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German Crimes Tried in Poland: A Political and Legal Analysis on the Example of Supreme National Tribunal Trials in Southern Poland

Introduction

The cross-over from war to peace in 1944-45 was an exceptionally difficult time for Poland. The country's inhabitants were exhausted and pauperized by two occupations, and the front lines that passed to and fro over her territories brought her neither real liberation nor reconstruction as a sovereign state. With hindsight we can see that the fate of Poland in 1945 was sealed some time before. However, the communist authorities assuming power in Poland found themselves inordinately obstructed in their design by the very strong groundswell of anti-communist sentiment which manifested itself through passive and active resistance. In response, communist propaganda seized on any and all arguments to legitimise the new authorities. A reckoning with German war crimes appeared to be an ideal stratagem for uniting the nation in its quest for justice behind the new government and, thereby, give it a credible measure of legitimacy. The popular cry for an implacable reckoning with the German invader, and punishing him for the crimes perpetrated in Poland, was not subject to discussion. All that was needed, from the new regime's point of view, were laws and a judicial system that both responded to public expectations in regard of German war crimes, and served the needs of the communist authorities in consolidating their grip on power. The point was to emphasise the merits of the new authorities in prosecuting German criminals without touching upon the crimes of the second invader, the Soviet Union.

Although the purpose of the communist authorities, which sat in judgment over war criminals and punished them, was convergent with social expectations, the organizational aspects of this process were far from easy,

since both occupations, German and Soviet, took a tremendous toll on the Polish legal profession, and the education of new cadres at such short notice was impossible.¹ This quantitative depletion was caused by numerous deaths, deportations to the USSR, emigration, as well as commitment to the anti-communist movement which automatically disqualified one from working for “People’s Poland”. At the same time, in the years of occupation, for objective reasons, no new legal experts were educated that could supplement the shortages. Thus, the communist authorities were, in a sense, doomed to make use of pre-war legal experts who, in their majority, were not as ready to serve the new regime as might have been hoped for. From an objective point of view, this fact also had a positive aspect – the most important being, that the biggest trials of German criminals, mainly before the Supreme National Tribunal, were ushered through carefully, without violations of rights and procedures, and without strident propaganda broadcasts on the part of the participating lawyers. The political objectives of the new authorities were completed naturally – the authorities added to their list of successes the efficient delivery of sentences regarding the greatest war criminals, as was expected by Polish society. The communist-controlled media, on the other hand, sought to provide the desired propaganda effects.

Two interesting aspects, less frequently raised in Polish literature, may also be worth noting. They concern the dispensation of justice which took place after analysing and comparing Polish trials with the Anglo-American approach, and the Nuremberg Trials themselves. Firstly, in Poland there was basically no broader discussion among jurists on the legislative solutions available. This contrasted with the turbulent debates among not only Anglo-American jurists themselves, but also between representatives of the common law and Roman law systems. This situation was quite exceptional though, in a sense, understandable.²

The second interesting issue that remains is that of the treatment of German criminals in Polish prisons, which is discussed below mainly on the example of the Krakow Montelupich Street prison (further referred to as Montelupich), where the most important war criminals who were tried in Poland were kept in custody.³

The most important legal dilemmas accompanying the trials and how they were perceived in Poland, are presented below.

1 Of the 3500 pre-war judges and prosecutors, only 1300 were available for service after the war; for more details, see: Piotr Kładoczny, ‘Kształcenie prawników w Polsce w latach 1944-1989’, in *Studia Iuridica*, 35 (1998), 89-114, 89.

2 Susanne Jung, *Die Rechtsprobleme der Nürnberger Prozesse: Dargestellt am Verfahren gegen Friedrich Flick* (Tübingen, 1992), 144.

3 Forty KL Auschwitz staff members, Rudolf Höss, Amon Göth, Josef Bühler.

Legal Dilemmas in Punishing German Criminals

In terms of quantity and quality, World War II crimes were organized on an unprecedented, one might say industrial, scale in terms of output and work organisation. As a result, the Allies faced serious legal dilemmas. The German Reich's legal system completely ignored and breached the elementary moral principles informing natural law; on the other hand, it was consistent with the criteria of legality from the positivist perspective. Put simply, German lawyers, standing on the ground of "pure" law, were unable to defend themselves against violating the spirit of the law. This was unquestionably due to the dominant effect of the early 20th century and inter-war positivist school on German law and the tradition of German legal thinking.⁴

Once the war was over, the international community faced several legal dilemmas in its urge to punish German crimes. Firstly, delivering judgments against criminals who acted in accordance with the law of their own state (the German Reich) was problematic. Secondly, the issue of passing judgment on persons who did not commit crimes directly – leaders of the German Reich, concentration camp governors etc. – remained unresolved. Thirdly, and finally, the problem of the legal structures, which were created to judge criminals in violation of the time-honoured legal principles of *lex retro non agit* and *nulla poena sine lege*. All persons examining the Nuremberg laws and the trials of those accused of crimes agree on their critical importance, though at that time there were plenty of lawyers who subscribed to the opinion that "Nuremberg is a return to barbarity".⁵

In addition to many lawyers, representatives of legal institutions of the victorious powers also sought to dissociate themselves from the Nuremberg Trials. The clearest example of this may be seen in a comment made by the Chief Justice of the American Supreme Court, Harlan Fiske Stone: "Jackson [Chief US prosecutor – JL] is away conducting his high-grade lynching party in Nuremberg. I don't mind what he does to the Nazis, but I hate to see the pretence that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned

4 German legal positivism was the brainchild, among others, of Rudolf von Jhering, Georg Jellinek, Hans Kelsen (Austrian), Bernhard Windscheid and Gustav Radbruch.

5 These words were uttered by the German lawyer Robert Servatius. At Nuremberg, he was the defence counsel of Fritz Sauckel (who dealt with the exploitation of forced labour). Later, Servatius was the main defence counsel of Adolf Eichmann at his trial in Jerusalem. Initially, British and American lawyers had doubts; for obvious reasons the opinions of German lawyers were taken into consideration to a much lesser degree. Quot. after: Norbert Frei, *Vergangenheitspolitik: Die Anfänge der Bundesrepublik und die NS-Vergangenheit* (München, 1996), 163.

ideas.”⁶ In a private letter, he wrote: “I wonder how some of those who preside at the trials would justify some of the acts of their own governments if they were placed in the status of the accused.”⁷ The above quote encapsulates in one statement all the charges against the Nuremberg and other criminal trials: “the court of the victorious over the vanquished”. It applied not only to legal doubts, but also to the principle itself, that the victorious powers, in breach of international law, imposed methods of proceedings by diktat, and the judges in all of the trials represented only the victorious powers.

The Nuremberg Trials, as described by Franciszek Ryszka, were “unique and one-off” for both their proponents and their critics. The International Military Tribunal (IMT) conducted proceedings from 20 November 1945 until the pronouncement of the sentences on 1 October 1946. The trials concerned twenty-four leaders of the Third Reich, half of whom were sentenced to death. In terms of passing judgments on war criminals, the most important seem to have been the so-called Nuremberg principles which aroused the greatest controversies and which were an integral part of the International Military Tribunal Statute.⁸

Without engrossing ourselves in the course of the trial before the IMT itself, it is worth taking a closer look at the main legal doubts which accompanied the establishment of the Nuremberg principles and the rare comments of Polish lawyers on their subject. It is worth emphasizing that discussions among lawyers, even before the Nuremberg Tribunal was decided upon, were apt to end in deadlock. The international judiciary was ready to pass judgment only on crimes directly attributable to their physical perpetrators, not on behind-the-scenes decision-makers issuing orders, which resulted in genocide. The very fact of the IMT being established ended speculation in this aspect, and although doubts and controversies rumbled on concurrently, the decision itself concerning the establishment of the IMT remained beyond dispute.

The first of these legal dilemmas concerned the issue of operating in line with the law that was valid in Germany (which for soldiers also included having to obey orders). The legal principle of an Act of State, as firmly rooted in Anglo-American law (particularly upheld in American case law), is derived directly from the notion of the sovereignty of a state.⁹ This principle re-

6 Thomas Mason Alpheus and Harlan Fiske Stone, *Pillar of the Law* (New York, 1956), 716.

7 *Ibid.*, 716.

