

Marek Kornat

Lex Retro Agit: Polish Legislation on Nazi German War Criminals in the Concepts of the Polish Government- in-Exile in London (1942-1943)

News of Nazi crimes committed in occupied Poland during the Second World War came as a great shock to Polish public opinion in the free world – that is, in exile. The issue was to become a great challenge to the entire civilized international community, but the special legislation in the form of the President of the Republic of Poland's Decree of 30 March 1943 on punishing war crimes remains a little known historical episode, especially outside Poland. That could be regarded as odd because it was a precedential regulation and an interesting example of the confluence of politics and jurisprudence on the prosecution of unimaginable German crimes that were being committed at the time.¹

The term “war crime” gained some currency further to the internationally recognized regulations on land warfare adopted at The Hague Conference in 1907. Terms addressing existing criminal legislation remained in force, but in face of new kinds of war crimes, they were found to be wanting. “According to the prevailing opinion of Polish jurists, the Polish Penal Code was unequal to the task of punishing German crimes both in terms of definitions of the crimes themselves and the sanctions that they should trigger. According to Waław Komarnicki, the Minister of Justice of the Polish Government-in-Exile and, up to the war, a professor of law at the Stefan Batory University in Wilno (Vilnius), the Polish legislator proved infinitely less cre-

1 More than fifty years ago, Leszek Kubicki devoted an important monograph to this issue: *Zbrodnie wojenne w świetle prawa polskiego* (Warsaw, 1963). Franciszek Ryszka, in *Norymberga, prehistoria i ciąg dalszy* (Warsaw, 1984), provided important reflections on the genesis of the “Nuremberg law”, and discussed and reconstructed Polish concepts of special legislation on the prosecution of war criminals.

ative than the German perpetrator.² “New crimes require new terms”, was to be written in 1944 by Rafał Lemkin when stating the basic intention of the legislators of all nations that suffered during the Second World War.³ We can add that new crimes required also new legal norms.

The most important impulse for the new special legislation was, of course, awareness of the escalation of the criminal policies of the German authorities in occupied Poland. “Germany’s conduct in the occupied territories not only contravenes international law, especially the provisions of The Hague Conventions, but also the most common and serious crimes described in the criminal codes of all civilized states. Both those in command individually, and those who directly carried out the orders of those in command, should be made to answer for their crimes in the future. I believe that after the war, some kind of international tribunal will be created to which the perpetrators will be conveyed and where they will be judged. With this in mind, a Commission consisting of representatives (jurists) of countries fighting against Nazism, and an American lawyer [even though the USA was still neutral at the time – ed.] should be formed immediately, to work on proposals for such a tribunal together with its procedures, and its methods in ensuring the gathering and preparing detailed evidence to be used in future trials. For that purpose, the Commission should communicate by radio with people in the occupied territories telling them to gather and secure evidence for the above purpose. Implementation of this proposal could contribute to reducing the level of aggression, at least to some extent, of the occupation authorities ... In the event of its approval, I believe that our Government should turn to the governments of the coalition fighting against Germany with a request to nominate, if they accept this proposal, their representatives (jurists) who will become members of such a Commission. The next step would be to convene

2 The Polish Institute and Sikorski Museum (London), Embassy in London, vol. A.53/1 and Stanisław Stroński’s Papers, 183/30 [abbreviation: IPMS].

3 The first juridical conceptions of the new types of crimes were put forward by Lemkin in his memorandum presented in Madrid in Autumn 1933: *Les actes constituant un danger général (interétatique) considérés comme délits de droit des gens: Rapport spécial présenté à la Vème Conférence pour l’Unification du Droit Pénal à Madrid (14-20 X 1933)*, Paris 1933 (German version: *Akte der Barbarei und der Vandalismus als delicta iuris gentium*, Internationales Anwaltsblatt, Nr. 11 [November] 1933. The historiography on Lemkin is enormous. For his early biography see: Marek Kornat, ‘Barbarity – Vandalism – Terrorism – Genocide: On Raphael Lemkin and the Idea of Defining “the Crimes under the Law of Nations”’, *The Polish Quarterly of International Affairs*, 17/2 (2008), 79-98; idem, ‘Rafał Lemkin’s Formative Years and the Beginning of International Career in the Inter-war Poland (1918-1939)’, in Agnieszka Bieńczyk-Missala and Sławomir Dębski (eds), *Rafał Lemkin: A Hero of Humankind* (Warsaw 2010), 59-73. See also: William A. Schabas, ‘Raphael Lemkin, Genocide and Crimes against Humanity’, in Bieńczyk-Missala and Dębski (eds), *Rafał Lemkin*, 233-56.

an organizational meeting of the Commission – to determine the further course of action to be taken (including the possibility of cooperation with English and American jurists)” – wrote Prof. Stanisław Stroński, the Polish Minister of Information in the Government-in-Exile.⁴ His reflections were to remain an important programme declaration.

