unpleasant childhood memories. My formative years might help explain the career path I later undertook and the historical themes I selected for teaching and research.

In 1949 I returned to an almost *Judenrein* divided Germany. My schooling and university studies were completed in West-Berlin, one of the hot spots of the Cold War. Frequent, lengthy visits to Amsterdam continued to cement my Dutch connections. They also paved the way for the archival research for my doctoral dissertation, supervised by Hans Herzfeld, a senior German historiographer, and edited by Martin Broszat.¹⁶ The study dealt with the regime in the Nazi occupied Netherlands. I received immense support from Louis de Jong, Jacques Presser and other members

14 Australian Parliament, House of Representatives, Hansard, 22.3.1961, 452.

15 Victor Klemperer, *The Lesser Evil. The Diaries of Victor Klemperer, 1945-1959* (City: Orion Publishing, 2004), pp. 254, 257, 281, 288, 289. German edition: *So sitze ich denn zwischen allen Stühlen, Tagebücher 2 Bde.* (Berlin: Aufbau Verlag, 1999).

16 Konrad Kwiet, *Reichskommissariat Niederlande. Versuch und Scheitern nationalsozialistischer Neuordnung*, (Stuttgart: Deutsche Verlags-Anstalt, 1968) (Schriftenreihe der Vierteljahrshefte für Zeitgeschichte 17).

of the *Rijksinstituut voor Orlogsdocumentatie* (State Institute for War Documentation or RvO). While researching the archives I met several young German representatives of the legal fraternity, public prosecutors entrusted with the task of searching for documentary evidence for war crimes investigations and trials assigned to them. I still remember how some of them complained they had not trained to do this job, while others expressed their concern that such work would derail their legal careers.

My academic career commenced in 1966, in West Berlin, as the assistant of Ernst Schulin, who has remained my mentor till today. I joined a handful of young German historians who were the first in Germany to research and teach the history of German Jewry, antisemitism and the Holocaust. We were taught by a visiting professor, Adolf Leschnitzer, once exiled as a contributor to "German-Jewish Symbiosis."¹⁷ The tiny circle around Monika Richarz also gradually expanded.

The mid 1960s was also a time of unrest and protest. Students and intellectuals launched attacks against the established order, calling for "mastering the past," demanding that Nazi crimes should be investigated and the perpetrators brought to justice. I joined a small circle of radicals who had reactivated the old ideas of the *Anarcho-Syndicalists* and of Rosa Luxemburg. However, as I only had the stomach to throw eggs and tomatoes at university venues and on the streets, but not stones or other dangerous missiles, I was quickly expelled from the hard core of the group. Like so many other young revolutionaries, I retreated into the cocoon of the academic establishment. I profited greatly from my professional discourse with Arnold Paucker and Helmut Eschwege, Avraham Margalioth and Josef Walk, Walter Grab and Werner Jochmann, Reinhard Rürup and Hans Mommsen, Wolfgang Benz and Jürgen Matthäus, as well as later with Raul Hilberg and Richard Breitman, Yehuda Bauer and Dan Michman, and, upon my arrival in Sydney, with John Milfull and Bernd Hüppauf, Colin Tatz and Suzanne Rutland.

In 1976 I left Germany again, this time for Australia, where I found a new home, I must confess that, as a permanent resident, I am entitled to and have retained my German citizenship, in other words, my European passport. I took up a position at the University of New South Wales in Sydney with the brief of assisting John Milfull to build up German and European Studies, of introducing Jewish Studies and Holocaust Studies, and later at Macquarie University, Genocide Studies together with Colin Tatz. From there it was a small step to the history of Nazi war crimes, perpetrated in Europe during World War II.

17 See his classic study, *Saul und David. Die Problematik der deutsch-jüdischen Lebensgemeinschaft* (Heidelberg: Verlag Lambert Schneider, 1954).

The Special Investigations Unit

In 1986, ten years after my arrival, the war crimes debate resurfaced in Australia, reignited by a prominent investigative journalist for ABC, Mark Aarons.¹⁸ His radio series, *Nazis in Australia*, hit a raw nerve, attracting large audiences and considerable controversy. After many years of research, Aarons revealed that a significant number of Nazi killers had not only found sanctuary Down Under, but had also been protected and recruited as informants by ASIO, Australia's domestic counter-intelligence organization.