8 Tadeusz Cyprian and Jerzy Sawicki, *Walka o zasady norymberskie, 1945-1955* (Warszawa, 1956), 77-9.

9 John Murray, *Natural Law and Legal Positivism in the Nuremberg Trials*, Senior Honors Thesis, Paper 428; See Christine G. Cooper, ‘Act of State and Sovereign Immu-

sults in the fact that, in an ‘anarchistic’ international system, the authorities of one state are not authorized to judge the authorities of another state, since the legal principles determined by a sovereign state constitute the law binding on its territory.¹⁰ According to these assumptions, a person, acting under orders or in line with his state’s interests, cannot bear personal responsibility for his state’s behaviour. Thus, in a way, that person has immunity because his actions are legal if in line with the law determined by the sovereign authority. Both European and American jurists, even those recognizing the legal positivist approach in a moderate manner, were aware that a complete deviation from the Act of State principle may set a dangerous precedent and may also give a legal basis in future for one state to interfere in the internal legal system of another sovereign state. The idea of deviation from the principle of unconditional sovereignty of law was criticized most vehemently by dyed-in-the-wool legal positivists. Under no circumstances may they be automatically considered as being opposed to the punishment of German crimes. To put it more bluntly, they were unshakably attached to legal formalism, to compliance with the law whatever it may be. This blinkered their ability to find a way of judging criminals; they could not bring themselves to breaking the principles they regarded as sacrosanct, believing that the legal and political order rested on principles which, if undermined, would be the prelude to the destruction of law as we know it. For many positivists, the Nazi period became an argument for deviating from the excessively principled dominance of formalism over axiology and the excessively radical separation of law from morality.¹¹

Finally, the dilemma of “operating in accordance with the law” was resolved as a result of the so-called Radbruch Formula. Gustav Radbruch, a pre-war German positivist, in his analysis, came to the conclusion that the positivist model of education of German jurists made them unable to resist the Acts passed by the Nazi system: “Positivism with its belief that ‘an Act is an Act’ disarmed German lawyers and made them defenceless against acts with lawless and criminal contents.”¹² Radbruch started with the assumption

nity: A Further Inquiry’, *Loyola University Chicago Law Journal*, 11/2 (Winter 1980), 193-236.

- 10 When writing about an anarchistic international system I have in mind Hobbes’s view of the international system as the world “without the Leviathan”, therefore without the superior power over sovereign national states.
- 11 Herbert Hart (1907-1992), was one of the first positivists who concluded that, in spite of the fact that law does not have to necessarily refer to standards of morality or justice, it does, nonetheless, need to contain some basic principles resulting from moral standards (“a minimum of nature law”), in more detail. See: Herbert Hart, *The Concept of Law* (Oxford, 1961).
- 12 Gustav Radbruch, ‘Gesetzliches Unrecht und übergesetzliches Recht’, *Süddeutsche Juristen-Zeitung*, 5 (1946), 105-8, 105.

that if the international community wanted to penalise the German crimes that were not in breach of German law though in complete negation of the elementary principles of morality, it could not do so under the written law, since no such crimes were envisaged under that law. Radbruch took a Roman legal maxim as the basis for what has been referred to as the Radbruch Formula: *lex iniustissima non est lex*, which can be translated as: *an unjust law is no law at all*. Finally, it was accepted that a natural sense of justice was more important than some dogmatic adherence to inoperative principles. It should be emphasized that such an approach was also fostered by European public opinion, outraged as it was with each successively revealed war crime.

For jurists specialising in international law, this was one of the biggest dilemmas in history. It concerned not only the use of principles but, above all, the place of morality and established values in international law.¹³ The legal interpretation which had ultimately prevailed in Nuremberg also makes it possible to try war criminals today, such as those from what used to be Yugoslavia or Ruanda.¹⁴ The Radbruch Formula made it possible to overcome the dichotomy engendered by the positivist approach to law, namely: justice of the victors versus the impunity of the criminals. Article 8 of the IMT Statute ultimately recognized that operating under the command of one's government or superior does not release the executioner of an order from penal liability for its effects, though it may prompt greater leniency in approach.¹⁵ It has also been underlined that if there is a clash between domestic and international law, the latter takes precedence since in this situation national law is not binding on the citizen.¹⁶

Another serious dilemma faced by jurists was the need to pass judgment on the leaders of the Third Reich who did not commit any crimes directly. This dilemma also concerned some concentration camp and extermination camp governors, who themselves did not physically participate directly in the crimes they themselves commissioned. Finding a solution to this burning

13 See also: Herbert Reginbogin and Christoph Safferling, *The Nuremberg Trials: International Criminal Law Since 1945* (München, 2006).

14 The Tribunal in The Hague does not refer directly to the Radbruch formula, but it appears to be an alternative in difficult legal situations (particularly in international law): where legal norms are helpless, reference is made to the philosophy of law. The German courts referred directly to the Radbruch formula in so-called "Mauerschützen" cases, that is, soldiers shooting at people trying to force their way over the Berlin wall. For more details see: Marcin Lubertowicz, 'Lex iniustissima non est lex: Gustav Radbruch's Formula as an Alternative in the International System of Human Rights Protection', *Studies of Erasmiانا Wratislaviensia*, 4 (2010), 361-78.

15 Charter of the International Military Tribunal, available at: <http://avalon.law.yale.edu/imt/imtconst.asp> [16 July 2019].

16 Cyprian and Sawicki, *Walka*, 27.

problem was especially pressing since there were pending trials before American and British courts even before the commencement of the Nuremberg Trials, not to mention in their course.¹⁷

Legal structures enabling judgment of people who had not committed crimes directly existed both in Great Britain and in the United States. In British law, this was the concept of conspiracy, and in American law the concept of connivance. Both systems allowed passing judgment on organized crime or economic crime.¹⁸ In American judicial case-law, the actions of one participant in connivance with a group of criminals can be attributed to each group member under this provision. Thus there was a number of perpetrators accused of the joint commitment of a crime, and the prosecutor's office had to prove that the accused did participate in a joint plan and were aware of its criminal objectives. The adoption of such an assumption in judging German criminals also made it possible to examine their affiliations with some organizations as participation in a conspiracy to stage a war of aggression. This concept was promoted since 1944 by the American lawyer Murrey C. Bernays, while submitting consecutive memorandums to the American government, suggesting the use of the concept of conspiracy or of connivance, in order to put on trial not only individual people, but also organizations such as the Gestapo, SS, or SA.¹⁹ He suggested that the tribunal, which would have to judge war criminals, should link the criminal acts with the doctrine and policy of the Third Reich.²⁰ Furthermore, he believed that members of these organizations should automatically be arrested as suspected participants in a conspiracy. Ultimately, the concept of "the common plan" aimed at aggression or domination of other nations was used in the prosecutions and trials that took place even before the Nuremberg Trials.²¹ The English used this

17 The biggest of them is the trial of the Bergen-Belsen (17.10.-17.11.1945), Dachau (15.11.-13.12.1945) and Mauthausen-Gusen (29.3.-13.5.1946) concentration camp staff.

18 Michał Królikowski, *Odpowiedzialność karna jednostki za sprawstwo zbrodni międzynarodowej* (Warszawa, 2011), 148-54.

19 Shane Darcy, *Collective Responsibility and Accountability Under International Law* (Leiden, 2007), 200; see also: Stanisław Pomorski, 'Conspiracy and Criminal Organisations', in George Ginsburg and Vladimir N. Kudriavtsev (eds), *The Nuremberg Trial and International Law* (Boston, 1990), 213-48; on the perspectives of particular powers: Reginbogin and Safferling, *The Nuremberg Trials*.

20 Darcy, *Collective*, 199.

21 Darcy, *Collective*, 201; see also: Wolfgang Form, 'Justizpolitische Aspekte west-alliiertes Kriegsverbrecherprozesse 1942-1950', in Ludwig Eiber and Robert Sigel, *Dachauer Prozesse: NS-Verbrechen vor amerikanischen Militärgerichten in Dachau 1945-1948* (Göttingen, 2007), 41-66.

concept in the trial of the Bergen-Belsen staff,²² and in November 1945, in the trial of Almelo, the British Military Court stated directly that “group members are responsible on equal terms with a man who fired the actual shot.”²³

The American military prosecutor William Denson (the main prosecutor in the trials of the Dachau and Mauthausen–Gusen concentration camp staff members) also used “the common plan” formula which, despite the objections of many lawyers (American defence attorneys tried to question it), allowed accusing persons (among others, concentration camp commanders) who did not commit crimes directly but consciously contributed to achieving the objectives of a criminal system.²⁴ This concept turned out to be effective: Denson accused one hundred and seventy-seven camp officers – all of whom were found guilty, ninety-seven of whom were sentenced to death and fifty-four to life imprisonment.²⁵ The words “common design” were to be used regularly in indictments and the operative parts of sentences.

This concept evoked howls of protest from lawyers unacquainted with the common law regime, notably the French, who demanded adherence to the “continental” principles of individual penal liability. But this solution made it possible in Nuremberg to judge the leaders of the German Reich and was reflected in the IMT Statute, in Article VI: “The Tribunal established by the Agreement referred to in Article I hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or

22 *The Belsen Trial, Trial of Josef Kramer and 44 Others*, British Military Court, Luneburg, 17 September–17 November 1945, Case No. 10, Law Reports of Trials of War Criminals, vol. 1, 4.

23 The trial before the British Military Court in Almelo, in the Netherlands, where 4 Germans were accused of killing English POWs and Dutch civilians, *The Almelo trial. Trial of Otto Sandrock and three Others*, British Military Court for the Trial of War Criminals, Almelo, 24–26 November, Case no. 3, Law Reports of Trials of War Criminals, vol. 1, 35.