Discussion of the Polish government’s efforts to establish international commitments of the Allies to prosecuting German war criminals is beyond the scope of this article.⁵ We should remember, however, that on November 30, 1939, the Polish President-in-Exile, Władysław Raczkiewicz, issued a decree addressing the issue of the criminal conduct of the German and Soviet authorities on the territories they occupied in Poland. In spring 1941, Polish diplomacy made best efforts to secure from the Allied governments a declaration on punishing Nazi criminals. A Polish note to the governments of Allied states and governments-in-exile, and, indeed, to neutral states, was published on 3 May 1941.

These Polish diplomatic efforts bore fruit in the shape of a well-known international conference of representatives of nine countries in London in January 1942, at which the famous St. James’s Palace declaration was issued. Assuming that such an agreement between the Allied countries had to be inherently very general, and its binding power relatively limited, the Polish government aimed at promulgating “acts or decrees issued by all of the Allied states, announcing punishment for the crimes committed by the German occupiers in breach of international law.”⁶

To the limits of its abilities, the Polish Government-in-Exile in London made every effort to acquaint western public opinion with knowledge of the Nazi genocidal policy in Poland. A number of brochures on this topic were published in English: *The German New Order in Poland*, *The German Mass Extermination*, *The German Attempt to Destroy the Polish Nation*, *The Persecution of Jews in German-Occupied Poland*. *The Polish White Book*, issued by the exiled Ministry of Foreign Affairs in 1942 in English, subtitled *German Occupation in Poland*,⁷ was regarded as an especially important opinion-forming publication.

In face of information trickling in from the occupied country on the war crimes that were being committed, the exiled government decided to set up a

4 IPMS, Collection 183/30.

5 Ryszka, *Norymberga*, 93-140. One of the last articles on this topic was written by Dariusz Stola, ‘Dyplomacja polska wobec zagłady Żydów’, in Waldemar Michowicz, *Historia dyplomacji polskiej*, V: 1939-1945 (Warsaw, 1999).

6 IPMS, Collection 183/30.

7 *Polish White Book: German Occupation in Poland: Extracts of Note Addressed to the Allied and Neutral Powers* (New York, 1942).

War Crimes Office. It was to be managed by Manfred Lachs, a future judge of the International Court of Justice at The Hague.⁸

The authors of the Polish special legislation referred to the precedential Commission examining German crimes on occupied Belgian territory (the Committee on Alleged German Outrages) set up in 1915 in Britain under the chairmanship of the then British Prime Minister, Herbert Henry Asquith. In its report, the Committee stated that “murder, lust, and pillage prevailed over parts of Belgium on a scale unparalleled in any war between civilized Nations during the last three centuries.”⁹

On 24 February 1942, the Polish Government-in-Exile adopted a resolution on its intention to put Nazi war criminals on trial. On 23 June 1942, a request on the need to pass special legislation was submitted to the Council of Ministers (further referred to as the cabinet of the Polish Government-in-Exile) and signed by Komarnicki.¹⁰

The proposed legislation was based on two assumptions:

Firstly, Komarnicki, believed that war criminals would be tried not by international tribunals, but by state courts operating on the basis of military court regulations; it was argued that this was “increasingly widely accepted” by public opinion. The principle of military courts having special jurisdiction over war crimes was introduced by Articles 228 and 229 of the Treaty of Versailles.¹¹

Secondly, in the eyes of the law, “Criminal acts of the German occupiers are crimes both under the national laws of the occupied states, and international law, codified in The Hague Conventions, but both the former and the latter regulations are insufficient.” New crimes required new definitions and bespoke legislation.

