

NON-ENGLISH SPEAKING WITNESSES IN THE AUSTRALIAN LEGAL CONTEXT: THE WAR CRIMES PROSECUTION AS A CASE STUDY

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P R E F A C E

This paper has its origin in a request from the Director of Public Prosecutions of South Australia to provide a linguistic report to be tendered in court during the 1992 committal hearing of Heinrich Vagner, a defendant in one of the Australian War Crimes cases. The need for such a report emerged shortly after the commencement of the committal hearing of Ivan Polyukhovich, the first man charged with War Crimes in Australia, at which witnesses from Russia and Ukraine began to give their evidence in April 1992. It was felt by the court that there were serious communication problems between the legal profession on the one hand, and the Soviet witnesses on the other, and the author was asked to identify these problems and explain the reason for their occurrence. Although not a socio-linguist, the author was approached as someone who had an understanding of the languages used by the witnesses and of their socio-cultural background, as well as experience in the area of interpreting and translating. It was hoped that the report would help to prevent some of the communication problems in subsequent cases involving Soviet witnesses.

Following the writing and submission of the report, opinions were expressed that the paper had a wider area of application than the War Crimes Prosecutions alone and would be of pedagogical value in Australia's multicultural society. It was suggested that the points made in it should be drawn to the attention of professionals, such as the judiciary, lawyers, police investigators, social workers and others who deal with clients from a non-English speaking background. By its design the paper is an empirical one,

and there is consequently no attempt to reach any theoretical conclusions. Its purpose is rather to provide source material based on the proceedings of the War Crimes Prosecutions for analysis by those researchers with an interest in the theoretical aspects of communication with non-English speakers.

The Australian War Crimes Prosecution is widely regarded as having been a failure as no convictions were achieved. There are, no doubt, many reasons for this, but one of the more clearly identifiable ones relates to linguistic and cross-cultural differences. It was in the handling of non-English speaking witnesses that the Australian legal system seemed to have had difficulties, particularly in the courtroom. Though this is not an uncommon problem, these circumstances were unique in that, not only were the numerous witnesses on which the cases depended predominantly of non-English speaking background, but they had never been Australian residents and were brought to Australia specifically for the Australian War Crimes Prosecution cases, and thus, in addition to a total lack of command of English, had no understanding of either Australian cultural norms or the Australian legal system. If there is to be a benefit from this experience then it can be used as a lesson for improving some of the inadequacies currently inherent in the system.

In this article I will examine the Australian War Crimes Prosecution as a case study, in order to demonstrate those linguistic and socio-cultural difficulties which impede the smooth working of the justice system. I will first look at courtroom interpreting practices, then outline the frequently understated difficulties of translating and interpreting, with specific relationship to Russian/Ukrainian and English. I will then describe the Ukrainian witnesses and some of their background to illustrate their perception of the court procedure and of their role in it. I will then illustrate the kinds of exchanges between Australian investigators and judiciary, on the one hand, and these witnesses, on the other, which lead me to conclude that there was a serious breakdown in communication during the court hearings. Finally, I will make some suggestions as to how such problems could be avoided by the legal and other professions who deal with matters involving people of non-English speaking backgrounds.

INTRODUCTION

Linguistic problems became obvious at a very early stage of the investigations. Mutual misunderstandings or even total breakdowns in communication led to frustration on both sides. What was the reason for this? Was it, perhaps, caused by the insufficient expertise of the interpreters, as suggested by one of the magistrates? Or, maybe, by the uncooperativeness of the witnesses? Or else was there some other reason? Should, perhaps, those who deal with the witnesses and play a decisive role

in the court proceedings be more aware of the cultural, social and linguistic differences that are the basis of some of these problems?

In order to deal with this problem I will begin by considering briefly the specific difficulties of interpreting and translating, both in principle and with particular reference to English-Russian/Ukrainian translation and vice versa. I will then examine specific cases of communication problems that first arose during the preliminary investigation and became increasingly disturbing during the giving of evidence and cross-examination in court during the hearings.

SOURCE MATERIAL

The original materials for the present article derive from a number of sources:

POLYUKHOVICH CASE: Videotapes and transcripts of interviews conducted by Australian investigators in Ukraine in December/January 1989-1990 and April 1990 and transcripts of the committal hearing in the Adelaide Supreme Court in April 1992.

BEREZOVSKY CASE: Videotapes and transcripts of interviews conducted by Australian investigators in the Ukraine in 1991 and transcripts of the committal hearing in the Adelaide Supreme Court in June-July 1992.

VAGNER CASE: Videotapes and transcripts of interviews conducted by the Australian investigators in the Ukraine in 1989 and in 1991-1992.

Some further additional documents related to earlier War Crimes investigations and Trials conducted in the Soviet Union (Gibner, Zhilun, Marchik).

COURT INTERPRETING IN AUSTRALIA

Court interpreting has become common practice in Australia in the past few years. There is a currently functioning national system of accreditation of interpreters and translators and a range of Government bodies that supply accredited interpreters to courts. Yet the Court Interpreting system does not always seem to function satisfactorily and suffers from a number of serious deficiencies. Too many participants prefer to see the court procedure run smoothly (at least superficially) without any interruptions or delays. There appears to be little awareness among the legal profession of the lack of clarity in the phrasing of questions addressed to witnesses through an interpreter, or the impact of the length of the questions, or else the rapid pace of the procedure. There is also a frequent lack of awareness by those involved in the running of the court procedure concerning the nature of the interpreting process, namely the difficulty, or even impossibility, of translating a large number of terms, expressions and concepts from English into another language and vice versa, or the need for the interpreter to consult

a dictionary, or ask for additional information, or add comments or explanations. There are also other major issues, such as the cultural differences of non-English speaking defendants or witnesses, which can lead to misinterpretation and misunderstanding of their demeanour by Australians. Not many realise the disadvantaged position of non-English speakers in a courtroom situation, even when they are assisted by an interpreter, and the reasons why they are disadvantaged.

Some of these issues have been recently discussed in a number of reports (*Multiculturalism and the Law* 1992, *Access to Interpreters in the Australian Legal System* 1991). One, for example, mentions that non-English speakers 'are likely to be greatly disadvantaged in using an interpreter because of:

- * the present low standard of court interpreting;
- * their lack of familiarity with the adversarial system;
- * lack of understanding by the lawyers of the role of the interpreter and how to use interpreters properly.' (*Access to Interpreters in the Australian Legal System* 1991).