While Aarons instigated the public debate, Jewish communal leaders such as Isi Leibler, Joachim Schneeweiss and Leslie Caplan, moved into the political arena. In early 1986 Leslie Caplan, then president of the Executive Council of Australian Jewry, together with his assistant Jeremy Jones,¹⁹ embarked on a journey to discuss the renewed international efforts to bring Nazi war criminals to justice with the World Jewish Congress and his counterparts in the USA, Canada and Israel.

Upon his return to Australia, Leslie Caplan began to lobby the Hawke government to take action. A few years later he pursued his keen interests in war crimes in a different domain when he returned to university and submitted, under my supervision, a thesis that shed light on the campaigns and decision-making process leading to the amendment of Australian war crimes legislation in 1988.²⁰ As he told me many times, one specific consideration determined his strategy: prosecuting Nazi war criminals was presented not as a Jewish but rather as an Australian issue, as a matter of current political concern. Briefed by Aarons and Caplan, the Labor government made haste to investigate the allegations, and in doing so followed the example of the Americans and the Canadians.

An official enquiry was set up. A former senior official of the Attorney General's Department took six months to produce the Menzies Report, which was published in summary.²¹ The names of seventy suspected war criminals were placed on a separate list, classified as secret.

18 Mark Aarons, *War Criminals Welcome Australia: A Sanctuary for Fugitive War Criminals Since 1945* (Melbourne: Black, 2001); see also Aarons' *Sanctuary: Nazi Refugees in Australia*, (Melbourne: Heinemann, 1989).

19 Jeremy Jones, Reports on *Australia and Nazi War Criminals*. Report no. 1 (6.5.1986); Report no. 2 (23.6.1986); Report no. 3 (29.10.1986). My thanks to Jeremy Jones for the information and reports provided.

20 Leslie Caplan, "The Road to the Menzies Inquiry" (BA Hon. Thesis, Macquarie University, 1996); to be published by The Australian Jewish Historical Society, Sydney.

21 The Parliament of the Commonwealth of Australia. *Review of Material Relating to the Entry of Suspected War Criminals into Australia*, Parliamentary Paper no. 90/1987.

In 1987 the decision was made not to instigate denaturalization and deportation proceedings, but instead to lay criminal charges. After much heated debate, the Australian parliament passed the War Crimes Amendment Act, which came into force once it received royal assent, in January 1989.²² By then the SIU had already commenced its operations. Established within the Federal Attorney General's Department, headed first by Robert Greenwood and later by Graham Blewitt, it was commissioned to examine all war crimes allegations made against Australian citizens or residents, to collect documentary and eye witness evidence and to prepare cases for trial. Today, few Australians remember the SIU's name and work.

I joined the SIU in 1987, appointed by Robert Greenwood, as were all other staff members comprising lawyers, police officers, analysts, translators and office personnel, altogether some eighty people. Apart from myself, they were all Australian citizens from many walks of life, unfamiliar with the history of the Nazi regime, its perpetrators and victims. They all distinguished themselves through a high degree of professionalism, dedication and commitment, sharing the belief that however belatedly, genocidal killers from Europe should be brought to justice in Australia.

Robert Greenwood carried in his wallet a tiny photograph showing the remnants of corpses in a mass grave excavated by the SIU. When asked why he took over at the helm of the SIU, he would point to the photograph and say: "That's why I did it!" As proscribed by law, strict confidentiality was preserved. Not a single piece of information was ever leaked to the media. When the unit was closed by the Keating government in 1992, members of the SIU responded with disappointment, even anger, unhappy that they could not complete their work. They dispersed in many directions; most remained in contact, and maintained the close friendships formed during their years in the SIU. Regular reunions keep the memory of the SIU time alive.

Let me say a few words about the work undertaken by the SIU. Over a five year period it investigated eight hundred and forty three cases.²³ For each suspect a PU file or personal dossier was kept, recording the progress of the investigation, which in turn determined the priority given to the case.²⁴ The folders of prominent, high profile

22 Attorney-General's Department, *War Crimes Amendment Legislation and Materials* (Canberra, 1989).

23 Attorney-General's Department, *Report of the Investigations of War Criminals in Australia*, Canberra: Australia Government Publishing Service 1993 (Final SIU Report).