The first draft of a special criminal act for war criminals was produced by the Legislative Commission of the Polish Government-in-Exile. Its content was substantiated as follows: “Since the assault on Poland of 1 September 1939, the Germans have committed in the areas they have occupied numerous acts of cruelty with such sophistication and on a scale that defies comparison to anything seen in modern war. It constitutes the conscious appli-

8 IPMS, Collection 183/30.

9 Ibid.

10 The Polish President-in-Exile did not apply his right of veto which he possessed under the Constitution of 1935. The legislative practice assumed the preparation of draft decrees by the cabinet for the president to sign. The process would commence with the given minister tabling a request for action in a given matter; this would be followed by a cabinet debate, and an appropriate resolution approving the final form of the given legal regulations would be adopted.

11 The implementation was not complete; jurisdiction was conferred upon German courts.

cation of total war, created by German military and legal doctrine, being the effect of long nurtured predatory instincts. No one and nothing is safe from this total war. It turns against the civilian population; its victims are women, children and elderly people. It destroys cultural assets with exceptional barbarity. It is in conflict with the binding international law of The Hague Conventions, with the common customary laws of modern states, and with the corresponding legal meaning of the term civilized nations. It is contrary to Christian culture and, by destroying moral values, leads to total nihilism. In relation to Poland, total war is the destruction of the Polish Nation, both by removing the material grounds for its existence and by destroying its cultural heritage built up throughout the ages. The present Polish-German war is but a further stage in the sustained Germanic march to the East, the 'Drang nach Osten' under the banner of 'ausrotten', for over a thousand years. In view of this state of affairs, the Polish Government in London has a special obligation to resort to any means of intervention at its disposal that may impede this German policy of extermination. For no Allied state is the war crimes issue as important as it is for Poland, as no occupied state is in a similar situation to that of our country. Therefore, the special activity of the Polish Government related to this issue is entirely justified, which does not make the joint efforts of the Allies any the less important. Implementation of this activity should be supported by the Polish Government regardless of the steps it takes on its own. The country demands particularly intensive and energetic counteraction from its Government against German terror in Poland. This is of great moral significance for our country and it supports the population in its relentless resistance to the occupiers."¹²

The idea of a special act on war crimes institutionalizing the responsibility for the criminal acts that were being perpetrated required retroactive effect. It was designed to enable prosecution of criminal acts thus redefined that were committed on Polish soil after 31 August 1939. "The decisive factor for the Polish Government regarding the retroactive effect of the promulgated decrees is the German disregard for any legal and moral principles in relation to the Polish State which provides a legal basis for the application of extraordinary retaliatory measures."¹³ That was the basic *ratio legis*.

This was to be an act of "the Will of the Polish Republic" on holding responsible war criminals upon termination of hostilities. It took the form of the highest legislative act available which gave "the most solemn, firm and binding expression" to this will.

¹² IPMS, Collection 183/30.

¹³ Ibid.

The concept of special criminal law for crimes committed in occupied Polish territories was expressly set out at cabinet meetings in London on 2 and 15 July 1942. The main author of the decree on criminal responsibility for war crimes was Komarnicki, though it might be added that Ministers Stanisław Stroński and Marian Seyda exerted significant impact on the final form of this decree's executive regulations.

On 15 July 1942, the cabinet appointed a special ministerial committee to draft this decree. It consisted of the following ministers: Waław Komarnicki (Minister of Justice), Stanisław Mikołajczyk (Deputy Prime Minister), Stanisław Stroński (Minister of Information), Marian Seyda (Minister of Congress Works) and Edward Raczyński (Acting Minister of Foreign Affairs).

The statements of President Roosevelt on 21 August 1942 and Winston Churchill on 8 September 1942, on pressing charges against war criminals after the war and recognizing this to be one of the major war aims, were actually preceded on 20 August by the appointment of an Inter-Allied Commission for Punishing War Crimes), which was chaired by the British diplomat William Malkin. Representatives of the exiled Dutch and Czechoslovak governments "requested issuing special enactments demonstrating that regulations of their criminal laws are insufficient." The Polish representative at this meeting did not support this motion.