24 See also: Joshua Greene, *Justice at Dachau: The Trials of an American Prosecutor* (New York, 2012), 37–54.

25 ‘Extract from the Review of Proceedings of the General Military Court in the case of US vs. Weiss, Ruppert et al, held at Dachau’, in *Trials of War Criminals before the Nuremberg Military Tribunals*, vol. 1, Nuremberg October 1946–April 1949, 289–98.

assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”

Simultaneously, article VII emphasized that: “The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”²⁶

In this case, the primary aim is to emphasize the penalization of crimes committed either individually or as part of an organization and to use further in the text of the Anglo-American legal structure the formula: *participation in a common plan or conspiracy*. Finally, the Nuremberg principles recognized that the preparation of, or planned aggression involving unprovoked invasion constitutes a conspiracy.²⁷ The Tribunal did not consider prosecutors’ motions to punish participation in a conspiracy in relation to three types of crimes stipulated in the statute. Thus, it did not refer either to war crimes or to crimes against humanity.²⁸

Another doubt raised by Western jurists was the violation of two legal principles: *nullum crimen sine lege (nulla poena sine lege)* and the principle of *lex retro non agit*. These charges referred to the principles of retroactivity of the law in regard of crimes against peace and crimes against humanity that were introduced in Nuremberg. There were no such regulations before in international law which would allow judging and punishing mass crimes planned and performed by a state apparatus. But in 1944, the Polish lawyer Rafał Lemkin coined and defined the term *genocide*, translated later into Polish as *ludobójstwo*.²⁹

The Charter of the International Military Tribunal referred to “crimes against humanity”, but the term *genocide* soon gained common currency. Since these legal terms (crimes against humanity and crimes against peace) were created to cover Nazi crimes *post facto*, many lawyers had doubts whether the fundamental principles of law were not being violated when judging war criminals.³⁰ The opponents of retroactive laws emphasized that the victorious powers used the same methods as the Nazis when they took power in Germany in 1933. In response to the memorandum of the German Ministry

26 United Nations, Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, 82 U.N.T.C. 280, available at: <http://www.refworld.org/docid/47fdfb34d.html> [16 July 2019].

27 See Ilias Bantekas and Susan Nash, *International Criminal Law* (London, 2003), 330; also Drózdź, *Odpowiedzialność*.

28 Cyprian and Sawicki, *Walka*, 27.

29 Rafał Lemkin, *Axis Rule In Occupied Europe: Laws Of Occupation, Analysis Of Government, Proposals For Redress (Washington 1944)*, available at: <http://www.preventgenocide.org/lemkin/AxisRule1944-1.htm> [16 July 2019].

30 Jung, *Die Rechtsprobleme*, 137-38.

of Justice entitled *The National Socialist Criminal Law*, the order came to simply deviate from warranty criminal law.³¹

In 1947 a debate between outstanding German lawyers – Gustav Radbruch, Hodon Freiherr von Hodenberg and August Wimmer³² – was held in the prestigious *Süddeutsche Juristenzeitung*. Gustav Radbruch unequivocally opted for the Nuremberg legislation, referring to the primacy of natural law. He believed that legislation categorising the crimes of the Nazi government as criminal offences did not go beyond the principle of *lex retro non agit*, since the written law only covered those acts which, at the time of their commitment, were deemed to be crimes regulated by superior norms, that is natural law. August Wimmer believed that the principle of *lex retro* had been breached but the Allied law should be used nevertheless owing to the enormity of the crimes in question. The completely opposite position was taken by von Hodenberg, who was a declared enemy of the Allied legislation. He believed that the retroactive character of these regulations was in conflict with the basic principles of law. What is interesting, like Radbruch, he referred to “super-statutory” law as belonging to the basic and inalienable canons of the *lex retro non agit* principle.

To recapitulate, the Allied law ultimately formulated in the so-called Nuremberg principles was controversial in many aspects; it breached customs which were widespread and respected in international law and in national legal provisions. However, it should be remembered that within the legal community itself, there were diverse interpretations of various legal regulations and many attitudes based on differing law school doctrines. In the dispute with positivists, who undeniably had no problem with the wish to punish war criminals, axiology prevailed. It is obvious that the post-war criminal trials, both before Allied and Polish courts, could only take place because they operated by reference to super-statutory arguments. What was decided not only embodied a generally shared sense of “justice”, but also the political will of the authorities.

31 Władysław Wolter, ‘Prawo karne pod znakiem swastyki’, in Marek Maciejewski and Maciej Marszał (eds), *Pod znakiem swastyki: Polscy prawnicy wobec Trzeciej Rzeszy 1933-1939, Wybór pism* (Kraków, 2005), 341.

32 Hodo Freiherr von Hodenberg, *Zur Anwendung des Kontrollratsgesetzes Nr. 10 durch deutsche Gerichte*, 113-21; August Wimmer, ‘Die Bestrafung von Humanitätsverbrechen und der Grundsatz “nullum crimen sine lege”’, *Süddeutsche Juristen-Zeitung*, 2 (March 1947), 123-9; Gustav Radbruch, ‘Zur Diskussion über die Verbrechen gegen die Menschlichkeit’, *Süddeutsche Juristen-Zeitung*, 2 (March 1947), 131-5.

The Debate on the Punishment of War Criminals and the Practice of the Polish Judicial System

Traces of the debates of western jurists can be found in the Polish subject literature, but they cannot be seen as anything more than *post facto* comments. Among others, the prosecutors Tadeusz Cyprian and Jerzy Sawicki spoke dismissively of legal “hair-splitting”,³³ unequivocally classifying the dilemmas of the western lawyers as an aversion to passing judgment on criminals or even of harbouring the desire to “shield the major war criminals”.³⁴ This often untrue interpretation was no doubt fuelled by political exigencies and pressure from the new “People’s” authorities which manifested itself in the assertion that the only “consistent advocate of punishing war criminals and supporter of the need to formulate the principles of penalizing war crimes, and all acts which constitute preparation for aggression was the Soviet Union.” Prosecutor Mieczysław Siewierski assessed these dilemmas in a more moderate and less political manner: “The resistance of the western lawyers against this judiciary undoubtedly resulted from deep-seated conservatism, from thinking habits and the strength of tradition. ... Although the arguments “against” blurred the correct lines of the western governments’ proceedings for a long time, they were however all ultimately rejected, the expression of which was the establishment of the International Military Tribunal.”³⁵

IMT notices in the Official Journal in 1947 were binding on the Polish judiciary although, in practice, they did not have a great impact on the court proceedings.³⁶ A new departure of a kind for Polish judicature was the possibility of prosecuting and punishing members of organizations recognized as criminals by the IMT. In fact, an amendment to that effect was introduced in December 1946.³⁷

Polish lawyers involved in the work of the Supreme National Tribunal faced the same challenges as lawyers in the Nuremberg Trials, including minor changes related to procedural conventions, like the possibility for prosecutors to make opening speeches instead of having acts of indictment read out, as was the Anglo-American custom adopted at Nuremberg. The trials

33 Cyprian and Sawicki, *Walka*, 7.

34 *Ibid.*, 8.

35 Mieczysław Siewierski, ‘Wpływ instytucji procesu norymberskiego na postępowanie przed Najwyższym Trybunałem Narodowym’, in *Norymberga-nadal otwarty rozdział historii: On the XXX anniversary of the sentence of International Military Tribunal* (Warsaw, 1977), 141-2.

36 *Dziennik Ustaw Rzeczypospolitej Polskiej*, 1947, no. 63 item 367 (Journal of Laws of the Republic of Poland, further quoted as Dz. U.).

37 It was an amendment of the Decree on the scale of penalties for Fascist-Nazi criminals responsible for crimes, the abuse of civilians and captives, and for traitors.

were most accurately summarized by prosecutor Mieczysław Siewierski: “It can be concluded that both judicial systems [before the IMT and Supreme National Tribunal –JL], though of different origin, tradition and purpose, were, nonetheless, similar to each other in their significant issues ... it is difficult to deny that these were the courts of the victors trying the vanquished, but (courts) which implemented the wishes of the victors in such a way that it was not revenge against the defeated, but punishment meted out in accordance with the principles of law and morality – so that it returned sound verdicts in which punishment was borne only by those who were proven guilty following ordinary trial procedures.”³⁸

Polish judiciary grappled in its own way with the problem of passing judgments on concentration camp governors and staff members (including Rudolf Höss), as well as representatives of the administrative authorities in Poland’s occupied territories (notably the likes of Josef Bühler and Arthur Greiser). Although they issued orders leading to countless deaths, they did not commit any crimes directly. Prosecutors who had to formulate charges against these defendants were faced with a particularly awkward task. Their objective was not only to punish war criminals, but also to set the course in a new field of law in Poland and show the world the enormous volume of crimes committed against the Polish nation (as opposed to ‘against humanity’ as was the case at Nuremberg). The point was to expose the criminal logic and objectives of the German occupation of Poland, and the tools and methods employed by the Nazi regime. The ultimate aim was to prove, indubitably, the existence of a criminal system that was created by the Nazis in German-occupied Polish territories.³⁹

Mieczysław Siewierski, one of the Polish prosecutors, defined this concept in the following way: “the criminal system, used by Nazism from the outbreak of the war to its finale, aimed at the destruction of the whole Polish nation, together with its cultural and material achievements. This system developed beforehand and implemented to its full extent by the criminal leadership and henchmen of Nazi organizations ... [who] used every opportunity to destroy our nation.”⁴⁰ There were provisions in the Polish Penal Code of 1932 concerning incitement and aiding and abetting crime, which could be applied to those who did not commit crimes directly.⁴¹ There were, however, no terms for ‘perpetration’ and ‘co-perpetration’, which would more adequately correspond to the crimes subject to judgment. Thus in Pol-

38 Siewierski, *Wpływ*, 145.

39 In some aspects, the concept of a “criminal system” was reflected in the idea of “the common plan”, the common elements of which include, among others, deliberate participation in the system/plan and awareness of its criminal objectives.