24 Today the case specific PU files are kept under strict lock and key by the Australian Federal Police in Canberra. The general SIU files are held by the National Australian Archives in Canberra. They contain extensive archival record collections obtained

“A” cases covered more than one meter of shelves. Only once were investigations continued when the suspect had already died. To our embarrassment, in this particular case we received the news of the suspect’s death at the Prosecutors Office in Minsk, where we were about to interview a potential witness. The allegations assembled by the SIU came from manifold sources located in Australia and overseas. Among them were quite a few anonymous denunciations. These came, presumably, from hostile neighbors, work colleagues and disgruntled relatives.

These thorough and time-consuming investigations resulted in the successful preparation for trial of only three cases. The reasons for this are clear, and symptomatic of the difficulties surrounding belated war crimes investigations. The crimes in these cases were committed in remote locations in the Ukraine. The accused were local residents who had entered the service of the Nazi occupation force. Geographical limitations and the social structure of village communities made it impossible to find witnesses, often acquaintances or relatives, who were able to identify the defendants, to recall the events and to point the way to the nearby murder and burial sites. Mass executions by mobile killing squads or murder in stationary or mobile gassing installations did not, as a rule, permit the survival of witnesses. The three SIU suspects came before the courts in Adelaide in the early 1990s, pleading not guilty. Witnesses’ testimonies to the contrary proved insufficient to satisfy the court.

First to be charged under the War Crimes Act was the seventy-five-year-old Ukrainian born Ivan Polyukhovych. He was a former gamekeeper, a forest warden accused of having participated in the liquidation of the small Jewish community of Serniki, a village situated in the Pripjet marshes. Eight hundred and fifty Jews, mostly women and children, were murdered there in autumn 1942, presumably on the eve of *Rosh Hashanah* (Jewish New Year). Polyukhovych was further charged with hunting down and shooting Jews who escaped into the surrounding forests. After the Supreme Court judge had disallowed much of the prosecution’s evidence, the jury took less than one hour to agree on a verdict of not guilty. The second case was dismissed by a magistrate due to contradictory evidence given by witnesses and historical experts. Seventy-eight-year-old Mikolay Berezovsky, a former Ukrainian policeman, was charged with the murder of one hundred and two Jews in the village of Gnivan. Medical opinion ensured a premature ending to the third case – sixty-nine-year-old Heinrich Wagner was declared unfit to appear in court. This ethnic German

from numerous sources. Copies of select historical documents have been made available for research. They are accessible at the Australian Institute for Comparative Genocide and Holocaust Studies, headed by Colin Tatz, now located at The Shalom Institute, University of New South Wales, Sydney.

was accused of serving in the Ukrainian auxiliary police force. Deployed in the village of Israelovska, he allegedly participated in the killing of one hundred and four Jews, including nineteen children, classified as *Mischlinge*.

I should like to mention an important byproduct of the Wagner case. While interviewing a key witness in Germany, the German public prosecutor present at the interrogation warned the witness, a former colleague of Wagner's, to be careful in his testimony. The witness did not heed his advice and admitted, freely and in great detail, that he had participated in the *Judenaktion* (action against the Jews) and consequently was put on trial. In 1997 a German juvenile court handed down a short prison sentence, after convicting him of aiding and abetting murder.

One particular case in Australia, which in my view was the most important SIU case, remained without consequences for the accused. Karlis Ozols, a Latvian SS officer and a chess champion of international stature, served as a Lieutenant with the *Arajs Kommando*, Latvia's infamous killing squad. As commander of the Latvian Company of the German Security Police, he guarded the Minsk Ghetto and the nearby gassing installations. He participated in the murder of some 30,000 Jews, partisans and other victims. The investigations had to be abandoned in 1992, despite the advice of a renowned QC that a *prima facie* case had been established. The Australian government, headed by Prime Minister Paul Keating, insisted on closing down the SIU, allowing only a small *War Crimes Support Unit (WCPSU)* to continue functioning as long as the legal proceedings in Adelaide were still underway.²⁵ New accusations of war crimes were referred to the Australian Federal Police, a decision which precluded the allocation of additional resources to the unit and sent a clear signal that the second chapter of the war crimes debate in Australia was closed.