The British Lord Chancellor, John Simon, made a statement in the House of Lords on 7 October 1942 on the problem of appointing an international research commission investigating the crimes of Nazis and their allies and the consequent examination of competencies of international and national tribunals. In autumn 1942, Frederic Herbert Maugham, Lord Chancellor in the previous cabinet of Neville Chamberlain, presented the idea of appointing two international criminal tribunals: one for Western Europe and one for Eastern Europe. Komarnicki took issue with this concept, arguing that "Lord Maugham's idea is most distasteful to us; in the event of its acceptance, we would have to create a common tribunal with the Bolsheviks."¹⁴

The main reason for the Polish concept of special legislation against war criminals was, as expressed by Komarnicki at a Polish cabinet meeting in London: "Poland has a special moral right to be in the vanguard of states demanding punishment for German criminals, because Poland paid and is still paying a particularly bloody price in terms of the lives and property of its citizens. Recent reports from the country are desperate and alarming in tone and impose on Government the obligation to act with the utmost vigour to achieve its goal."¹⁵

¹⁴ Ibid.

¹⁵ Ibid.

During the cabinet meeting of 17 October 1942, Komarnicki delivered a report on the proposed draft presidential decree on criminal responsibility for war crimes committed in occupied Poland. He tabled it as a motion for resolution at a cabinet meeting on 15 July 1942.¹⁶ The final text of the “decree on criminal responsibility for war crimes” was voted through by the cabinet on 17 October 1942.¹⁷

This decree consisted of eleven articles which may be summarized as follows:

Article 1 defined the category of persons subject to criminal responsibility and stipulated: “Citizens of the German Reich or its allied countries or countries cooperating with or serving the German Reich or these countries in wartime, are subject to criminal responsibility, under this decree, for crimes committed after 31 August 1939 regardless of their place of commitment.” The article was formulated in such a way that it provided the possibility of holding responsible collaborating Ukrainian or Lithuanian units allied with the Germans and collaborating Polish citizens.

Article 2 defined the crimes covered by the decree: “Whoever, in breach of the standards of international law, commits an act to the detriment of the Polish State, a Polish legal person or a Polish citizen, shall be subject to imprisonment.”

Article 3 specified the criminal liability for the given crimes, stipulating that: “If an act listed in Article 2 caused death, exceptional torment, physical disability, permanent physical or mental illness, permanent inability to work, imprisonment for at least 14 days, the eviction or resettlement of a Polish citizen, the perpetrator shall be subject to the penalty of life imprisonment or the death penalty.”

Article 4 specified an additional penal sanction for perpetrators of particularly serious crimes: “If an act listed in Article 2 caused common danger to human life or health in Poland, the perpetrator shall be subject to the death penalty or life imprisonment.”

Article 5 contained a short provision on penal sanctions for the use of forced labour and forced conscription of Polish citizens into the army of an invader-occupier state: “A person who forces a Polish citizen to join a foreign army or – in breach of international law – to work for the enemy, shall be subject to the penalty of life imprisonment or the death penalty.”

Article 6 listed the penal sanctions to be imposed on the judiciary of the German occupation authorities: “(1) A person that adjudicates on behalf of occupation authorities on the basis of legal provisions issued in breach of the

16 For documentation of these activities see Marian Zgórniak (preface), Wojciech Rojek (ed), *Protokoły posiedzeń Rady Ministrów Rzeczypospolitej Polskiej 1939-1945*, vol. 4: *Grudzień 1941 – sierpień 1942* (Kraków, 1998), 364-73.

17 *Ibid.*, t. V: *Wrzesień 1942 – lipiec 1943* (Kraków, 2001), 38-51.

standards of international law, and thereby causes harm to a Polish citizen, shall be subject to imprisonment. (2) If this kind of ruling results in one of the situations listed in Article 2 or Article 3, the perpetrator shall be subject to the death penalty or life imprisonment.”

Article 7 dealt with the criminal responsibility of the executors of the German occupier’s policy regarding the intentional destruction of Poland’s cultural heritage. It introduced the term “public or private property of importance to the nation” and stipulated: “Whoever, in breach of the standards of international law, robs, steals, destroys or to a significant extent damages public or private property, if the property is of national importance, shall be subject to the penalty of life imprisonment or the death penalty.” In order to counteract the policy of looting in the occupied territories and the destruction of Polish cultural heritage, the term “property of importance to the nation” was introduced covering both cultural property and commercial and economic assets.

Article 8 laid down that: “In the event of sentence being passed for an act described in the decree, the court may adjudicate an additional penalty of forfeiture of property and of the right of inheritance.”

Article 9 specified that “The penalties under Articles 2-8 of the decree shall be applied both to the person issuing an order to perform an act stipulated hereby and to the person performing that act.”