40 Siewierski, *Wpływ*, 140.

41 Dz. U., no. 60 (1932), item 571.

ish practice, the term “instigator”, “helper”, and “indirect perpetrator” were used. Moreover, in the first trial before the Supreme National Tribunal (of Arthur Greiser), the term “did participate” was used.⁴²

The Polish wartime experience made social approval for punishment of criminals a foregone conclusion. However, it is also necessary to emphasize that for the jurists of the Supreme National Tribunal and other courts involved in the prosecution and punishment of crimes against the Polish nation, it was obvious that only those criminals who were proven guilty could be punished, although it was not necessary for one to have directly participated in a crime to be punished for its commitment. In the speech for the prosecution against Ludwig Fischer, the governor of the Warsaw district of the General Government, the Supreme National Tribunal prosecutor Jerzy Sawicki characterised what was a new type of crime in the following way: “A criminal in a white collar does not like brutality. He says that he is only acting in the interests of an abstract state. A further peculiarity of these acts is connected with it. These criminal teams reveal a great resemblance to criminal cartels and trusts.”⁴³ The Supreme National Tribunal judges very meticulously determined the form of the crime and the persons specifically accused of participating in its commitment. Hence, in the operative parts of the sentences handed down in the Greiser and Höss cases, the attribution of direct participation in killing their victims was removed from the charge sheet.

The Basic Legal and Institutional Punishment of German Criminals in Poland

When Soviet troops entered Poland and enforced a new political order at the point of a bayonet, one of the fundamental tasks of the reconstituted judiciary was to develop legal standards according to which it was possible not only to judge the German criminals, but also to create a proper legal system.⁴⁴ Only an outline of this system will be presented below.

Both pre-war regulations (among others, the Polish Penal Code of 1932 and the Code of Criminal Proceedings of 1928) and the legal regulations adopted by the communist authorities provided the legal basis for punishing

42 Siewierski, *Wpływ*, 144.

43 Tadeusz Cyprian and Jerzy Sawicki, *Oskarżamy* (Kraków, 1949), 155.

44 Polish legislation, to some extent, was based on international law, but it should be remembered that the Nuremberg acts, namely the most important legal acts concerning the prosecution of mass crimes, were created later than the first Polish legal acts. For more information see Czesław Pilichowski, Bernard Franczyk, Włodzimierz Hanczakowski, and Krzysztof Staszko (eds), *Ściganie i karanie sprawców zbrodni wojennych i zbrodni przeciwko ludzkości. (Wybór dokumentów)*. (Warsaw, 1978).

war criminals. The Polish judiciary focused at that time on four aspects of investigating, prosecuting and punishing war crimes:

1. the establishment of special regulations of material criminal law, namely, drawing up a register of acts, principles and measures regarding their punishment, so as to classify war crimes and collaboration effectively (the PKWN Decree of 31 August 1944 with later amendments – the so-called *August Decree*);
2. the establishment of a special judiciary to try war criminals (Special Criminal Courts, the Supreme National Tribunal);
3. the appointment of a special institution, which would record and examine evidence associated with war crimes (the Main Commission and District Commissions to Examine German Crimes in Poland);
4. the establishment of international cooperation in prosecuting and punishing war criminals (the Polish Military Mission for the Investigation of German War Crimes, Delegate of Poland at the United Nations War Crimes Commission).

The most important legal act was undoubtedly the so-called *August Decree*, which specified criminal acts subject to judgment.⁴⁵ They were:

1. participation in killing, abusing or repressing civilians or POWs;
2. association with harmful actions against people for political, national, religious or racial reasons by way of their imprisonment and extradition;
3. forcing any actions from persons subject to repressions by the German authorities by blackmail or other harmful forms of coercion;
4. participation in criminal organizations, appointed or recognized by the German authorities, formed to commit crimes against humanity, peace or war crimes (SS, NSDAP, SD, Gestapo).

The above-mentioned acts were supposed to be subject to punishment in the period between 1 September 1939 and 9 May 1945. Article 1 of the *August Decree* (points 1 and 2) was not to be disputed by judges as to the selection of punishment – it envisaged death as the only possible sanction.

The Special Criminal Courts were set up to accelerate prosecution and court procedures (the indictment was to be filed within two weeks, the date of the hearing was to be designated within forty-eight hours and the sentence was to be announced immediately after the hearing and the judges' meeting).⁴⁶ Judgments of the Special Criminal Courts were final and binding. The only possibility of avoiding the adjudicated punishment was to appeal for clemency to President Bolesław Bierut. The Special Criminal Courts

45 Dz. U., no. 4 (1944), item 16.

46 Dz. U., no. 4 (1944), item 21.

operated to 17 October 1946 when, by special decree, their competencies were transferred to district courts.

The most significant thing, however, was the appointment of the Supreme National Tribunal pursuant to the Decree of 22 January 1946.⁴⁷ It was to judge war criminals extradited from any of the German occupation zones. Polish legislation did not have any precedents in its history of delivering judgments against similar categories of perpetrators. Therefore, the establishment of such a Tribunal, consisting of outstanding specialists, was aimed not only at judging particular persons, but also at the development of the necessary procedures and legal regulations. Supreme National Tribunal verdicts were final and only those sentenced to death could appeal to the KRN President. The Supreme National Tribunal operated from 18 February 1946 to 5 August 1948. The first two Supreme National Tribunal trials, of Arthur Greiser and Amon Göth, were held even before any Nuremberg Trial sentences were delivered. The Supreme National Tribunal hearings took place in front of a panel of three judges and four jurors, and during secret meetings of the three-man panels of judges without the jurors. Being aware of the trial-related difficulties, the Supreme National Tribunal included eminent Polish jurists – prosecutors, judges, defence attorneys appointed *ex officio*.

In 1946, the Polish Military Mission for the Investigation of War Crimes was established, which was supposed to ensure the effective extradition of war criminals to Poland, but, because of financial problems, extradition applications were submitted only for the most important criminals. The estimated number of those extradited to Poland stands at 1,800,⁴⁸ of whom 1342 were Germans.⁴⁹

47 'Dekret o Najwyższym Trybunale Narodowym' in Pilichowski, Franczyk, Hanczakowski, and Staszko (eds), *Ściganie i karanie sprawców zbrodni wojennych i zbrodni przeciwko ludzkości (wybór dokumentów)*, 488-92.

48 The total number of war criminals extradited to Poland was recognized as unsatisfactory and the communist authorities blamed the western superpowers for that. However, it is a fact that from mid-1947 neither the British nor American authorities made it difficult to extradite war criminals to Poland, provided the required documentation was presented. Thus the Polish side was also to blame in that it was too late in appointing the Polish Military Mission and did not ensure the appropriate technical and financial resources for it to function properly. Furthermore, the members of the mission were not informed about the course of trials, and therefore they could not inform the Allied authorities on the fate of those held in custody. Elżbieta Kobińska-Motas, who examined this issue, pointed out that the reluctance of the Allied authorities to extradite war criminals to Poland was also due to the fact that Polish courts handed down relatively mild sentences; see Elżbieta Kobińska-Motas, *Ekstradycja przestępców wojennych do Polski z czterech strefokupacyjnych Niemiec 1946-1950*, vol. 1, (Warsaw, 1991), 90-118.

49 Others are mainly Volksdeutsche (425) and persons of different nationalities, typically Austrians, Poles, Ukrainians and Jews; see Elżbieta Kobińska-Motas, *Ekstradycja*

Trials – General Characteristics

An analysis of the trials of German criminals in Poland in the immediate post-war years reveals it was decreed that there should be express differentiation between those in which the accused were war criminals, performing the most important functions in the structures of the occupation authorities or concentration camp staff members (their cases were mostly examined by the Supreme National Tribunal), and those less spectacular cases most commonly pending before the Special Criminal Courts. The first, with the participation of outstanding Polish jurists, were characterized by diligence, thorough preparation and a relatively moderate degree of politicization. The trials belonging to the second category were undoubtedly of much lower priority.⁵⁰

The preparation of trials in terms of charges and procedures, legal staff and logistics constituted a great challenge for Poland. There were few experienced judges, attorneys or prosecutors; the trials were held in difficult conditions, under strong pressure from society which expected nothing less than severe punishment of its criminal oppressors. Those sentiments which were based simply on a willingness to take revenge were often fanned by the press, especially the local variety.⁵¹ Equally important were the instructions of the authorities which put pressure on the appropriate selection of jurors. They composed the so-called civil factor. The list of jurors was determined by the KRN Presidium; they were chosen from among the candidates presented by the provincial national councils. They were supposed to be persons who “took or take active part in either military fighting with the invaders, or in civil self-defence and resistance units, including propaganda campaigns

przestępców wojennych do Polski z czterech stref okupacyjnych Niemiec 1946-1950, vol. 2, (Warsaw, 1992), 21-2.