In 1997 the Ozols case resurfaced, albeit behind closed doors. The Federal Police refused to complete the investigation, arguing that expenses amounting to \$300,000 were an unreasonable burden on the taxpayer and constituted resources claimed by other, competing units within the Federal Police. The Federal Police continued to table their annual war crimes report in Parliament and recorded new allegations. However, nothing was done to investigate these cases, which in turn meant that the services of historians were no longer required.

25 Attorney General's Department, *Report on Activities of the War Crimes Prosecution Support Unit, 1992-1994* (Final WCPSU Report, unpublished).

The Legacy of the Special Investigations Unit

War crimes legislation, investigations and court proceedings were controversial from the outset.²⁶ Within the legal fraternity a critical and at times even damning attitude prevailed. Serious reservations were voiced about the retrospective nature of the law, the problem of jurisdiction, and above all the many obstacles to securing evidence, especially eyewitness accounts, after more than four decades. Doubts were expressed as to whether the adversarial system of the Australian trial procedure was in fact the most suitable to deal with the problems of war crimes trials.

With hindsight, it would have been much better to have followed the Canadian and American examples and to have instigated not criminal, but rather deportation and denaturalization proceedings. In all probability, if that had been done, at least a handful of the four to five thousand Nazi killers who had murdered with impunity would have been deported from Australia. At any rate, with the opening of the Polyukhovych trial, an appeal was lodged with the Australian High Court to clarify the legal validity of the legislation. In October 1991 the constitutional validity of the legislation was upheld by a majority of four.²⁷

Once the SIU had been set up, the Australian government showed no interest in extending its jurisdiction by further amending the war crimes legislation. When, in the early 1990s, civil war broke out in Yugoslavia, Australian citizens and residents of Croatian, Serbian or Bosnian origin hastened back there to participate in programs of ethnic cleansing characterized by destruction, incarceration, torture, rape and murder. The SIU, in particular Robert Greenwood and Graham Blewitt, urged the government to be permitted to investigate the new allegations. The response was swift: no war crimes unit was required. Service as either mercenaries abroad or regular soldiers in

26 There is a growing number of publications dealing with the Australian Nazi war crimes debate, largely written by representatives of the legal fraternity. To mention only a few: Irene Nemes, "Punishing Nazi War Criminals in Australia: Issues of Law and Morality," *Current Issues in Criminal Justice* 4:2 (1992-1993), pp. 141-55; Gillian Triggs, "Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?" *Melbourne University Law Review* 16 (1987), pp. 382-401; Gillian Triggs, "Australia's War Crimes Trials and the Role of Law," in: *The 50th Anniversary of the Geneva Convention on Humanitarian Law*, eds. H. Durham & T. McCormack (City: Kluwer Law International, 1999); Ranki, "Holocaust History and the Law," op.cit. fn. 3; Lawrence McNamara, "History, Memory and Judgement: Holocaust Denial, The History Wars and Law's Problems with the Past," *Sydney Law Review* 26 (2004), pp. 353-94. See also the study of David Fraser, *Law After Auschwitz. Towards a Jurisprudence of the Holocaust*, (Durham, NC: Carolina Academic Press, 2005).

27 Polyukhovych v. The Commonwealth of Australia, 172 CLR 501 (1991).

foreign armies were offences under Australian domestic law, and it was thus left to the Federal Police to investigate their crimes, which they failed to do.

In the public domain, the war crimes debate had, in my view, little, if any impact on public awareness and memory, although reactions varied. Many Australians voiced their anger at what they viewed as an irresponsible waste of public money, some eighteen million dollars. Others were mindful of the victims and stressed the moral and social obligation to let justice prevail, however belatedly, and not to allow murder to go unpunished.

Not all Jews welcomed the debate in 1986 either. Some survivors warned against opening old wounds or providing antisemites with fresh ammunition. Fierce criticism was articulated by the ethnic communities to which the suspected war criminals belonged. Their spokespersons chose to speak of injustice or an act of revenge, of defamation of innocent people. Their disapproval found its most vehement expression in the form of a warning that the war crimes debate would stir up animosities and ethnic tensions, in particular between Jewish and Eastern European communities. It was claimed that this, in turn, could threaten the fabric of Australia's exemplary multicultural society.