Article 10 was particularly important, as it stipulated that “the time bar periods provided in Article 86 of the Criminal Code, are to be suspended for the duration of any adjournment or abeyance, and recommenced upon the activities of the Supreme Military Court being resumed”.

Article 11, which closed the decree, stipulated that “cases related to crimes covered by this decree are under the jurisdiction of the competent military courts, issuing rulings in the military proceedings mode.” This meant that criminal jurisdiction against German war criminals was to be of a military character.

The Decree came into effect as of the date of its announcement. It was signed on 30 March 1943 by President Raczkiewicz on the strength of powers vested in him by the Constitution of 23 April 1935, which authorized the Head of State to rule by decree when the Legislative Chambers (Parliament) proved inoperative.

It is easy to see that the repeatedly used fundamental term “international law” was to be understood as referring to the standards codified in The Hague Conventions of 1907, which addressed responsibilities related to the occupation of territories conquered in war.¹⁸

¹⁸ The efforts of the international movement for codification of international criminal law were focused on this idea. The very term “international criminal law” started to

The Decree of the Polish President of 30 March 1943 does not specify the nationality of victims of the criminal policy of German Nazis in the occupied territories of Poland. It assumes only one category of victim – Polish citizens.

The penalties specified in these decree were unquestionably severe. The most serious crimes were to be punished by long-term prison sentences or execution, leaving the decision to the military courts that were to be appointed. The criminal sanctions defined in the decree clearly referred to the Polish Criminal Code of 11 July 1932, where life imprisonment or execution was the punishment for those convicted of premeditated murder without mitigating circumstances.¹⁹ However, these criminal sanctions were primarily assumed to be consistent with the common criminal legislation practice during the war in most civilized countries.

In a presidential decree on responsibility for war crimes, the term *crime against humanity* was not used. Nor was the term *genocide* used; that term was introduced into jurisprudence by the Polish-Jewish lawyer Rafał Lemkin in 1944, when he published his thesis *Axis Rule in Occupied Europe*,²⁰ which proved to be of fundamental importance to the course of thinking on German war crimes.

The concept of retributive justice for German war criminals required overcoming the central principles of legal positivism, which was the dominant system of jurisprudence in Europe at the time. It also required the temporary suspension of the norms of Roman law such as, for example, the *lex retro non agit* principle. Polish émigré efforts in regard of this contingent jurisprudential adjustment were concentrated in their entirety on substantiating this extraordinary need.

The main author of the Polish decree, Komarnicki, spoke on 17 October 1942 most of all against the no-retroactivity rule: “A lot of legislative arguments were used against responsibility for war crimes, in particular against special enactments. The retroactive nature of the proposed Act was criticized in particular. This polemic, however, was based on a misunderstanding. The special act was not retroactive in a material sense, as the criminal acts of the Germans and their allies were always considered crimes by civilized nations,

gain currency, which constituted a significant achievement. These efforts were reconstructed by a Polish lawyer: Emil Stanisław Rappaport, *Konferencja Międzynarodowa Unifikacji Prawa Karnego a jej poprzedniczki (Garść wspomnień, wrażeń i myśli 1927-1933)* (Łódź, 1934).

19 Rafał Lemkin (ed), *Kodeks Karny r. 1932 wraz z prawem o wykroczeniach i przepisami wprowadzającymi Kodeks Karny i prawo o wykroczeniach* (Warsaw, 1932).

20 I have described Lemkin's views on criminal law in various publications. See Marek Kornat, ‘Rafał Lemkin i pojęcie ludobójstwa’, in Alicja Bartuś and Piotr Trojański (eds), *Auschwitz a zbrodnie ludobójstwa XX wieku*, (Oświęcim, 2012), 13-27; Idem, ‘Barbarity – Vandalism – Terrorism – Genocide, 89-93.

which gave rise to adequate provisions of both international and national law. A special element was the intensification of criminal acts, so far of an unprecedented scale of innovativeness in this field, going beyond previous definitions, and, first of all, requiring that criminal sanctions be made much more severe.”²¹

The arguments of the authors of the Polish act on punishing war criminals stipulated directly that the legislator must apply the principle of rightful “retribution” against war criminals. “Retribution is an ethical principle and, as such, has played a considerable part in the development of the criminal law” – wrote Professor Stefan Glaser.²²

The application of the principle of “retroactivity” of this special act itself is based on the right to retortion. But it was always held that the most important motive of this special legislation was a desire to “fulfil the nostrum of historic justice; that is, to establish the moral principles of international relations. This was at the same time a protest against German crimes which resulted from a system destroying international relations and trying to push humanity back in its development.” This kind of argument was an attempt to prove that the activities of Polish legislators were based not only on Polish issues, but also on a generally shared position, and was aimed at fixing international relations by modernizing and improving international law.