- 50 Opinions should be formulated with care, since owing to the complex ethnic situation in different regions of Poland, Special Criminal Court sentences may have seemed inconsistent. With regard to Małopolska (southern Poland), the assessment is clearly negative. With regard to Silesia, this issue is tackled by Adam Dziurok in: *Władze komunistyczne a byli członkowie organizacji nazistowskich na Górnym Śląsku w latach 1945-1956* (Warsaw, 2000), with regard to Gdańsk: Dariusz Burczyk, ‘Specjalny Sąd Karny w Gdańsku (1945-1946): Przyczynek do monografii’, *Przegląd Archiwalny Instytutu Pamięci Narodowej*, 7 (2014), 289-312.
- 51 Some press titles generally questioned the sense of the trials, owing to the “obvious guilt of those accused”. Headlines like: ‘Czy adwokat może bronić zdrajców narodu?’ (May an attorney defend the traitors of the nation?) (*Robotnik Pomorski*, May 30, 1946) were to appear. The Supreme Bar Council in Warsaw ordered attorneys to submit an additional written motivation statement on why they wished to defend persons accused of war crimes.

or the reconstruction of Polish Statehood campaign.⁵² Most often, Supreme National Tribunal juror panels were composed of parliamentary deputies.

The most important trials, among others, of the notorious concentration camp oppressors, who were responsible for the deaths of prisoners of various nationalities, were closely followed by foreign observers. In the West, the impartiality of Polish courts was called into question, like the new authorities, which were not perceived as trustworthy.

The extraordinary legal regulations were binding on the Special Criminal Courts.⁵³ The rule of no right of appeal was adopted,⁵⁴ indictment would not require substantiation, it was not necessary to conduct investigations other than cursory preliminary inquiries, and there was obligatory remand in custody for defendants. Once an investigation was closed, the prosecution had to bring the indictment to court and the term of the hearing was expected to be set with a deadline of no more than forty-eight hours upon its receipt. Sentences announced after a short trial were final and binding. Those sentenced to death could apply to the President of the Home National Council (KRN) for a pardon. Judges and prosecutors of special courts and courts of appeal had equal rights. Jurors had the same rights as judges – the only difference being that jurors were unable to chair hearings. The right of defence attorneys to participate in hearings was inalienable, and, for the most important trials, defence attorneys were appointed *ex officio*.

Organization of Supreme National Tribunal Trials in Kraków

Lesser Poland (Małopolska) had a special place on the ‘map of justice’ for German war criminals, because the majority of trials before the Supreme National Tribunal were held in Kraków. It was impossible to organize the trial of Rudolf Höss in Kraków despite the fact that Kraków lawyers, led by Jan Sehn, were prepared for it.⁵⁵ Amon Göth was the first war criminal to stand

52 Zbigniew Biegański, ‘Kara śmierci w orzecznictwie Specjalnych Sądów Karnych w Polsce (1944-1946)’, *Echa Przeszłości*, (Olsztyn, 2004), vol. 5, 185.

53 Dz. U., no. 4 (1944), item 21.

54 The principle of no right to appeal obtained until the establishment of the Supreme National Tribunal (NTN) in January 1946. The first NTN prosecutor was entitled to file cassation complaints (i. e. file for the annulment of a judicial decision) regarding Special Criminal Court verdicts.

55 In the case of Rudolf Höss, who was intentionally tried separately, regardless of the simultaneous proceedings against the entire Auschwitz camp personnel, the efforts were shared by three cities: Katowice (since Oświęcim [Auschwitz] was then in the district subordinate to the Court of Appeal in Katowice), Kraków (since the investigation was conducted by the District Commission of Inquiry into German Crimes

trial before the Supreme National Tribunal in Kraków. This trial ran from 27 August to 5 September 1946 in the District Court at Senacka Street.⁵⁶ Göth was sentenced to death by hanging; the sentence was executed on 13 September 1946 at Montelupich prison in Kraków. The biggest trial in Poland – that of forty staff members (including five women)⁵⁷ of the Auschwitz camp – was held in the National Museum in Kraków.⁵⁸ Many representatives of national tribunals from the Allied countries were there to witness the proceedings. Josef Bühler was judged in the last trial before the Supreme National Tribunal (from 17 June to 10 July 1948 in the District Court at Senacka Street). The sentence, death by hanging, was executed on 22 August 1948 in Kraków's Montelupich prison.⁵⁹ All trials were public. The Supreme National Tribunal secretary's office issued public entry cards which entitled the bearer to witness only one hearing of the Tribunal. The first rows of seats were reserved for VIPs, government representatives and the press. There were also separate seats for foreign observers. Family members of the accused, notified by the Red Cross, could be present at all these hearings. Simultaneous interpretations into four languages were provided in these courts.⁶⁰

It is also worth remarking on the atmosphere during the court hearings, especially in the most spectacular ones. Maintaining law and order in court was required especially by the Supreme National Tribunal judges. A striking fact emerging from the descriptions of the trials is the calmness of those in the public gallery, among whom, after all, were the victims of crimes and their families. Despite great emotions, no serious incidents which could have disturbed the course of these trials occurred.⁶¹ On the other hand, angry

in Kraków, and therefore the whole investigation material was in that city) and Warsaw (for prestigious reasons)

56 See: AIPN GK 196/39-45, Sentence in the case of Amon Goeth, 220 and the following; Martyna Grądzka, 'Wszystkim tym zarzutom przeczę zdecydowanie i stanowczo: Proces Amona Leopolda Götha przed Najwyższym Trybunałem Narodowym w Krakowie', *Zeszyty Historyczne WiN-u*, 35 (2012), 85-100.

57 They were: Maria Mandl, commandant of the women's camp – who was sentenced to death; and the overseers Therese Brandl – death sentence, Luise Danz – life imprisonment, Hildegard Martha Lächert – 15 years in prison and Alice Orłowski – 15 years in prison (see: AIPN Kr 425/351, Operative part of a judgment in the Auschwitz trial, 59, 61).

58 AIPN Kr 1/1381, Stanisław Kosiński, 'Przygotowania do procesu oświęcimskiego w Krakowie', *Dziennik Polski*, (October 16, 1947), 22.

59 See: AIPN GK, 196/245, Sentence in the case of Josef Bühler, 1 et seq.

60 AIPN Kr 1/1381, Stanisław Kosiński, 'Przygotowania do procesu oświęcimskiego w Krakowie', *Dziennik Polski*, (October 16, 1947), 22.

61 The atmosphere in the courtrooms was described in numerous newspaper reports and accounts from trials; see for example AIPN Kr 1/1381, 'To był rzetelny proces, rozmowa z Janem Brandysem', *Tarnowski Magazyn Informacyjny*, 4/255 (January 27, 1985), 27; Janusz Gumkowski and Tadeusz Kułakowski, *Zbrodniarze hitlerowscy*

exclamations addressed to the defendants were heard in front of the buildings in which the trials took place, and thus these defendants were given bodyguard protection.

Jurists participating in these trials not only had to be experienced, but also resilient to general public pressure. Judges and particularly *ex officio* defence attorneys were in a difficult situation. Many of them asked to be exempted from this duty due to personal reasons, but their applications were turned down.⁶² In the Auschwitz trial and the trial of Josef Bühler, the *ex officio* defence counsel was Bertold Rappaport.⁶³ As one of the prosecutors, Jan Brandys, remembers “among the defence attorneys was ... Rappaport; he was older, and very well-known in Kraków. He asked the court to be exempted from his duties as defence counsel since he belonged to the Jewish nation and it was difficult for him to defend those who committed such horrendous crimes against Jews. His application was not taken into consideration.”⁶⁴

In the group of prosecutors, special attention should be paid to Mieczysław Siewierski and Jerzy Sawicki. Siewierski, a doctor of criminal law at the University of Łódź, was at that time the first prosecutor of the Supreme Court. After the war, as a Supreme National Tribunal prosecutor, he brought the case for the prosecution against Arthur Greiser. Immediately after the end of a subsequent trial of Albert Forster, Siewierski himself was arrested on charges brought under the *August Decree*. He was accused of prosecuting communist activists before the war and appointing judges to work in commissions basing their legitimacy on “the Fascist Constitution” of 1935.

przed Najwyższym Trybunałem Narodowym (Warsaw, 1961); Cyprian and Sawicki, *Oskarżamy*; Tadeusz Cyprian, and Jerzy Sawicki (eds), *Siedem wyroków Najwyższego Trybunału Narodowego* (Poznań, 1962).

62 For more information on this topic see: Marcin Zaborski, ‘Czy bronić “zdradców narodu”, “zbrodniarzy faszystowsko-hitlerowskich” i “Volksdeutschów”? Uchwała Naczelnej Rady Adwokackiej z dnia 25 maja 1946 r. w sprawie udziału adwokatów w procesach o zdradę narodu lub o rehabilitację wyłączonych ze społeczeństwa’, *Palestra*, 1-2 (2013), 234-47.

63 Gumkowski and Kułakowski, *Zbrodniarze hitlerowscy*, 87, 179.

64 AIPN Kr 1/1381, ‘To był rzetelny proces, rozmowa z Janem Brandysem’, *Tarnowski Magazyn Informacyjny*, 4/255 (January 27, 1985), 27. A similar situation occurred in Poznań, where both of Arthur Greiser’s nominated defence attorneys, Stanisław Hejmowski and Jan Kreglewski, unsuccessfully applied for release from this duty. In a letter to the Supreme National Tribunal, Hejmowski justified his request in the following way: “No Wielkopolska attorney can be a defence attorneys of Greiser ... I myself was banished by the German occupation authorities from Poznań to the General Government in December 1939, and I was deprived of the fruits of my achievements attained in the course of ten years of professional practice. During the war I lost two brothers killed by German hands. In truth, it is difficult to require me now to be Arthur Greiser’s defence attorney” (cited after: Gumowski and Kułakowski, *Zbrodniarze hitlerowscy*, 4-5).