Other issues addressed by the reports concern the loss of impact of a statement when interpreted (*Access to Interpreters in the Australian Legal System* 1991: 45), the misinterpretation of the witnesses' demeanour by judges (*Access to Interpreters in the Australian Legal System* 1991) and frequent loss of credibility (Laster 1990b).

The Report suggests that 'further attention needs to be given to the impact that the use of interpreters has on the outcome of proceedings' and expresses concern at the fact that 'the interpreters can deliberately or inadvertently affect the balance of power between the adversaries in the court room' (*Access to Interpreters in the Australian Legal System* 1991: 45).

The Report further states, quoting Sir James Gobbo of the Supreme Court of Victoria, that 'while judges often found particular witnesses were truthful and impressive, this was rarely said of witnesses whose evidence was given through an interpreter, as such evidence often lost all impact' (*Access to Interpreters in the Australian Legal System* 1991: 45). The Report also refers to a paper by Kathy Laster (1990b) in which she argues that the presence of an interpreter does not guarantee that justice will in fact be achieved. Her study concludes that 'the role of court interpreters is pivotal in shaping the impressions that listeners form of witnesses' (*Access to Interpreters in the Australian Legal System* 1991: 46).

However, the issues do not solely involve interpreters. The Report relates criticisms of those judges who try to determine 'whether the witness is telling the truth through an assessment of a witness's demeanour'. This frequently leads to misinterpretation of the behaviour and reactions of people who come from a different culture by those who are not aware of such differences. 'A lack of understanding of cultural differences is likely to cause

a judge, jury or magistrate to draw incorrect conclusions about the veracity and credibility of a witness from his or her observed demeanour in court or the witness box' (*Access to Interpreters in the Australian Legal System* 1991: 47).

A GENERAL APPROACH TO THE PROBLEMS OF TRANSLATION AND (COURT) INTERPRETING

There is a wide range of perceptions of the interpreter's task. Many believe that the translation should be 'true and faithful', and this accords with the oath sworn by interpreters. This view is discredited in the Report of the Attorney-General's Department which quotes a statement of the Chairman of NAATI to the effect that verbatim, or literal translation, is a 'philological impossibility' (*Access to Interpreters in the Australian Legal System* 1991:47).

Problems with Vocabulary

One of the major problems encountered in translation is the discrepancy of the vocabularies that exist between different languages. A number of words and concepts that exist in one language do not exist in another, or else can be translated in a number of different ways. Thus, some of the abstract concepts that exist in English, such as 'privacy' and 'identity' do not have any equivalents in Russian. Another area concerns the vocabulary which is used to describe a country's cultural background or social, political and administrative structure (food, clothing, measure, weight). Some examples that occurred in the present cases were *khutor* - a type of hamlet or farmstead that existed in some parts of Ukraine - and *mestechko* - a country town in pre-war Poland, Ukraine and Byelorussia with a high percentage of Jewish population.

Such a lack of equivalents frequently occurs in systems that have no direct counterpart in other societies. This applies in particular to the Australian legal system, which functions differently from the one formerly known as the Soviet one and has components that do not exist elsewhere. Whereas general terms such as judge, jury, etc. do exist in other languages, when it comes to terms such as solicitor, barrister, magistrate, allegation, witness box, affidavit, committal, parole and bail, it becomes impossible to avoid an explanation of not only what these terms mean but also of how the Australian Legal system operates. This is also applicable to some of the current Russian terms, like *prokuror* ('procurator') - a position within the system of Soviet law which combines duties similar to those of a prosecutor with some additional ones.

In cases where there is no equivalent word or concept in the target language, various approaches can be used. Whereas in literary translations it

may be more important to find an analogy which may not be accurate enough but will not disrupt the flow of the narration, in the legal situation it is the meaning of the word or statement which must be paramount. It is therefore more appropriate for the interpreter to give a brief explanation or definition of the word that has no equivalent than to use an analogy that is not particularly accurate and will mislead the witness.

Another problem arises when dealing with polyvalence of words and concepts in translation. In some languages a word may have a wider or narrower meaning than in another, so that, unless a wider context is provided, it may be unclear which of the meanings to which the speaker is referring. For example, the Russian and Ukrainian languages do not differentiate between 'hand' and 'arm', both of which can be translated as *ruka*, and 'foot' or 'leg' (*noga*). So when a speaker mentions that he/she has been wounded in a limb, unless it is accompanied by a sign indicating precisely where that person was wounded, it is impossible to tell whether it was his/her hand or arm or else foot or leg that was affected. There is also only one word in Russian (*gorod*) for both city and town.

In English, words such as 'vehicle' can mean a large variety of means of conveyance. A Russian/Ukrainian interpreter will have difficulty translating a question such as 'Was there a vehicle at the end of the column?', as 'vehicle' can mean either a car or a truck or a van, among other possibilities. Similarly, the English verb 'to go' may apply to going on foot as well as to travelling by road, sea or air, whereas Russian and Ukrainian are more specific about the way one travels. Russian and Ukrainian have different words for each one of the above instances, so that even the knowledge of whether a person came on horseback, in a cart or walked affects the translation of a sentence like 'He came to our village'. The lack of additional information in such instances must unavoidably lead to incorrect translations.

The same problem applies to other verbs of motion, such as 'to take (someone) away' and 'to bring'. Depending on whether it took place on foot or by means of any conveyance, including a horse or a cart, a different verb would be needed. Again, the absence of the precise context or additional information inadvertently produces inaccuracy or errors in translation.

In practice, unless the meaning of the witness is clarified at an early stage, the translation can be incorrect, the error not become apparent, and incorrect information recorded as a result. Thus, in an interview (12 November 1991) witness M. Kostyanetskaya talks about someone's *nevestka* (sister-in-law) which is translated into English as "daughter-in-law" and this error never comes to the witness's attention as the only word that the interpreter uses and can use in Russian is *nevestka*.

The only way to avoid the very real possibility of such errors, which is

particularly important in legal cases, is for the interpreter to be aware of the problem and feel at liberty to clarify the meaning of the word as soon as it is used by the witness.