The uproar was short lived, however. At the opening of the Polyukhovych trial noisy demonstrations staged by a few professional Holocaust deniers and antisemites produced some headlines, but the media soon lost interest in the issue. Even the Jewish press chose to refer to the trials only occasionally, largely on their back pages. The public proceedings in Adelaide took place before empty galleries. References to the accused as "nice neighbors" or "old" and "sick pensioners" were quite popular in the scant media coverage. For the overwhelming majority of Australians, the news of the closure of the SIU went almost unnoticed.

What exactly was my role in all of this? Seconded from the University and leaving the academic principles of freedom of teaching and research behind, I followed the clear instructions of the SIU and the Department of Public Prosecutions, the representatives of the legal profession. For each case under investigation I searched for and evaluated historical records kept in archives, as well as judicial material transmitted in post-war Nazi war crimes investigations and trials. In other words, I was now engaged in applied history.

I joined the tiny circle of internal, or in-house historians. Not more than forty historians have served in this capacity in Western war crimes units. The American Office for Special Investigation (OSI) commenced its operations in the late 1970s with two historians. This number increased later to ten. The Canadians appointed up to fifteen. To my knowledge, the British war crimes unit, attached to Scotland Yard, required two. West German investigations – amounting to more than 110,000

cases – were carried out without any in-house historians. The SIU recruited two other full-time historians: Juergen Matthäus and Martin Dean. Both have emerged as eminent Holocaust scholars, now working at the US Holocaust Memorial Museum in Washington.

As did all in-house historians, I submitted reports and compiled historical profiles of suspects. As chief historian I coordinated the research conducted by historical consultants, the so-called external historians, entrusted with special tasks. The SIU hired up to ten such experts, among them Richard Breitman, Ruth Bettina Birn and Martin Gilbert.

In close cooperation with my colleagues, I prepared the historical-archival evidence to be submitted to court. As a rule, relevant documents, classified as A, were referenced in footnotes of the affidavits. If they were not challenged by the defense, they became exhibits for the prosecution. The evaluation and selection process of key documents required not only the guidance or, if you like, the supervision of the prosecution teams, but also close cooperation with the historical expert witnesses testifying in court. The SIU recruited three world renowned American historians; Raul Hilberg, Christopher Browning and Jonathan Steinberg. Their affidavits were intended to shed light on Nazi war crimes policies and their implementation in the specific crime scene in question. The affidavits of the in-house historians centered on the career of the suspect, the operations of units and the role the suspect played within the machinery of mass destruction.

When seeking other jobs, Nazi war crimes historians encountered some barriers. Highly specialized, not to say overqualified, they were often regarded as unsuitable candidates for academic positions. A few succeeded in continuing their careers in research centers or museums. As demand for historians in modern war crimes investigations was scarce, only a handful proceeded from Nazi war crimes units to modern war crimes commissions and tribunals. The prosecutor's office of the UN Tribunal in The Hague comprised several hundred staff members. Only one historian was appointed, an OSI historian who had once investigated alleged Yugoslavian war criminals residing in the USA. In The Hague he was entrusted with the task of providing investigators with political and military analyses (briefing papers). Canada, the world leader in modern war crimes investigations, redeployed five of its in-house historians, assigning them to five territorial war crimes areas.

As stated at the beginning of this article, testifying in court is not an easy task for historians.²⁸ Initially, in the early 1980s, some expert witnesses were viciously

28 See the illuminating review essay by Richard Evans, "History, Memory, and the Law: The Historian as Expert Witness," *History and Theory* 41 (October 2002): pp. 326-45.

attacked by the defense. They were confronted with the views of Holocaust deniers, or with allegations that they were relying on historical records fabricated by the KGB. More commonly, they were asked ambiguous and provocative questions to which they often had no convincing answers. I was told that such questions are a legitimate defense strategy designed to confuse or discredit the expert witness for the prosecution. I never experienced such incidents in Australia, and only occasionally in Canadian and American courtrooms. I should like to add a tiny detail. I was reprimanded not only by a Supreme Court judge, but also by the prosecution. Unfamiliar with legal rules, and in the collegial spirit of an academic, during the four days of my cross examination I dared to talk to the other side, to the friendly defense lawyer when it was incumbent upon me to keep silent.