Siewierski was put in the same prison and the same cell as Albert Forster. He was sentenced to five and a half years in prison.⁶⁵ Prosecutor Jerzy Sawicki, a Lviv attorney of Jewish descent, specialized in international criminal law. As the Home National Council (KRN) Delegate, he represented the Polish judiciary at the Nuremberg Trials, and later he was a Supreme National Tribunal prosecutor – the main prosecutor in the trials of Arthur Greiser and Josef Bühler and the Auschwitz camp staff. He was the co-author of a publication issued in 1945 devoted to proceedings against criminals, which served as a kind of guide for lawyers. He was regarded as a pliant stooge of the “security apparatus”. After 1948, Sawicki, as a university lecturer and co-author of the binding interpretation of criminal law, co-created the Stalinist legal system of the People’s Republic of Poland (PRL).⁶⁶

All the accused persons, both of higher rank (Josef Bühler) and ordinary concentration camp staff members, defended themselves with the same arguments, namely, that they were simply obeying orders and were unaware of their effects. Furthermore, they argued that they did not directly participate in the crimes they were accused of or simply denied their criminal acts or sought to diminish their own guilt. An exception was the Auschwitz governor, Rudolf Höss, who took the entire responsibility for all crimes in the camp on himself. For the most part, he did not defend himself during the trial, claiming that he simply executed orders, but he did not deny his guilt. All those sentenced to death submitted requests for clemency to Bolesław Bierut, the President of the Home National Council (KRN). Only Höss did not. Upon delivery of his sentence, he thanked his attorneys and then declared that he would not apply for pardon because he was aware that it was impossible for him to expect it.⁶⁷ But not all cases were as clear-cut as that. For example, the President exercised his power of clemency in regard of

65 ‘Nie zamierzam podejmować żadnej polemiki – Wokół mitu “bydgoskiej krwawej niedzieli”, z prof. Witoldem Kuleszą rozmawiają Paweł Kosiński i Barbara Polak’, *Biuletyn Instytutu Pamięci Narodowej*, 12-1/35-36 (2003-2004), 16-7.

66 Jerzy Sawicki and Bolesław Walawski, *Zbiór przepisów specjalnych przeciwko zbrodniarstwom hitlerowskim i zdrajcom narodu, z komentarzem* (Kraków, 1945). Zbigniew Błażyński, émigré journalist in Munich (Radio Free Europe) and London (The Polish Daily), wrote: “The Ministry of Public Security had in their files evidence that Sawicki cooperated with the Gestapo in the Lwów (Lemberg, Lviv) ghetto. Sawicki knew about these files which guaranteed his total obedience. Eventually, the case became widely discussed and Sawicki was dismissed from his post as a prosecutor, but before he left, he worked well with the secret police”; see: Zbigniew Błażyński, *Mówi Józef Światło: Za kulisami bezpieki i partii 1940-1955* (Warsaw, 2003), 236.

67 Gumkowski and Kułakowski, *Zbrodniarze hitlerowscy*, 172.

Johann Paul Kremer and Arthur Breitwieser, changing their death sentences to life imprisonment.⁶⁸

Upon analysing the defence attorneys' speeches (among others, those of Stanisław Druszkowski, Mieczysław Kossek, Bertold Rappaport), it can be stated that the defence lines were convergent with the arguments of the defendants themselves: the absence of direct perpetration, lack of awareness of the effects of their own orders, the impossibility of a proper moral assessment of their acts owing to the demoralisation of individuals by the system (the SS was "a school for murderers" and Auschwitz was "the product of this school") were assumed.⁶⁹ Several recurring themes could be extracted from the prosecutors' speeches (among others, of Tadeusz Cyprian, Stefan Kurowski, Jerzy Sawicki, Mieczysław Siewierski, Mieczysław Szewczyk).⁷⁰ Each prosecutor pointed to the irrelevance of the legal regulations with regard to the crimes that were committed. Some also emphasized how much effort it cost them to examine those crimes in the most objective and fair manner possible. It was stressed by, among others, prosecutor Sawicki, in a very dramatic speech: "I am to speak about the guilt of the accused persons, i. e. I have to express their guilt in words. Your Honours, words are meant for humans and what happened there, is inhuman. . . . I know that normally when a prosecutor stands before the court and asks for a death sentence, the court, the prosecutor and those in the gallery shudder with horror. I can feel my helplessness when in this room I pronounce the words 'death penalty'."⁷¹

While the reliability of proceedings in the main war criminal trials should be clearly positively evaluated, the activities of the Special Criminal Courts were already being criticized at that time. Dispensing justice on the basis of the *August Decree*, which exclusively and non-appealable imposed the death sentence on those found guilty under Article 1, could raise significant qualms due to the frequently insufficient evidence gathered in the course of Public Security Bureau investigations and the not always reliable and credible testimonies of some witnesses.⁷² Testimonies were often extorted by beat-

68 Both Johann Paul Kremer and Arthur Breitwieser were released from Polish prisons in 1958 and took up residence in West Germany.

69 AIPN Kr 1/1380, Speech of defence attorney Mieczysław Kosseka in the trial of staff of the camp in Oświęcim, 132-48, *ibid.*, Speech of defence attorney Stanisław Druszkowski in the trial of staff in Oświęcim, 149-63. For more information see Joanna Lubecka, 'Karanie niemieckich zbrodniarzy wojennych w Polsce', in *Zeszyty Historyczne WiN-u*, 34 (2011), 11-44.

70 AIPN Kr 1/1380, Speech of a prosecutor Mieczysław Szewczyk in the trial of staff of the camp in Oświęcim, 58-94; the final speech of prosecutor Kurowski in the trial against members of the staff of the Oświęcim camp, 164-80.

71 Cyprian and Sawicki, *Oskarżamy*, 33, 41.

72 Dz. U., no. 4 (1944), item 16.

ings or threats, some defendants retracted their earlier testimonies in court on the argument that they did not speak Polish.⁷³ Lawyers participating in the trials were aware that the authorities mainly aimed at achieving their intended propaganda goals. Therefore, the judges sometimes did not react to complaints made by defendants, while prosecutors pressed charges in an emotional manner, even referring to defendants in a derogatory fashion. *Ex officio* attorneys usually limited themselves to formulating requests for milder sentences or imposing penalties complying with the *August Decree*, namely the death penalty.⁷⁴ Trials of those accused of war crimes were often terse and cursory affairs, and did not relate to the acts of specific persons, but to the crimes of the German occupiers. “This outright Nazi, mass murderer, sadist and miscreant, should be eliminated from Polish society forever” – we read in one of the sentences.⁷⁵

Imprisonment

The British and American forces entering Germany in 1945 released concentration camp inmates as they progressed. The shock which they experienced seeing clearly visible evidence of crimes (crematoria with bodies of gassed victims, trains filled with corpses, piles of prisoners’ bodies) gave rise to emotional reactions, frequently involving lynchings. Allied soldiers often executed concentration camp staff members or armed kapos without trial, in summary revenge. The scale of this phenomenon was not marginal and some of these events are remembered as massacres. The most famous massacre took place after the liberation of Dachau where Americans killed 560 staff members, as mentioned by an eyewitness in his book.⁷⁶ The court investigation was discontinued owing to the impossibility of determining individual guilt. The judge drew attention to the fact that the soldiers’ behaviour was caused by the shock they experienced upon entering the camp.⁷⁷ Volatile emotions and numerous discussions accompanied the use of prohibited methods of

73 Biegański, *Kara śmierci*, 196.

74 Biegański, *Sądownictwo i skazani na śmierć z przyczyn politycznych w województwie pomorskim (bydgoskim) w latach 1945-1956* (Bydgoszcz, 2003).

75 Biegański, *Kara śmierci*, 197.

76 Howard A. Buechner, *Dachau: The Hour of the Avenger: An Eyewitness Account* (Metairie, Louisiana, 1989); these events were thoroughly analysed by Jürgen Zarusky “‘That is not the American Way of Fighting’: The Shooting of Captured SS-Men During the Liberation of Dachau”, in Wolfgang Benz and Barbara Distel (eds), *Dachau and the Nazi Terror 1933-1945*, vol. 2, *Studies and Reports* (Dachau, 2002), 133-60.

77 Alex Kershaw, *The Liberator: One World War II Soldier’s 500-Day Odyssey from the Beaches of Sicily to the Gates of Dachau* (New York, 2012), 320.

interrogation by British and American investigators. Several cases drew closer public attention to the extent that the American authorities initiated investigations into the alleged abuses. The most famous trials related to Dachau where e.g. the alleged killers of American POWs (Malmedy Massacre Trial) and the staff of the Dachau concentration camp were tried. In both investigations, false testimonies were extracted by torture.⁷⁸ A special commission was established (it went down in history as the Simpson commission), consisting of three judges – Gordon Simpson, Leroy Van Roden and Charles Lawrence – to examine the case in July 1948.⁷⁹ The Commission thoroughly examined sixty five proceedings in both the Malmeda and Dachau trials, and the final report confirmed that the American investigators had employed prohibited methods.⁸⁰ Upon publication of the report, under pressure of the general public (mainly German), the death penalties handed down in the Malmeda trial were commuted to life sentences.