Problems with Grammar

Grammar, or a structure “of means used to express the relations of words to each other in sentences”, including syntax and the principles of word-formation (*The Universal English Dictionary*, Ed. Henry Cecil Wyld, London) is another aspect preventing literal translation. Every language is ‘organised’ uniquely, with its own means of marking the relationship between words in a sentence. For instance, in English, which is an analytical language, it is achieved through a mainly direct and rather rigid word order, with the aid of prepositions that ‘connect’ words. Slavic languages (including Russian and Ukrainian) are, on the other hand, synthetic languages, operating by means of inflections, easily changing the form of words by adding prefixes, suffixes and endings. This also allows a much more flexible word order, which seldom coincides with the English one.

Among the most striking differences between Russian/Ukrainian and English is the lack of articles in Russian/Ukrainian and the presence of three genders.

Even the most straightforward words, such as ‘yes’ and ‘no’ cannot be translated automatically as they are sometimes used differently in English and in Russian, especially in responses to negative questions. In English, a question such as : ‘You didn’t see him, did you?’ elicits a negative answer if the person interviewed agrees with the statement made and an affirmative one if the interviewed person does not agree. In Russian/Ukrainian the answer of agreement would be ‘yes’, confirming what is being said by the interviewer, and ‘no’ signifying disagreement with him/her, precisely the opposite of the English. A literal translation of ‘yes’ or ‘no’ is likely to cause confusion.

THE UKRAINIAN WITNESSES

The witnesses in the current War Crimes prosecution have until now been discussed in general terms, without any reference to who they were, where they came from and what made them different compared to other witnesses who usually come into contact with the Australian legal system. It is also important to explain why two languages have been mentioned, Russian and Ukrainian, occasionally being treated as one entity. The place of origin and general background of the witnesses will now be detailed, and subsequently their relevant cultural characteristics.

The witnesses in question are the largest group of foreign witnesses ever brought to Australia for the purpose of prosecution. The first group of witnesses for the prosecution of Ivan Polyukhovich exceeded 20, and the

second and third groups for the prosecution of Mikolay Berezovsky and Heinrich Vagner were almost as numerous.

It is significant that the cases provided large numbers of witnesses, as otherwise such a study would not have been possible. Whereas in other cases involving witnesses of non English-speaking background communication problems can be viewed as isolated ones and uncharacteristic, in these particular instances a certain pattern was observed, and lessons can be learned from the experience of dealing with the witnesses in the three cases. Although communication problems arose at an early stage during the preliminary interviews that were conducted in the Ukraine, the atmosphere then was informal enough to be able to clarify problems as they occurred in the process. It was the courtroom situation, the attitude of the judiciary and particularly the pressure of cross-examination that turned what were minor difficulties into major issues. The video recordings of preliminary interviews in the three cases have been studied, and courtroom transcripts of the first two cases examined, on the basis of which certain observations have been made. But first a brief description of the background of the witnesses.

In the case of Polyukhovich the witnesses come from the Rovno Region in the Western Ukraine, an area that was annexed by the USSR in 1939. These witnesses were mainly born and brought up under Polish rule, but spent the major part of their lives as citizens of the USSR. All of them come originally from a rural area, had very little schooling (some are illiterate), and although some of them now reside away from their place of birth and live in cities, on the whole they all live very much on the land and depend on it. In the case of the witnesses for the Berezovsky and Vagner cases, they come from the Central Ukraine: Vinnitsa region and Kirovograd region respectively. Unlike the Western Ukraine, Central Ukraine became part of the Russian Empire in the 17th century, and therefore these witnesses grew up under the Soviet regime and had greater exposure to the Russian language. The witnesses for the Berezovsky and the Vagner cases share some of the main features of the Polyukhovich witnesses: they also come from a rural area and had very limited education (a few classes of primary school). The majority of them still live in the country.

From a Western viewpoint these people appear to have limited means of existence, their material possessions consisting only of basics. In the former USSR people outside large cities have had no exposure to technology, and the first time in their lives that the witnesses saw a video camera and a picture of themselves on the screen was when they were interviewed by the Australian investigators.

The Language Used by the Witnesses

As long as Ukraine was part of the USSR, it had two official languages, Ukrainian and Russian. Due to the Russification policy conducted by the

Soviet State in all the Republics and Regions populated by non-Russian ethnic minorities, the Russian language was the predominant, and certainly the official, language. It was the language of all formal procedures and official documents. This explains why all the official documents, including Protocols of Interrogations obtained from the USSR are in Russian, except for those issued in the Ukraine during the German occupation. During the visits of the Australian investigators, the procedure of preparing for the interview and the preliminary questions by the Soviet procurators were conducted in Russian and it would be assumed by the Soviet officials that the witnesses were capable of communicating in Russian. Thus the introductory part of the interrogations of the witnesses, which states the rights and obligations of witnesses, has a following provision, 'In accordance with the Article 19 of the Code of Criminal Procedures of the Ukrainian SSR, the witness (name of witness) was given an explanation regarding his right to give evidence in his native tongue. (Name of witness) stated that he/she had a good knowledge of the Russian language and did not require the services of an interpreter.' In every single case of the interrogations, the witness agreed to testify in Russian. Thus, N. Davyborshch, interviewed in Kirovograd on 12 November 1990, when asked by the procurator, 'Do you need an interpreter from Russian into Ukrainian, do you understand Russian?' replies, 'The answer is yes, I understand Russian, I don't need an interpreter from Russian into Ukrainian'. V. Luk'yanenko, interviewed in Kirovograd on 20 November 1990 explains further: 'I understand both Russian and Ukrainian languages. I stayed for six years in the army'. Nevertheless, although all the witnesses said that they understood Russian and could speak it, it soon became clear that the language they used was not pure Russian. Rather, it was a mixture of Russian and their native Ukrainian, in various proportions. They would use this mixed language without any signs of awareness, and were frequently unable to determine which language they spoke. For instance, to the question which language such and such person spoke and whether it was Russian or Ukrainian, witnesses for Polyukhovich would say, 'Russian, Ukrainian' (Ye. Bogatko), implying that it is the same thing, or describe it as 'our language'. Some of the witnesses in the Vagner case would react in a similar way. V. Lepsheyeva (22 March 1991, Vinnitsa), when asked about the language of her choice says:

A: 'Ukrainian, I can't speak English.'

Q: 'Do you mind if your evidence will be recorded in the Russian language?'

A: 'Whatever they want.'

Q: 'It's all the same to you.'

A: 'It doesn't matter, I speak Ukrainian.'