The work I did was exciting and rewarding. I was one of the first Westerners to gain access to secret archives located in the Soviet Block, by this time already on the brink of collapse. I have not recorded the number of trips I made to State and Regional Archives, to Party and Military Archives, to KGB and *Stasi* Archives. I will never forget the hospitality received, the lively evenings in restaurants, over fine food and drink, after long hours of work. Presents were exchanged. And occasionally, at some places, very sought after technical equipment was offered in order to speed up the delivery of the material requested.

The trips to Prague were particularly important. Turning up for the first time, we were assured that there were no secret archives in Czechoslovakia. We drove to Kolin, a historic town close to Prague, in an attempt to find the legendary castle of Zasmuky, the place where the SS had deposited a large part of its wartime records. What we found was a run down farming estate. Robert Greenwood hammered on the door. After a while, a farmer opened the door and then disappeared with a shrug of his shoulder. On our second visit to Prague, we were told that there might be some Nazi records of interest to us. When we returned, a few weeks later, we entered the Secret Military Archives. I can assure you that opening dusty, sealed record boxes and discovering a plethora of SS records which had until then been regarded as lost, was one of the most memorable moments of my professional career. Graham Blewitt, keeping a protocol at my side, found my excitement contagious.

Among the records were German police reports, telegraphic messages sent from the summer of 1941 onwards to Berlin Headquarters. They transmitted dates and places, units and personnel relating to the first killing operations in the newly conquered territories of the Soviet Union. They were intercepted and deciphered by skilful code breakers in Bletchley Park, the wartime headquarters of British Signals Intelligence. Copies were sent to the Americans, stamped "Most Secret" and specially marked: "To be kept under lock and key: never to be removed from office."

In 1996, Richard Breitman, the longest serving historical consultant of the SIU, discovered the transcripts at the National Archives in Washington.²⁹ Comparing the German originals with the Allied decodes together with him was another highlight of my career, and one which confirmed a disturbing insight. Even after the war, the British and American governments had shown no interest in handing over this material to any of the war crimes commissions and trials.

The so called “Ultra System” or “Ultra Success,” deciphering with the help of the Enigma machine, had been vital to Allied victory. National and political interests dictated keeping the code breaking success secret. The West maintained its deciphering superiority over the East, this time as a weapon in the emerging Cold War. Put another way: keeping official secrets from the Soviets and others was considered more important than bringing Nazi killers to justice. As Richard Breitman put it: “There always seem to be higher priorities for governments and their defenders than swift action against genocide and its perpetrators. That may be one reason why some people continue to believe that they can get away with mass murder in the pursuit of political goals.”³⁰

At any rate, the opening of the Secret Archives provided a fresh and decisive impetus for research on the Nazi Regime and its genocidal policies. I would also argue that both the old Nazi war crimes debate and the new modern war crimes debate had a great impact on jurisprudence, especially on international criminal law. At many universities, teaching and research programs have been introduced which are centered on the study of war crimes, crimes against humanity and genocide where some twenty years ago such programs hardly existed.

The SIU differed from other war crimes commissions in two major ways. In court, the SIU tendered only original documents. Archivists, the custodians of historical records, brought the original in folders to Adelaide. Their affidavits confirmed the authenticity and archival transmission of the exhibit/document. This procedure, unchallenged by the defense, caused considerable astonishment in archival circles around the world. The only document which we had to table as a certified copy was the infamous *Wannsee Protokoll*. The German government refused to authorize the removal of the original, kept at the Political Archive of Foreign Affairs, arguing that it was the only surviving copy.

29 Richard Breitman, *Official Secrets: What the Nazis Planned. What the British and Americans Knew* (New York: Viking, 1998).

30 Letter by Richard Breitman to the Editor of *The New York Times*, 26.9.1996. Copy in my possession.

I did not interview witnesses. That was left to lawyers and policemen. I assisted the latter in tracing potential witnesses and by providing historical background information for their interrogations. I quickly learnt that testimony provided by living witnesses is more important than historical documentation. Yet, I also encountered the problems and limitations of eye witness accounts given fifty years after the event, in a foreign courtroom and under the strict rules of cross examination. The experience of insufficient testimonial evidence resulting in the acquittal of the accused has encouraged me to adopt a more critical approach to "Oral History," a burgeoning field in the historical fraternity. Moreover, I have begun to collect, from a growing number of memoirs, episodes and accounts which fall into the realm of historical legends and fairy tales, and can only serve as distractions from the hard evidence of criminality.