American and British soldiers and investigators treated their German prisoners and suspects with wonton cruelty, under the influence of successively uncovered evidence of German crimes. Concentration and extermination camps on German-occupied Polish territories were liberated by the Red Army. We know that during these events, lynchings also took place however, they were attributed to Soviet soldiers. From the Polish perspective, what seems to be more interesting was the treatment of German criminals in Polish prisons and during trials.

The majority of war criminals, who faced the Supreme National Tribunal, were sentenced to death. From the moment of detention or extradition to Poland to execution of the sentence, they remained in Polish prisons. Information on the conditions they were kept in and how they were treated by their Polish fellow prisoners, guards and prison authorities is incomplete be-

78 *Malmedy Massacre Investigation, Hearings Before a subcommittee of the Committee on armed services. United States Senate, Eighty-first congress, first session, Washington 1949*, available at: http://www.loc.gov/rr/frd/Military_Law/pdf/Malmedy_hearings-2.pdf [2 January 2016]; see also: Giles MacDonogh, *After the Reich: The Brutal History of the Allied Occupation* (New York, 2007), 406-7.

79 Eiber and Sigel, *Dachauer Prozesse*, 70-3.

80 The report mentions, among others: beatings and brutal kickings; knocking-out of teeth and breaking of jaws; mock trials; solitary confinement; torture with burning splinters; the use of investigators pretending to be priests; starvation; and promises of acquittal; (Leroy van Roden: *All but two of the Germans, in the 139 cases we investigated, had been kicked in the testicles beyond repair. This was Standard Operating Procedure with American investigators*); see: Freda Utley, *The High Cost of Vengeance* (Chicago, 1949), 186; Eiber and Sigel, *Dachauer Prozesse*, 70-3, see also: *Malmedy Massacre Investigation, Report of subcommittee of the Committee on armed services, United States Senate, Eighty-first congress*, available at: https://www.loc.gov/rr/frd/Military_Law/pdf/Malmedy_report.pdf [2 January 2016].

cause this issue has not been comprehensively examined yet. On the basis of the analysis of prison documentation from Kraków, from the Montelupich prison where forty-three of the accused persons were kept, it is possible to make certain deductions.⁸¹ Certainly the most important German criminals did not have worse prison conditions in Kraków than the Polish prisoners sentenced on the basis of the *August Decree*. The Germans did not complain to the prison authorities about overcrowded cells, nor about ill-treatment by prison guards.⁸² They were often detained in single cells or together with other Germans. The cells in which they were kept were separated from the rest of the prison with an iron door and prisoners were under observation of the guards day and night.⁸³ The cells were furnished modestly but sufficiently (stool, table, wooden bunk with a straw mattress). The cells were often equipped with stoves but they were “sparingly” used. In complaints of German prisoners written by hand in Polish (probably with the help of their Polish fellow prisoners, as was indicated by the signature of the given prisoner, which was usually clearly different from the handwriting in the Polish text), they usually spoke of the all-pervading cold permeating their cells (among others, Hans Aumeier, Ernst Boepple, Amon Göth)⁸⁴ and they asked for warm clothing. Those requests were most often positively considered, as substantiated by hand annotations of the prison governor.

In describing his prison conditions, Friedrich Siebert (head of the General Government’s administrative department); emphasized first of all the insufficient food rations, as a result of which many prisoners drastically lost weight.⁸⁵ An advantage was the cleanliness of the cells which, of course, were maintained by the prisoners themselves. As Siebert highlights, both Germans and Poles were treated in the same manner and, whether it was good or bad, depended on individual guards or officers on duty. However, he clearly

81 The Montelupich prison in Kraków housed all the defendants in the Auschwitz trial, including camp commandant Rudolph Höss. For prison records documenting length of stay, medical cards, the course of proceedings and private correspondence, see AIPN Kr 425/1-704.

82 Apart from “small” acts of spite, e.g. frequent switching on of light at night, see Bundesarchiv Berlin, Bühler R52 II 256a, Verhältnisse im Gefängnis Montelupich, August 47-Juli 48, Friedrich Siebert to Albert Weh’s widow, 21.

83 Ibid.

84 Hans Aumeier – the deputy of commandant Höss in the Auschwitz camp, sentenced by the Supreme National Tribunal to death in the trial of that camp’s personnel; sentence was delivered on December 22, 1947 (AIPN Kr 425/12); Ernst Boepple – secretary of state in the General Government administration, studied in Tübingen, Oxford, Paris, and London, Ph.D in philosophy, sentenced to death. The sentence was delivered 15. 12. 1950 (AIPN Kr 425/53); Amon Göth – commandant of the labour camp in Płaszów, sentenced to death, executed 13. 8. 1946 (AIPN Kr 425/138).

85 BArch Berlin, Verhältnisse im Gefängnis Montelupich, August 47-Juli 48, 21.

states in his account that “None of the Germans in his wing were beaten, but there were heavy-handed nudges, usually when one did not understand the guard’s questions.”⁸⁶ Siebert mentions that idleness and boredom were the worst in prison, in particular owing to the fact that wardens stuck to a strict supervisory routine devised to ensure that prisoners did not communicate with each other outside the cells. They received mail but no packages, although the letters spoke of numerous packages that had been sent.

The largest number of complaints on prison conditions was filed by Hans Aumeier, who wrote about the cold in his cell, malnutrition, the absence of outdoor walks, and the arbitrary acts (*Willkür*) of fellow prisoners. His letters are not so much requests as expressions of irritation at the harsh conditions he was kept in.⁸⁷ In reaction to his complaints, Aumeier was examined by a prison doctor who stated (by way of entries in his medical records) that his health condition was good and excluded malnutrition. The only documented case of a prisoner being beaten is that of Maria Mandl, who was extradited to Poland via the Czech Republic. In the Polish documentation, namely her medical records, there is the following note: “beaten by Czechs, bruises on the nose, near the ear, chin and neck, back pains. Spits blood. Allegedly.”⁸⁸

The prison documentation also contains numerous hand-written requests of German prisoners for permission to keep diaries, for tobacco rations (among others, such a request was made by Göth) or for books. Most often, however, they asked for pen and paper to write letters to their families or to make notes in preparation for their trials. The prison authorities agreed to the transfer of Wilhelm Haas,⁸⁹ who was sentenced to death, to a cell with another German and to give him a chess set.

Lawyers also paid attention to ensure appropriate conditions for defendants and convicts. In the statement of the first Supreme National Tribunal prosecutor, Tadeusz Cyprian, to the prosecutor of the Special Criminal Courts in Kraków, we read “prisoners: Dr. Jozef Buhler, Dr. Kurt Ludwik Burgsdorf, Rudolf Hoess, Amon Goeth [...] will be tried by The Supreme National Tribunal, and since their hearings will undoubtedly be attended by foreign observers, I regard it as desirable to ensure that both the physical and mental condition of these prisoners is the best possible during the hearing. In view

86 Ibid.

87 AIPN Kr 425/12 (Hans Aumeier’s prison file).

88 Maria Mandl (Mandel) – born in Austria, in charge of the female section at Auschwitz, sentenced by the Supreme National Tribunal to death in the trial of that camp’s personnel, executed 24.1.1948 (AIPN Kr 425/351).

89 Wilhelm Haase – SS-Sturmbannführer, liquidator of the Jewish ghetto in Kraków, sentenced to death, executed on May 23, 1952 (AIPN Kr 425/189 – the prison files contain numerous misspellings of his name: Hasse’s given name on his file is the diminutive Willi and not Wilhelm).

of the foregoing, I ask the prison's Board of Governors to give these prisoners the possibility of reading books on neutral subjects in German, but not journals, and further, that they be provided with the possibility to keep diaries or jot down defence notes by giving them tables, chairs, paper, pencils. And an attempt was to be made to ensure that they did not neglect their personal hygiene (clean underwear, walks)."⁹⁰ Less typically perhaps, Jan Sehn, the chairman the Regional Committee of Inquiry into Nazi crimes in Kraków, who appealed by letter for the defendant to be granted his request to have a picture of his wife and children; this letter has been preserved in Josef Bühler's file.⁹¹

The war criminals detained in Polish prisons were under constant medical observation. Each cell was visited by a physician every week, "a Jew who had a Polish surname, and spoke German well. His behaviour left nothing to be desired."⁹² The majority of prison files contain medical records of prisoners' health problems, medical diagnoses and health assessments. Pulmonary disease, including tuberculosis, was usually mentioned. The bodies of German prisoners who were executed and those who died as a result of diseases were transported to the Department of Descriptive Anatomy of the Jagiellonian University (letters with requests for acceptance of the bodies often bore the stamp "strictly confidential").⁹³

The prisoners were allowed to conduct private correspondence. All letters, both incoming and outgoing, were censored. Many of them never reached their addressees (due to censorship) like those saying farewell before execution – the originals are kept with the prison documentation. The prisoners corresponded primarily with their closest families. Many letters in the prison documentation were written by the prisoners' wives and children. When reading this correspondence, which undoubtedly requires more penetrating analysis, some recurring themes can be identified. We can find information on family life (e. g. difficult living conditions), full of assurances of affectionate love and attachment, and evidence of deep faith in the innocence of those in the dock, as well as hope (sometimes even confidence) that husbands and fathers will return home.⁹⁴ Several letters have greetings from children, their

90 AIPN Kr 425/138 (Amon Göth's prison file), 31.

91 Josef Bühler – state secretary and deputy governor (to Hans Frank), sentenced to death by the NTN, executed 21. 8. 1948 (AIPN Kr 425/63).