Few are capable of giving a clearer explanation. M. Kostyanetskaya in an

interview of 12 November in Kirovograd comments, '... My language is mixed. I use both Russian and Ukrainian words and I don't need an interpreter from Russian into Ukrainian or from Ukrainian into Russian. I understand and can use those two languages.'

One of the reasons for such confusion is the close similarity between the Russian and Ukrainian languages. Both are Eastern Slavic languages, with a very similar grammar and vocabulary. The long-term exposure of the residents of Ukraine to the Russian language, aggravated by the similarity of the two languages, made such a hybrid possible. It also creates an unusual situation for interpreters who, ideally, should understand both Russian and Ukrainian. It may become particularly problematic for the interpreter when a witness uses a word that has a similar sound and exists in both languages, but has different meanings in them, so-called deceptive cognates. For example, the Russian *nedelya* means 'week' while Ukrainian *nedilya* means 'Sunday'. In Russian *listopad* means 'fall of leaves' (which would correspond to the end of August-beginning of September) whereas in Ukrainian it is 'November'. Or *vsekh pobili* in Russian means 'they were all beaten up' while in a dialect of Ukrainian *vsikh pobyly* is used to mean 'they were all killed'.

The Witnesses' Experience of the Soviet Legal System and their Expectations of the Role they would Play as Witnesses in the Australian War Crimes Prosecution.

Linguistic difficulties were not the only problems to have complicated communication. One, briefly mentioned earlier, was a different legal and court system that existed in the former USSR until very recently and still exists to a large extent. The major difference from the Australian one is that it is not an adversarial system, and although in theory all the parties have an equal right to give evidence and question it, in practice the balance of power would be quite different, with the role of the procurator being predominant [Lapenna, I. *Soviet Penal Policy*, The Bodley Head, London, 1968.]. Thus, the witnesses for the prosecution would normally give their evidence but would not then be cross-examined in the same way as happens in Australian courts of Law. This explains why the Ukrainian witnesses felt that the position in which they found themselves in court was far from what they were prepared for. One thing they did not expect to happen was for their credibility to be questioned and their evidence destroyed. This aspect seems to have had a most stressful and demoralising effect on them, and made them feel as though they themselves were on trial.

There are also differences in the methods used to obtain evidence from witnesses. The Soviet system is less precise in obtaining such evidence, allowing the witness to speak on the subject in a relatively free narrative manner. It can be observed in Soviet protocols of interrogation, and even in

the initial parts of the evidence collected by the Australian investigators in Ukraine, which as a rule began with an address by a Soviet procurator to the witness inviting him/her to relate whatever they know on the relevant subject. ('Tell us what you know about the man called Ivan Timofeyevich Polyukhovich'). Although these witnesses were familiar with a direct question-answer system of interrogation, they were not accustomed to a yes/no manner of accurate and precise answers which only allow information that is relevant from the point of view of the questioning person, and not allowing the witness any freedom of expression. As a result, many witnesses were taken aback and felt frustrated when not allowed to relate their story.

The Australian legal system turned out to be very precise in another aspect - that of the phrasing of the evidence. Whereas the evidence-giving in Soviet courts appears to be primarily about the facts, in Australian courts constant references were made by lawyers to the witnesses' earlier statements and the phrasing of those statements ('Did you not say earlier in your statement ...'). This procedure was conducted with the assistance of interpreters, who were translating from English into Russian/Ukrainian the supposed exact words of the witness that had been previously translated from Russian/Ukrainian into English. No original documents or recordings were produced for this purpose, and as a result the witnesses were pinned down on the evidence that they had difficulty in recognising as their own.

Another pertinent issue that, no doubt, came as a surprise for the witnesses was the inadmissibility of the hearsay information by the Australian court. Officially hearsay is not admissible in Soviet Courts either, since Soviet legislation states that 'an anonymous letter, or the testimony of a witness or victim based on hearsay cannot serve as evidence' (Stetsovsky 1982: 88). Yet, there are provisions allowing it under certain conditions: 'If the testimony of a witness is based on the communications of other persons, those persons must also be cross-examined' (*Criminal Procedures Code of Ukrainian SSR*, Article 68.). In addition, as was mentioned previously, evidence-giving in USSR allows one to give one's testimony in a freer way. Yet, hearsay seems to be not only a legal but a cultural issue, which will now be discussed.

An Overview of Cultural Differences

Awareness of the different attitudes and norms of behaviour of people who come from different cultures is essential. It is easy to form a false impression of them by using the criteria of acceptable behaviour in our society. Body language, facial expression and eye-contact can be totally misleading if one does not realise that they may be used in a different way in other cultures. One can be quite mistaken about people's genuineness and credibility. Furthermore, our values may not be necessarily shared by people from other cultures who may have their own cultural priorities. Some aspects

proper to the Russian/Ukrainian culture and mentality require specific attention. Observations on cultural differences will be made based on Wierzbicka's research in cross-cultural communication (Wierzbicka 1991, 1992) with specific references to the differences between Slavic culture and that of English-speaking countries. The three essential aspects which shall be discussed will be knowledge, precision and emotions. All the three were of crucial importance in the court proceedings that are being described.

Knowledge: This issue follows on from the issue of hearsay discussed above. In these particular cases, witnesses who lead a community life in a small place are frequently unable to separate what they learned through being eye-witnesses from what they learned through their community or parents and relatives over many years. Not unlike Aboriginal witnesses, they are frequently unable to distinguish their own acquired knowledge from the collective knowledge of the community or the knowledge conveyed to them by their parents. Thus, Stefan Kolb (Polyukhovich case, May 1992) insisted that he knew that the murdered woman was Tsalikha, as the man who buried her had told him so. Or else Yekaterina Bogatko believed to have seen Ivanechko's mother or sister following the scene of alleged murder. She was then hiding together with her own sister who told Yekaterina Bogatko whom she was seeing (same case, April 1992). The interviewer must be very specific and possibly repetitive in his/her questions of the type, 'Did you see it/him/her with your own eyes?' However, there may be cases of collective knowledge when it is impossible to identify the source of information as it can not come as a result of being an eye-witness but must be based on information received from other people:

Q: 'How did you know it was the Berezovsky that you have been telling us about?'

A: 'Well, how could I, once you know this, it was the head of the police.' (...)

Q: 'How did you know he was the head of police?'