Komarnicki, being the main author of the Polish concept of special criminal law for a transitory period, argued for basing the Polish decree strictly on the norms of international law. As a Minister of Justice, he supported the use of regulations of The Hague Conventions.

Inspired by the Roman principle of *lex retro non agit* and corresponding to the requirements of civilized legislative standards, penal law constituted the main motive for criticism of the idea of special criminal legislation for a transitional period after the war. In Great Britain this criticism was strong, although the progressive flow of information about the wonton cruelty of the Nazis in Europe weakened it significantly. “Of course, there are still many doctrinaires among international law theoreticians demanding the maintenance of far-reaching guarantees of an impartial judiciary in this field, namely proceedings before international tribunals. Due to participating in numerous international congresses before the present war I am well acquainted with the mentality of this community. However, also in this community, understanding for intensifying reprisals for international crimes continues” – said Komarnicki at the cabinet meeting of 2 July 1942.²³

21 Ibid.

22 Ibid. The full text of Glaser’s considerations is in the annex to this article.

23 IPMS, Collection 183/30.

The “retroactivity” of the decree should be considered justified as needed because “in relation to the Germans, it will constitute the consequence of applying retroactively, criminal legislation in the countries occupied by them. In particular, this applies to Poland, whereas the German decree of 1 October 1939 introducing the German Criminal Code and courts martial (*Standgerichte*) was issued to judge alleged crimes committed before 1 September 1939. Under this decree, the Germans have convicted and are still convicting thousands of Polish citizens for the alleged abuse of Germans upon the very outbreak of the war. Under the terms of this decree, the Germans dispensed justice as they saw it throughout the entire territory of pre-war Poland. Defendants (brought to book under this retroactive law) included insurgents (in the post-World War I anti-German uprisings) of Greater Poland (Wielkopolska) and Upper Silesia.”²⁴

Komarnicki also referred to the speech of Lord Maugham at an International London Assembly on 28 September 1942, who stated that “retroactivity of legislation is by no means a stranger to English law.” He referred to numerous cases from the history of English law when retroactive legal acts described by English lawyers as *lex pro re nata* were issued.²⁵

It should be emphasized that the Minister of Information, Prof. Stanisław Stroński, introduced an important amendment to Article 1, which originally was narrower in scope. At his request, it covered “persons serving the German Reich or its allied states or states cooperating (with them) in time of war”. Stroński’s intention was to help the restored Polish State to “apply the decree to Latvian and Lithuanian policemen, and the so-called navy blue policemen who took part in German executions carried out in Poland.”²⁶

At a cabinet meeting, Komarnicki claimed that the international situation had essentially changed “in favour of the Polish theses on the responsibility for war crimes”. He stated that the favourable attitude of the international community to the Polish idea of special criminal legislation for war criminals was to a significant extent “the result of the operations” of the diplomacy of the Polish government in exile. First of all, Komarnicki spoke of the great impression made by information on the Nazi Reich’s criminal occupation policy. “Growing understanding of this problem is resulting to a large extent in increasing German terror ... It is clear that we are entering a new particularly grim and cruel phase of the war in which the Germans, who sense that the tide is turning against them, will resort to ever increasing cruelty, and cross every boundary, which may harm the Allied nations.”²⁷

24 Ibid.

25 Ibid.

26 Ibid.

27 Ibid.

Komarnicki argued that special national legislation would be necessary in order to impose adequate penalties on the perpetrators of crimes in occupied states. “The issue of the scope of those to be punished involves the issue of jurisdiction,” he said. “If only the leaders are to be tried, then the international tribunals will satisfy the need. But if those executing orders – and there are many of them – are to be tried as well, it will be necessary to involve national courts.”²⁸