The second pioneering job the SIU undertook was the excavation of mass graves and the presentation of forensic evidence for the crimes committed in Serniki, Gnivan and Israelovska. I was not involved in this work, which was carried out by a team of Australian archaeologists, headed by Professor Richard Wright. The findings, recorded in diaries and reports, photographic images and video recordings, helped determine the precise time of the execution, the killing techniques employed, the number of victims, their age, gender and type of injury, their possessions and final movements before death.

For me personally, this method of unearthing the Holocaust proved much more intriguing, instructive and educational than any historical documentation. Some of the objects found in the graves are exhibited in the Sydney Jewish Museum – shoes and watches, coins and combs, articles of clothing, glasses and dentures – all belongings to the victims, as well as bullets and a *Schnappsflasche* (alcohol flask) left behind by the murderers. The public display of these memorabilia reminds the Museum's visitors, in particular school children, of the Nazi war crimes debate in Australia and, at the same time, confronts them with ongoing genocidal campaigns which have become cardinal features of the twentieth and twenty-first centuries.

Once my services in war crimes matters were no longer required, I resumed my work at the University and at the Sydney Jewish Museum. I watched an Australian war of words from the side lines; a historians' dispute, sparked by the call to master the past, that is, an Australian past besmirched by shameful policies directed against Aborigines. I share the view of those who argue that dispossession and enslavement, killings, forced assimilation and removal of children, also known as "the stolen generations", were components of a genocidal strategy, intended by those at the pinnacle of power to bring about the eventual disappearance of Aboriginal people as an identifiable group in Australia. Today there is much talk in Australia about "reconciliation." One important

step was taken not long ago, in February 2008, when the current Prime Minister Kevin Rudd offered an apology in Parliament, stating clearly and repeatedly: “We are sorry.” We have yet to get to the specifics of what it is Australia is sorry for.

As a Jewish historian, I should like to add a personal insight. With few exceptions, no close relations have developed between the marginalized Aborigines and the well established Australian Jews. Over the last fifteen years a number of projects and organizational links have been established between the Aboriginal and Jewish communities. Four years ago, I attended a joint commemoration ceremony. Aborigines and Jews assembled in the Holocaust Centre in Melbourne to unveil a plaque commemorating the protest staged by a group of Aborigines in front of the German Consulate in Melbourne after *Kristallnacht*, the pogrom unleashed against Jews in November 1938.

I watched from the sidelines the third and final chapter of the Nazi war crimes debate *Down Under*: the attempts made to extradite the remaining war criminals. In 2001, Mark Aarons attempted to reignite the debate, revealing that some of the most prominent SIU suspects had served as informers for ASIO, and that a considerable number of modern war criminals had found sanctuary in Australia. They came from Chile and Yugoslavia, Cambodia and Afghanistan, East Timor and Rwanda, Sierra Leone and Ethiopia, Somali and Darfur. Aaron’s plea to establish a modern war crimes investigation has so far remained unheeded, but he and several others continue the campaign for justice today.

In 2002, a magistrate in Melbourne issued an extradition order against the Latvian born Konrads Kaljes, Australia’s most prominent Nazi of international stature. Like Karlis Ozols, Kaljes too had been an SS officer in the *Arjas Commando*. I met Kalejs in Canada, when giving evidence in his deportation case. Like so many perpetrators, he maintained his innocence, showing no remorse, protesting against the cancellation of his temporary Canadian resident’s visa. In Melbourne he lodged an appeal against his extradition to Latvia, but died before it was heard. In a veritably Kafkaesque ending to the Kaljes saga, Kaljes died in a country in which he had never felt at home.

In 2003, Efraim Zuroff toured Australia,³¹ in an attempt to encourage the government and political parties, as well as the Jewish communities, to bring Nazi killers to justice within the worldwide framework of the Simon Wiesenthal Centre, “Operation Last Chance.” His plea fell on deaf ears. In 2005, one (potential) extradition case was closed when the Hungarian suspect Lajos Polgar died.