A: 'We all knew.' (V. Lepsheyeva, 2 July 1992)

Precision: Precision as to detail and accuracy do not seem to be as important in Slavic cultures as in cultures of English speaking countries, as it is seen as leading to the loss of spontaneity, which is valued much higher as a manifestation of genuineness. In addition, in the particular case of the Ukrainian witnesses, country life and agricultural work have not been particularly conducive to being specific about events, times, dates, etc. This, reinforced by the remoteness of the events relevant to the case, made precision an even more vulnerable issue from the point of view of the War Crimes prosecution. The insistence of the interviewers on points of precision, and their repetitive questions in order to clarify matters such as the sequence of events, months or seasons, time of day and clothing worn, only

tended to aggravate the witnesses. However, this lack of precision did not appear to apply to all the areas of knowledge of the witnesses, and was certainly not a sign of memory loss. Thus, the witnesses seemed confident when asked to identify personal firearms. Also, their ability to differentiate colours was much more elaborate when describing domestic animals than when asked about the colour of clothing, which they very roughly divided into 'black' and 'white', often meaning 'dark-coloured' or 'light-coloured' respectively (*Poles'ye: Linguistics, Archaeology, Toponymy* 1968.).

Emotion: Emotions and spontaneity, by contrast, are seen as highly important in Slavic cultures. There is no social imposition on restraining or controlling one's emotions, and the term itself does not have the slightly pejorative connotation that it has in English. On the contrary, one is expected to demonstrate his/her emotions when discussing a moving or disturbing subject rather than to try to distance oneself from it and appear dispassionate. Whereas an Australian judge would tend to see the evidence of a distressed witness as unreliable in view of the witness's irrational behaviour, a Soviet judge is likely to view a dispassionate account as a callous one, especially during the giving of evidence on emotionally charged subjects.

AN ANALYSIS OF THE ACTUAL COMMUNICATION BETWEEN INVESTIGATORS/LAWYERS AND WITNESSES

The difficulties of translation and cross-cultural difference which I have considered thus far have been of a general nature, aimed at outlining the issue within the context of War Crimes Prosecution. They do not reveal the extent to which these differences affected, or even distorted, the perception of the witnesses by the Australian party. Neither do they indicate the stage of the hearings at which the communication breakdown occurred, and the reasons for this breakdown. In order to understand why the court frequently viewed the witnesses as inconsistent, unco-operative and irrational, one must examine the court transcripts which provide specific examples of the difficulties experienced by the Australian party, both the prosecution and the defence, in making themselves understood by the witnesses or in receiving answers from the witnesses.

Difficulties Experienced by Witnesses in Understanding the Questions Put to Them

The initial problem of communicating with witnesses through an interpreter is the lack of immediacy which this process introduces, and the temporal delays that appear between questions and answers, which hamper

understanding. Interpreting creates artificial gaps between questions and parts thereof, and answers, something that does not, as a rule, occur in natural conversation. As a result, when the interviewer makes a reference to a situation (a specific day, for example), and his sentence is then translated, and the interviewer then asks a question relating to this reference, it often transpires that by then the witness has forgotten what the reference was. Thus, in the preliminary interview I. Zhilun was questioned about a specific day. Then, when it was established about which day he was being questioned, he was asked something to the effect, 'How often did you see him prior to that day?', and the response of the witness was 'Which day?' (December 1989, preliminary interview).

The need to translate questions into another language exacerbates problems that may otherwise have remained 'invisible', such as lengthy and badly structured sentences, lack of precision and poor choice of words. I shall now describe a few types of questions that have caused the most difficulty.

Questions with a Number of Subordinate Clauses

Lengthy questions with a number of subordinate clauses are frequently hard to understand in the original, and become still more confusing in translation. They often contain too much information for both the interpreter to interpret and for the witness to assimilate and answer appropriately. As a result, the witnesses are frequently unable, at the end of such sentences, to identify the actual question among the agglomeration of clauses.

For example:

Q: 'The clothes he was wearing when you saw him kill Tsalikha, when you saw him wearing those clothes at other times, where was he?'

A: 'As he killed Tsalikha, where was he?' (Ye. Bogatko, 2 April 1992, Cross-examination)

Among the questions that cause particular difficulties are those which contain more than one question and those which contain quotations, especially if they also contain questions:

Q: 'Were you asked to what you saw on television in that question and answer, "Did you see police guarding the column?" and did you reply "Yes, of course"?''

A: 'Did I not reply what?' (V. Lepsheyeva, 2 July 1992, Berezovsky case, cross-examination.)

The following question contains one quotation inside another and is made still more difficult to comprehend by its excessive length:

Q: 'Do you remember him asking you this question, and this was a question that Mr Malone asked you, and he was reading from the statement that you'd given Mr Podrutskiy before, and he said this, "I'm reading from our translation of your previous protocol from 1987 and it states "when I saw Granovska I heard that she was asking the policeman who was guarding the column - she said her husband was Russian".' (...) And instead of answering her the policeman beat her with the lash and also beat the child". Is that correct?' (V. Lepsheyeva, 2 July 1992, Berezovsky case, cross-examination.)

The length of the sentence, and the presence of more than one question in it, make it impossible for the listener to relate the final question 'Is that correct?' to any specific reference.

Sometimes, in the case of a long question, the interviewer may split it into sections and clauses which are translated in sequence, as he/she speaks. Although this method appears to simplify the task for the interpreter, it is not a successful one. Instead, it destroys the dynamics of the sentence and the logical links between clauses; it does not allow the interpreter to see the sentence as a whole, and may in fact cause additional translating difficulties and errors. These are particularly common, for example, in sentences with temporal clauses, such as 'When you first saw so-and-so, what did he wear?' The witness tends to answer the wrong question, 'When did you see him first?' One of the reasons for this is that the Russian/Ukrainian translation of the question 'When did you see him first?' and the clause of a longer sentence 'When you saw him for the first time...' sound exactly the same. Certain questioning strategies can be adopted in order to avoid such confusion.

Insufficiently Precise Questions

Some questions are not sufficiently precise in their phrasing. This was demonstrated mainly in non-leading questions aimed at drawing information from the witness about a specific event, yet providing enough information for the witness to be able to answer it. One of the words that lack precision is 'then' used without sufficient context:

Q: 'There is a stone quarry at Gnivan or there was then?'

A: 'That is after the occupation or prior to the occupation?' (P. Rupp, 3 July 1992, Berezovsky case, evidence-in-chief).