92 BArch Berlin, Bühler R52 II 256a, Verhältnisse im Gefängnis Montelupich, August 47-Juli 48, 22.

93 Interesting information on the fate of bodies after execution of the sentences see: Stanisław Kobiela, 'Proces załogi KL Auschwitz-Birkenau w Krakowie 1947 r.', part 4, *Wiadomości Bocheńskie*, 1/30 (2009), 20-1; Kobiela, 'Tajemnice lekarza. Wywiad z Jerzym Ludwikowskim', *Wiadomości Bocheńskie*, 4/31 (1996), 11-3, 21-5.

94 In a letter to Hermann Kirschner his wife wrote: "Lieber Hermann sei getrost und versage nicht. Du hast ja keine Schuld. Wir sind alle unglücklich geworden durch

drawings, rarely pictures, attached to them. In a few farewell letters (not sent on to their families by the prison authorities), the accused persons themselves wrote that they were innocent and were about to die without any sense of guilt. An exception was Rudolf Höss, who during the trial underwent “an internal conversion” in the religious sense, but also by way of revaluation of the ideas he served.⁹⁵ It is worth mentioning that the credibility, or even frankness of Höss’s statements is sometimes questioned by western historians. When comparing investigation methods in the Dachau or Nuremberg trials, by analogy of a kind, they claim that descriptions of nearly ideal prison conditions and humane treatment by the Polish judiciary and prison guards were induced by promises made to him, or by other techniques (meaning physical or mental torture).⁹⁶

Reminiscences of Polish political prisoners suggest that German prisoners were used for cleaning up after executions (among others, they packed the bodies in bags and carried them to their designated places). Frequently they were even present during the executions of their fellow prisoners. Considering that they were sentenced to death, it certainly was no easy experience for them. For example, Ernst Boepple, deputy secretary of state in the General Government, witnessed the execution of Władysław Gurgacz, the chaplain of the Polish Underground Independence Army and two soldiers of that formation.⁹⁷

It is worth mentioning that Amon Göth, Rudolf Höss, Josef Bühler and Kurt Burgsdorf had numerous interviews with the Polish criminologist, psy-

diesen elenden Krieg. Wenn doch die Menschen aller Völker endlich vernünftig werden möchten, die ganze Christenheit betet täglich darum.” (“Dear Hermann, do not worry and do not break down. After all, you are not guilty. We all became unfortunate because of this nefarious war. When will all nations finally become smarter, the whole Christian world prays for it every day.” – translation into English J. L.). Hermann (in a prison file wrongly: Herman) Kirschner – sentenced to death in the Auschwitz camp, personnel trial, executed 24. I. 1948 (AIPN Kr 425/221).

95 *Autobiografia Rudolfa Hössa, komendanta obozu oświęcimskiego*, przeł. Wiesław Grzymiski, przedmowa Franciszek Ryszka (Warsaw, 1990), 182. In the Archive of the Metropolitan Curia in Kraków, in a file entitled “konwersacje 1946” a document confirming the conversion of Rudolf Höss on Catholicism has been preserved; it is signed by a priest, Władysław Lohna (who visited Höss in the Wadowice prison), the parish-priest, Czesław Krupa and a witness Karol Lenia (the verger); the document is unsigned and has no page numbering.

96 It should be said that such evaluations are formed first of all by authors undermining the scale and scope of German crimes, often also negating that the Holocaust ever happened; see, among others, Arthur R. Butz, *Der Jahrhundertbetrug* (Richmond, 1977), 163; Wilhelm Stäglich, *Der Auschwitz-Mythos: Legende oder Wirklichkeit* (Tübingen, 1979), 176, 260.

97 Dawid Golik and Filip Musiał, *Władysław Gurgacz: Jezuita wyklęty* (Kraków, 2014), 118.

chiatrist and lawyer prof. Stanisław Batawia.⁹⁸ He examined them from the vantage point of their mental health, characteristic features, and motivation regarding their acts.⁹⁹ Unfortunately, only the psychological analysis of Rudolf Höss is available in the form of a publication. Upon Höss being sentenced to death, lawyers, especially prosecutors in the Auschwitz Trial, wanted to postpone his execution because he could have been a useful witness in other trials. However, his sentence was carried out on the appointed day (16 April 1947), because social expectations were volatile in this regard, and the authorities insisted on a “quick success”.¹⁰⁰ At the request of the former prisoners of the Auschwitz camp, Höss was hanged in the camp.¹⁰¹ The sentences (death by hanging) handed down to the twenty-one staff members in the Auschwitz trial were carried out in the Montelupich prison in Kraków in January 1948. Josef Bühler was hanged in the same prison on 22 August 1948.

Summary

The most spectacular war criminal trials in Poland took place in 1944-1947. During those trials, sentences were delivered first of all to staff members of the German occupation administration and concentration camps operating on Polish soil. Despite the pressure of the communist authorities, who tried to exploit the trials for propaganda purposes and win greater social acceptance by focusing attention on anti-German sentiments, the trials of the most important criminals were conducted in a calm and professional atmosphere.

- 98 Stanisław Batawia, ‘Rudolf Höss, komendant obozu koncentracyjnego w Oświęcimiu’, *Biuletyn Głównej Komisji Badania Zbrodni Hitlerowskich w Polsce*, 7 (1951), 9-58; see more: Joanna Lubecka, ‘Unde malum? Badania psychologiczne zbrodniarzy niemieckich po 1945 r.’, *Zeszyty Historyczne WiN-u*, 37 (2013), 5-21.
- 99 Similar examinations were conducted by Americans, mainly by Gustav M. Gilbert and Leon Goldensohn (during the Nuremberg Trials, and Gilbert also during the Dachau trial). During the Eichmann trial, he was also examined by Israeli psychiatrist Istvan S. Kulcsar; for more details see: Lubecka, ‘Zrozumieć nazistę: Wątki racjonalizacji i zrozumienia zachowania zbrodniarzy nazistowskich w powojennych procesach i badaniach psychologicznych’, in Patryk Pleskot (ed), *Wina i Kara: Społeczeństwa wobec rozliczeń zbrodni popełnionych przez reżimy totalitarne w latach 1939-1956* (Warsaw, 2015), 129-50.
- 100 AIPN Kr 1/1381, ‘To był rzetelny proces, rozmowa z Janem Brandysem’, *Tarnowski Magazyn Informacyjny*, 4/255 (January 27, 1985), 27; see also: Marcin Witkowski, ‘Rudolf Höss w wadowickim więzieniu: Ostatnie dni byłego komendanta Auschwitz’, *Wadoviana: Przegląd historyczno-kulturalny*, 18 (2015), 128-49.
- 101 Gumkowski and Kułakowski, *Zbrodniarze hitlerowscy*, 173.

Thus the authorities did not have the opportunity to make political capital out of the trials, at least not to the degree hoped for, as, for the most part, the pre-war jurists recruited for the purpose proved insufficiently malleable. The majority of judges, prosecutors and attorneys discharged their duties as befitted their calling. They had to prepare and navigate precedent-setting trials which involved having to devise exceptional procedures and legal structures to judge collective crimes and crimes not committed directly physically, but by orders issued remotely. In some cases, the examples set by British and American jurists were followed, but most of the solutions were based on Polish law and penal procedures. It should be emphasized that social expectations regarding punishment of German criminals were to a certain extent convergent with the plans of the communist authorities, though the latter were no doubt thwarted in any attempts to rig the trials and exploit them for their own propaganda purposes.

We can say relatively less about the prison conditions in which defendants were kept. Although prison documentation was often preserved, it was censored and it can be presumed that it is incomplete. It cannot be safely said that the Germans brought to stand trial were not beaten or tortured mentally or physically in prison. On the evidence preserved from the Montelupich prison in Kraków, it can only be asserted that they were kept safe from Polish prisoners from whom they were separated in single cells, so only their prison guards could pose a threat to their well-being. But it is quite unthinkable to imagine that there were situations, such as did occur during trials in the West, whereby Polish investigators (prosecutors) would extract testimonies from German prisoners with the help of illegal methods.

As the Cold War hotted up, the prosecution and punishment of war criminals was significantly hindered. Poland was often denied its requests for extradition, and some of the criminals were prosecuted before West German courts.¹⁰² Court proceedings there were not always as they should be, but the Polish side could do nothing about that. After the collapse of the Soviet bloc, and as a result of better cooperation with German institutions and judiciary, fresh possibilities of prosecuting war criminals emerged. But the objective of currently pending trials is more to explain specific crimes than to mete out punishment. Indeed, ever fewer criminals can be brought to justice now, if only because most of them are now dead.

102 See: Hermann Langbein, *Auschwitz before court: The Trial in Frankfurt am Main 1963-1965: Documentation* (Wrocław-Warszawa-Oświęcim, 2011).