31 For Zuroff’s efforts to trace Nazi killers in Australia, see his *Operation Nazi Hunter: The Continued Search for the Perpetrators of the Holocaust* (New York: Ktav, 1994) and his report *Worldwide Investigation and Prosecution of Nazi Criminals* (April 1, 2005-March 31, 2006) (Simon Wiesenthal Center: Israel, August 2006).

2006 saw the beginning of another case concerning Karoly (Charles) Zentai.³² It was some time before the High Court of Australia gave the go ahead, in April 2008, for his case to be heard in a Perth magistrates' court, which found Zentai eligible for deportation for the alleged murder of a Hungarian Jew. Zentai made a final appeal, which seems likely to fail, and then the extradition order will be sent to a Federal Minister for a final decision. Medical evidence submitted suggests that the eighty seven year old suspect is near death. It looks as though the last Australian Nazi war crimes case will be closed, on humanitarian grounds.

From the side lines, I observed that the work of the SIU bore fruit – if not in the domestic arena, then in the international domain. As mentioned earlier, experienced Australian Nazi war crimes prosecutors and investigators were the first to take up leadership positions at the UN War Crimes Tribunal in The Hague. Graham Blewitt was appointed Deputy Prosecutor, serving in this capacity for ten years. Grant Nieman, head of the prosecution team in Adelaide, accepted the job of Senior Counselor. Several SIU investigators were assigned senior investigative positions. The Prosecutors Office commenced its work in April 1994. Six months later, the first indictment was issued. Before long, the experience and expertise of Richard Wright were required to present the archaeological and forensic evidence for the heinous crimes that were part and parcel of ethnic cleansing programs. After the “unearthing” of the Holocaust in the Ukraine, he continued his work with the “unearthing” of the killing fields in Srebrenica and other murder and burial sites.

Finally, also from the side lines, I observed Australian efforts to remove the domestic barriers against the prosecution of modern war criminals. In 2002, Australia ratified the Rome Statute.³³ Commonwealth Criminal Law was amended by integrating and classifying war crimes, crimes against humanity and genocide as criminal offences. Though the legal framework has been established, no one, to my knowledge, has been charged to date, and no war crimes unit has been created. Moreover, war criminals from conflicts prior to 2002 cannot be brought to justice under any existing Australian statute.

The structure and the aim of a modern war crimes unit are easily defined. A small but effective specialist unit is required, which should either be integrated into the Australian

32 Ruth Balint, “The Ties that Bind: Australia, Hungary and the Case of Karoly Zentai,” article submitted for publication. My thanks to Ruth Balint for providing me with the manuscript.

33 Gillian Triggs, “Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law,” *Sydney Law Review* 25/4 (2003): pp. 507-34.

Federal Police and be directly responsible to the Police Commissioner, or assigned to the Federal Attorney General's Department. It must be staffed with experienced personnel and furnished with sufficient resources to conduct investigations, both in Australia and abroad, in cooperation with other war crimes commissions and tribunals, as well as with intelligence and immigration agencies.

It remains to be seen whether and when the Australian government will change its political agenda. As in the past, the lack of political will is largely determined by concerns about ethnic tensions and electoral backlashes. A research report compiled by Fergus Henson from the Sydney based Lowy Institute, and submitted to the government in February 2009, calls for the establishment of a modern war crimes unit.³⁴ At Melbourne University, law Professor Tim McCormack and his team are conducting a large-scale research project designed to document and analyze Australia's post-World War II war crimes trials. Within the leadership of Australia's Jewish community, which includes senior lawyers who are veterans of the war crimes debate and of legal cases against Holocaust deniers, there remains a commitment to ensure that Australia does not continue to be a dumping ground for fugitive criminals from the world's conflicts.

Let me finish on a personal note. As I said earlier, I no longer believe in lessons of history. Yet, one lesson I have learned encourages me to speculate on the future. If Australia's obligation to trace, charge or extradite war criminals remains an empty phrase, then a chapter of Australian history will be repeated. At some time in the future another Mark Aarons, Leslie Caplan or Graham Blewitt will appear, reminding Australians that genocidal killers have again found sanctuary Down Under. Belated efforts to bring them to justice may well prove futile. By then, I assume, I will already be buried in a Jewish cemetery, leaving no memoirs behind – only my wife, five children and a growing number of grand children.

34 Fergus Henson, *Confronting Reality* (Policy Brief, Lowy Institute, Sydney, 2009).