In questions relating to more specific events, such as 'What did you do then (after the event)?' the word 'then' does not convey the idea of immediacy (straightaway after the event) and can be interpreted as:

(i) immediately after the event; (ii) on the same day; or (iii) during the remaining part of the witness's life. That the events happened almost 50 years ago increases the difficulty. One should qualify such questions by adding phrases such as 'immediately after it (the arrest, the execution, etc)' or 'on the same day'. Similar care should be taken when using words such as 'afterwards' and 'before'.

The phrasing of some of the non-leading questions is in itself unfamiliar to the witnesses who, due to their experience with Soviet authorities, have not been exposed to questions of a non-direct type. These questions frequently begin with 'Was there a time when ...?':

Q: 'Was there a time after that when the Germans came?'

A: 'In which time? I don't understand.' -

(F. Polyukhovich, 26 March 1992, Polyukhovich case, evidence-in-chief)

or 'At some time...':

Q: 'At some time, prior to the occupation of the village did you come to meet a person called Polyukhovich, Ivan Timofeyevich?' (Ye. Bogatko, December 1989, preliminary interview).

Once again, the vagueness of the sentence structure makes it difficult to translate, and deliberately vague expressions, such as 'was there a time' or 'at some time', did not make sense to the witnesses, who were unfamiliar with such a strategy of questioning.

Referring Witnesses to their Earlier Statements

Another unfamiliar type of question that is not traditionally asked in the Soviet legal system is one which refers witnesses to statements that they had made previously. They are usually phrased thus: 'Do you agree that in your previous interview on (date) you said this (quotation follows)?' Questions of this type are usually misunderstood and are seen as requests to agree or disagree with the actual statement quoted, rather than to acknowledge having made the statement. For example, to the question following the reading of the witness's earlier evidence 'Do you agree that that which was just read out to you then was what you said to Mr Podrutskiy and signed?', V. Lepsheyeva (2 July 1992, Berezovsky case, cross-examination) replies, 'I'm not in agreement with the fact that the senior policeman was Berezovsky', thus commenting on the content of the quotation, and not answering the initial question.

The referral to earlier statements made by the witness also caused difficulty because what was quoted by the interviewer in English was in itself a translated version of the original words used by the witness. These

were translated back into the Ukrainian, and, having undergone a process of double translation, the quote might resemble the original only remotely. These words should not be presented to the witness as his/her own words once said.

Problems may also arise when witnesses are directly referred to their earlier evidence which has been recorded on videotape. Even though their own words are being replayed, the evidence was usually given months, or even years, earlier. Also, the lack of familiarity of these witnesses with video equipment frequently prevented them from identifying themselves as the person on the screen, and the statements made as their own words once said. For example, during the giving of evidence by D. Kostyukovich (Polyukhovich case) the witness was asked to repeat what he had just heard himself say on the video recording:

Q: 'What did you just say on television then?'

A: 'I can hear what I had said, but I do not remember saying that. Neither had it entered our heads.'

Q: 'And tell again what you said.'

A: 'Where?'

Q: 'On the television that's just been played.'

A: 'Do I remember what I said then?'

Q: 'Tell us what you just heard.'

A: 'I did not look closely, I did not see.'

Seemingly Shared Concepts That Do Not Fully Coincide

Some of the difficulties in understanding a question are not only situational but also linguistic, and relate to certain words and expressions. As was discussed earlier, many terms and expressions cannot be translated at all. Among such expressions frequently used in the courtroom are 'Do you mind...', 'Do you appreciate...', 'May I suggest...', 'I put it to you.'

Yet sometimes misunderstandings can occur even as a result of the most commonly used words, as even they may not fully coincide in meaning with their translated version and can be understood differently. It can also occur for reasons mentioned previously: insufficiently precise phrasing. In such cases the English original is just as ambiguous as its translation. Here are several examples:

To know. The meaning can vary from knowing of someone's existence to knowing the person very well. The Ukrainian witnesses also distinguish between knowing someone by sight or knowing someone well enough 'to say hello'. Their system of hierarchy in a pre-war and war-time village between, for instance, children and grown ups allows them to establish another dimension of 'knowing' a person when the child 'knows someone

well' and yet would not be supposed to address this person, and this person would not acknowledge the child's existence. (A similar situation would apply to a policeman and one of his superiors.) Here are several examples of different understanding of the word 'know':

Q: 'Did you know any Jewish families that lived in the area?'

A: 'No, they lived far away, five kilometres from us.'

Q: 'Did you know of them but you do not know their name?'

A: 'Yes, I know of them but I do not know their names.'
(Ye. Bogatko, Evidence in chief, 2 April 1992)

A: 'I knew him, or rather I used to see him.' (I. Zhilun, 23 December 1989).

In some cases inaccurate use of the word 'know' occurs:

Q: 'Did you know one day in summer 1942 when you and your sister were in the field and your sister was harvesting buckwheat?' (Ye. Bogatko, Evidence in chief, 2 April 1992).

To meet. The word 'meet' can be understood in at least three different ways: (i) to meet someone for the first time; (ii) to meet someone accidentally (to run into someone); and (iii) to meet someone on a regular basis. For example, in the question 'At some time, prior to the occupation of the village, did you come to meet a person called Polyukhovich, Ivan Timofeyevich?' (Ye. Bogatko, December 1989, preliminary interview), 'meet' has a clearly ambiguous meaning being either 'meet for the first time' or 'meet regularly' (or even 'did you come in order to meet Polyukhovich?').

Work. A word that can be used by the citizens of the former USSR in its narrower and more formal sense as 'job', 'employment', and 'to work', 'to be employed'. From their description one would assume that a farm-worker does not work.

Q: 'What work did he do?'

A: 'What work? He didn't work anywhere. He (just) worked in the field and lived at home, that's all.'
(Ye. Bogatko, preliminary interview, December 1989).

Difficulties Relating to the Answers of Witnesses

Sometimes the answers and reactions of witnesses seemed not to relate directly to the questions, even though these questions may appear to be straightforward to the interviewer. These problems can be categorised as either linguistic or cultural in nature, although they are interconnected, and

this subdivision therefore seems somewhat artificial. Nevertheless, I shall consider them separately.