The effects of special legislation were not clear. In summer 1942, in view of the perception that “Germans are elated with the victories in Russia and Libya”, this gave rise to the argument that condemnation and the threat of penalties would not stop the criminals. There were also concerns as to whether “issuing the decree would not result in reprisals back home”. However, in the opinion of Minister Komarnicki, the idea of a special act could bring some positive results during the war, by affecting the Nazi leaders psychologically. He said: “It would be erroneous to believe that this activity has effect only on paper. On the contrary, it may have an inhibiting effect, especially considering the psychology of Germans who are raised in fear of *Gesetz* and *Verordnung*. The provisions of this act may have much stronger effect than the strongest words used in statements and speeches.”²⁹ Today, we can state that Komarnicki was not right, as the various statements of Allied governments on the intention to punish war criminals did not have a mitigating effect on the Nazi authorities in the occupied territories. It must be emphasized that the Polish Minister of Justice argued with the British general public, which maintained that “threatening with sanctions will have an adverse psychological effect on the Germans in that it would reinforcing their resistance.”³⁰

While addressing the cabinet on 17 October 1942, Komarnicki declared the need to inform the Allies on the decree of the Polish President and made the timing of its publication subject to agreement with them. The Minister was convinced that “the best possible moment for issuing the decree has come” but “its effect will be greater if we agree our moves with at least some of our Allies.”³¹ This was why the President signed the document nearly six months later.

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28 Ibid.

29 Ibid.

30 Ibid.

31 Ibid.

(1) The idea of Polish special legislation against war criminals was based on the belief that it was necessary to declare the adoption of penal sanctions against perpetrators of crimes in the occupied Poland before the end of the war.

(2) War crimes committed by the Soviets in the Polish territories they occupied in 1939-1941 were not forgotten, but any thoughts of retributive justice in their respect had to be sacrificed on the altar of a greater need once the USSR took up the main strain of war against the Third Reich.³² In Polish diplomatic parlance in exile, the Soviet Union became “the allies of our allies”.

(3) The Hague Conventions of 1907 constituted fundamental support for the authors of the Polish special legislation against war criminals. As frequently underlined, it expressed “the conscience of humanity” of those times. In the unyielding opinion of the Polish legislators, they provided the basis for defining acts forbidden by law in foreign territories occupied by civilised countries. However, they were not sufficient and new international and national regulations were needed.

(4) The principle definitions of new criminal acts were introduced with the awareness that they breached the *lex retro non agit* principle and, by way of special legislation, they provided the possibility of holding war criminals responsible. It was justified by reference to the principles of Roman law and the obligations imposed by The Hague Conventions that were breached by the authorities of the Third Reich.

(5) Waław Komarnicki, the author of the Polish doctrine of prosecution of Nazi crimes, subscribed to the view that punishment of the authorities of the Third Reich alone was not enough; it was also necessary to penalise the executioners of the orders, edicts and criminal practices ordained by those authorities.

(6) Polish legislators working on the presidential decree of 30 March 1943 on investigating war crimes believed that once the war ended, it would be necessary to establish special international judiciaries to punish war criminals. However, they argued with equal vigour that special national legislation and national jurisdiction would also be necessary.

(7) Komarnicki believed that the planned anti-German retributive justice legislation constituted “the best possible attempt at the first national codification of international criminal law in this respect” of all the nations that fell victim to German aggression and subjugation.

32 Prof. Komarnicki was a prisoner in the USSR in the period 1940-1941 and released under the terms of the Polish-Soviet agreement (a. k. a. the Sikorski-Majski Agreement) of 30 July 1941. By decision of Prime Minister Sikorski he was brought to London to take office as Minister of Justice.

(8) Finally, it should be stressed that no time bar was envisaged for the prosecution of Nazi crimes.³³ Special executive ordinances and regulations were to be developed later, after 30 March 1943, the date this presidential decree was to pass into law.

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Annexes³⁴

Decree of the President of the Republic of Poland of the 30 March 1943
on liability for war crimes

Article 1.

This Decree appertains to penal liability for offences set out hereunder after the day of 31 August 1939 committed in conjunction with the German Reich, its Allies and to all other Countries co-operating with them, as well as to persons in the employ of any such Countries, without regard to where such offences may have been perpetrated.

Article 2.

Persons who in defiance of the principles of international law commit any offence against the Polish State, Polish legal authorities or Polish citizens are liable to punishment by imprisonment.

Article 3.

If any offence under Article 2 results in the death, torture, physical disability, permanent physical or mental illness, incapability for work, imprisonment of fourteen days or more, compulsory eviction or expropriation of a Polish citizen, the offender is liable to punishment by life imprisonment or death sentence.