Cultural Problems

The so-called cultural difficulties relate to the different way in which the Ukrainian witnesses see and describe reality, and are probably better qualified as conceptual. Examples of this often come in response to questions eliciting detail and precision. Here are some examples in which 'strange' answers occur:

Months and seasons. As countryside residents of a certain age and educational level, the Ukrainian witnesses were often unable to identify the month of the year or season when an event took place. They used a reference system of agricultural and religious signs. These included the height of the crops, the harvesting of buckwheat, the ripeness of apples and festivals such as Easter, Whitsunday, Transfiguration, as well as less known ones (the Finding of the Head of John the Baptist or Low Sunday). Sometimes it is simply the weather that indicates the season: 'It was chilly, so it was either spring or autumn' (I. Zhilun, December 1992).

Time of the day. The day is subdivided differently in English and in Russian/Ukrainian, and although equivalents to the words morning, day, evening and night do exist, they do not fully coincide. It is particularly difficult to find equivalents to concepts such as 'late morning', 'early afternoon' or 'late afternoon'. Reference to 'night' needs to be extremely precise as in English there is frequently a lack of distinction between 'evening' and 'night'.

Similarly, apparently translatable expressions such as 'early morning' or 'in the early hours of the morning', when used to describe the hours following midnight, cannot be directly translated into Russian, since the Russian/Ukrainian concept of 'morning' implies daylight.

The Russian/Ukrainian speaker refers to 'lunchtime' ('before lunch' being similar to mid to late morning, and 'after lunch' in the afternoon). Occasionally the Ukrainian witnesses mention church services — the pre-sunrise service (*zautrenya*), the lunch-time service (*obednya*) and the early evening service (*vechernya*) which correspond very approximately to matin, mass and vespers.

Age. The witnesses would sometimes answer the question about their age by saying (literally), 'I'm from '32' (meaning 'I was born in 1932') - a common thing to say for residents of the former USSR of an older generation.

Population. Rather than give an estimate of the population of the village the witnesses use the word *dvor* - household (literally 'yard') and might reply, 'There were two or three hundred households.'

Linguistic problems, or problems of translation

Some of the replies of the witnesses sound odd because of the impossibility of adequately translating certain fairly common Russian/Ukrainian responses into English. Thus, the word *nu* which essentially means 'yes' said with a reservation, a certain caution and a slightly questioning intonation, was often translated literally as 'so?' or 'well?', and could be better described as 'well, yes', or 'yes, go on', or 'yes, and so?' Being translated simply as 'well', and especially 'so', resulted in conveying an incorrect impression of the witnesses' reaction, making them appear aggressive.

Another quite common positive response to questions beginning with 'Can you tell me...' has been 'Yes, I can', not followed by any additional information. This is due to the different way of addressing requests in English as opposed to Russian/Ukrainian. In Russian/Ukrainian it is usually in the form of a direct request in the imperative: 'Tell us whatever you know of the man...' English uses a less direct form of request and phrases it as a question. When translated literally into Russian/Ukrainian, in the form of a question 'Could you please ...?', it is also understood literally, as an inquiry about the witness' ability to provide information, and is answered accordingly, 'Yes, I can.' Similarly, a question starting with 'Do you remember ...?' receives a similar response. Thus, during preliminary interrogation (December 1989) I. Zhilun answers these questions by saying 'Why wouldn't I (remember)?' Another odd reply is 'I can't tell you' (F. Polyukhovich, 26 March 1992); this is a literal translation from Russian which does not demonstrate any unwillingness to answer, but simply means 'I don't know.'

Some of the unexpected answers can be due to the process of translating from one language into another and back. In some cases it is due to a double meaning of a word in translation. For example, when during a preliminary interview Mikhail Raykis (Berezovsky case) was shown a photo spread and asked, 'Does anyone here look familiar?' he replied, 'They aren't acquaintances of mine.' The words 'familiar' and 'acquaintances' in Russian/Ukrainian sound almost the same, and the question was clearly misunderstood by the witness. In other cases a misunderstanding can be due to grammar. Thus, Ye. Bogatko (Polyukhovich case) was cross-examined during the committal hearing regarding her evidence as a witness to Ivanechko's mother or sister coming and collecting the clothing of the people who had been shot. The cross-examination revolved around her statement that it was one person only, while she had been saying 'they came' and 'they took the clothing'.

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- Q: 'Did she (your sister) say "they came"?'
A: 'Yes. They came. They are taking her clothes.'
Q: 'But you only saw one person?'
A: 'Yes. There was only one.'
Q: 'But your sister said "they"?'
A: 'Yes'.

(Cross-examination of Ye. Bogatko, April 1992)

This misunderstanding was due, again, to a literal translation of the Russian/Ukrainian impersonal sentence (similar to the English 'they say') which uses the third person plural but which can mean one person only. (In this case, knowing the context, the translation should have been 'someone came' or 'someone took the clothing'.) It is obvious that in the said cross-examination the witness could not understand what was seen as inconsistency in her evidence, and what was expected of her. The original contained no inconsistencies.

Situations such as those described above were damaging for the witnesses, since their speech, perfectly normal and acceptable in the original, once translated, conveyed a wrong impression of them and of the information which they provided. In such cases, when the choice of words or the phrasing of the answers of witnesses appears odd, it may be useful to ask the interpreter to comment (e.g., Mr. Tilmouth addressing the interpreter, on 1 July 1992, Berezovsky case, re the word 'yellowish' used in relation to hair).

Reaction to a Situation Which Should Not Be Taken Literally

Some of the other unexpected responses of the witnesses were due neither to linguistic nor specifically cultural problems but appeared to be the result of a situation of stress under prolonged questioning, and should not have been taken literally, as they were an emotional outburst of witnesses (something that is socially acceptable in their culture, as indicated earlier) and indicated their inability to withstand the pressure of the situation any longer. A similar experience is described by Eades (1992) in relation to the interrogation of Aborigines. The author stresses, in particular, the inappropriateness of some of the methods of courtroom questioning where 'the power rests with the legal professionals (for example the witness has no right to ask a question)' (Eades 1992: 44). She proceeds to state that 'it is easy to misunderstand certain responses to legal questions, especially if the questioner does not recognise aspects of Aboriginal culture' (Eades 1992: 45). She further suggests that answers such as 'I don't know' or 'I don't remember' 'may not be statements about memory or knowledge but rather about the inappropriateness of the questioning strategy.' (Eades 1992: 45).

The author also warns that the affirmative answers often given by Aborigines are not necessarily a sign of agreement but a 'gratuitous concurrence' (Eades 1992: 53) which reflects the cultural attitude and reaction to people in authority, in particular.

The committal hearings of Polyukhovich and Berezovsky demonstrated the reaction to pressure and to what the witnesses saw as the lack of trust in their words. Most of them were incapable of explaining why they had previously given a different answer (Ye. Bogatko, when pressed, during cross-examination at the committal hearing, for an explanation as to why she had earlier called 'dark' 'black' tried to explain that it was the local way to describe colours: 'I spoke simply saying that he was not in white.' 'I used black. I did not discern what difference it has.')

In some cases, pressing repetitive questioning resulted in emotional outbursts and the rejection of previous evidence. For example, Fyodor Grogor'yevich Polyukhovich (26 March 1992, Polyukhovich case) became uncooperative as a result of confusion under cross-examination during the committal hearing and ultimately gave negative answers to almost everything about which he had been testifying earlier.

Q: 'Had you seen him before the occasion that you saw the Jews led into the pit?'

A: 'No, I did not see. Did not see. Did not see.'(...)

Q: 'So you had seen him before that day that you say you saw him at the pit?'

A: 'No, I did not see.'

Q: 'But you told us you saw him at his wedding.'

A: 'That was in 1940 as he was getting married.'

Q: 'I'm not talking about on that day. I'm talking about before that day.'

A: 'I did not see. I did not know him. Up until that time I did not know him.' (...)

Q: 'To be absolutely fair and clear, I'm talking about occasions you've seen him before that day, not on that day.'

A: 'I did not see.' (...)

Q: 'Before the day the Jews were killed.'

A: 'I did not see. I did not see.'

Further examples of a similar reaction by the same witness appear on pp. 1197-1198 of the cross-examination of F. Polyukhovich.

Dmitriy Kostyukovich (Polyukhovich case) threatened to stop giving answers if the prosecution continued the cross-examination in the same fashion; Kazimir Lipinskiy (Berezovsky case) eventually gave up during cross-examination at the committal hearing and agreed with whatever was suggested to him ('Do you want me to say it was Gorobets? Let it be

Gorobets’).

The impression conveyed by this kind of behaviour is that of an unreliable witness. In fact, however, it often reflects the difficulties of an inadequate questioning strategy.

CONCLUSIONS

It is difficult not to overemphasise the effect of the handling of the witnesses on the outcome of the Australian War Crimes Prosecutions. The problems were not isolated - they occurred time and time again with witness after witness, and their cumulative effect totally undermined the prosecution cases, which depended totally on the evidence of these witnesses. Those involved in cross-examining the witnesses were unwilling or unable, or simply unaware of the need to modify their questioning strategy in order to make appropriate translation possible. In addition to the inherent interpreting difficulties, there was no attempt to understand that the witnesses spoke both Ukrainian and Russian, and in a sense spoke neither language, thus adding further to the translational problems. In addition to the difficulties which any non English-speaker has in presenting as a reliable witness (see Sir James Gobbo’s comments above), there was no attempt to understand, or allow for, the cultural differences of the witnesses, and this further eroded their credibility.

Although the circumstances of the present cases are unique in Australian legal history, the atrocities currently perpetrated in other parts of the world make it possible, or even likely, that these, or similar, circumstances will arise again in the future and that, unless we learn the correct lessons from these cases, the same mistakes will certainly be repeated.

The problems associated with cross-cultural awareness can only be overcome by appropriate education. Report No. 57 of the Law Reform Commission deals specifically this issue, and makes recommendations on how to overcome some of these problems, proposing that awareness of these problems in the legal profession should be increased, especially among judges (*Multiculturalism and the Law* 1985: 20.), and that cross-cultural studies should be introduced as part of vocational training of all those involved in court procedure, including police (*Multiculturalism and the Law* 1985: xxvi.). ‘The Australian Institute of Judicial Administration should include in its education and information programs for the judiciary and court personnel, programs designed to increase cross cultural awareness and to provide training in the use of the interpreters’ (*Multiculturalism and the Law* 1985: xxvi.).

It is hoped that articles such as the present one will help to make members of the legal profession more aware of the difficulties associated with courtroom interpreting, and the extent to which they themselves

contribute to these difficulties. Particular care should be taken in the phrasing of questions, both in the evidence-in-chief and the cross-examination. Questions should not be overburdened with information. Attention should be paid for them to be logically structured, well-phrased and precise. There should be not more than one question per sentence. If it is impossible to avoid a lengthy question containing much information and a number of subordinate clauses, it should be subdivided into a sequence of short and precise self-contained questions. A lengthy question consisting of a number of clauses should not be split into unfinished sections, even if they represent a unit; it is preferable to ask the whole question and then have it translated as one, and perhaps then repeat it (even more than once, if necessary) for the benefit of both the interpreter and the witness.

It must be understood that court interpreting is not a transparent process. More communication is needed with and through the interpreter. The interpreter (or bilingual observer in court) should be encouraged to ask questions if more information is required for accurate translation, and offer comments, prompted and unprompted, relating to the original meaning of the statement by the witness. It should be clearly understood that such interruptions in the proceedings may be necessary, and they should never be treated as impediments to the court procedure. Without this type of additional clarification proper evidence may not be obtained.

Although the interpreter must aim for the utmost accuracy in translation, this can not be achieved by attempting to provide a literal translation, which is in any case impossible. This can be damaging to the witness, as a sensible and logical statement will sound ridiculous when translated literally, and the witness will be discredited.

No matter how accurate the interpretation may be, it is not the original and should not be treated as such. The words of the interpreter should under no circumstances be quoted as the words of the witness. For the purpose of reference the original should be quoted, in the original language.

If a witness is referred to a video recording, it must be determined that the witness clearly understands what is expected of him, can hear the recording properly and can repeat the essence of what was said in the recording.

Even if the above problems are overcome, sound recording still remains a *conditio sine qua non* in proceedings that require interpreting. No matter how good the translation and how smooth the communication may be, sound recording remains the only means of access to the original evidence.

Finally, a plea for suitably qualified court interpreters. Although an accreditation system exists for interpreters, it is obvious that there are numbers of court interpreters who have not been suitably skilled for the position; it is a profession which requires considerable training and

expertise. Finally, ongoing peer review in the courtroom situation is essential if appropriate standards are to be maintained.

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