Article 4.

If any offence under Article 2 causes general danger to human life or public health in Poland, the offender is liable to punishment by life imprisonment or death sentence.

Article 5.

A person who compels a Polish citizen to join foreign armed forces or, in defiance of the principles of international law, to work for the enemy, is liable to punishment by life imprisonment or death sentence.

33 This concept was discussed in Karol Jonca, 'Polska doktryna nieprzedawnienia zbrodni hitlerowskich', *Biuletyn Głównej Komisji Badania Zbrodni Hitlerowskich w Polsce*, 33 (1991), 33-45.

34 Both documents are kept in the Prof. Stroński's papers (IPMS, Collection 183/30).

Article 6.

(1) The punishment for a person passing judgment on behalf of the occupying authorities according to laws contravening the principles of international law wrongs a Polish citizen is imprisonment.

(2) If a judgment results in an offence under Articles 2 and 3, the offender is liable to punishment by life imprisonment or death sentence.

Article 7.

A person who in defiance of the principles of international law pillages, steals, destroys or substantially damages either public or private property of general national value, is liable to punishment by life imprisonment or death sentence.

Article 8.

Courts sentencing for any offences under this Decree may also impose the additional penalty of forfeiture of property and/or inheritance rights.

Article 9.

Penalties for offences under Articles 2 to 8 are to be imposed on persons who order offences to be perpetrated as well as on persons who carry out such orders.

Article 10.

Statutes of limitation as provided for under Article 86 of the Penal Code are to run from the day of resumption of a suspended Military High Court hearing.

Article 11.

Offences set out in this Decree are to be tried by courts-martial in accordance with the rules of wartime procedure.

Article 12.

This Decree shall be implemented by the Ministers of Home Affairs, Justice and Military Affairs.

Article 13.

This Decree will pass into law on the day of its publication.

President of the Republic of Poland

Prime Minister

Minister of Home Affairs

Minister of Justice

Minister of Military Affairs

Note on the Application of Criminal Procedure to Illegal Acts
Committed in Territories under German Occupation

An unprecedented feature of the present war is the extent to which international law is being violated. Acts are constantly being committed in contravention of the fundamental principles, rules and customs of the Law of Nations. These breaches are particularly marked in the occupied countries where, either at the command of the German authorities, or on their own initiative, officials are carrying out illegal acts which are not only hostile to the vital interests of the occupied nation in question but also harmful to human society in general.

It is unnecessary to specify these acts in detail. They include mass executions, the wholesale plundering of private property, the widespread adoption of methods of torture and similar proceedings.

It is submitted that acts of this kind, committed on so wide a scale and with such clear intent, ought not go unpunished.

The case for subjecting those held responsible for such acts to criminal law procedures rests on two grounds.

One is that the idea of justice demands it. Retribution is an ethical principle and, as such, has played a considerable part in the development of criminal law. One of the purposes of punishment consists in giving satisfaction to the moral feelings of the community at large. No authority responsible for the upholding of justice in the community can fail to take into consideration the resentment felt by a society that has suffered injury from a crime. This is not only the general view of ordinary mankind but has also been recognized and upheld both by theorists, such as Professor Henry Sidgwick and by practicing jurists such as Sir Edward Fry, Lord Justice Kennedy and Lord Justice Wright.

In this connection some discussion has arisen as to who should be proceeded against in cases where a crime has been committed by a subordinate at the command of his official superior. Some years ago, the writer of this Note submitted arguments in support of the view that the responsibility should be placed upon both parties and that both should be subjected to criminal penalties.

As a guarantee of impartiality in dealing with such cases, it is suggested that they should be tried by an International Court composed of nationals of countries which have not been under enemy occupation during this war. This court would be empowered to demand the extradition of persons against whom a charge was laid.

It might be found opportune to draw up a code of the crimes involved in such cases.

If it was decided that action along the above lines was called for at the end of the war, it is suggested that practical steps might be taken immediately

(1) to announce to the world by wireless and any other means that it is proposed to set up a court of this kind after the war,

(2) to urge by similar means the populations concerned to collect and preserve the fullest possible evidence, for use in the future trials.

In addition to their utility in the future, these measures would also, to some degree, have a preventive effect during the war.

Professor Stefan Glaser, PhD

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