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NAZI CRIMES IN POLAND: A NEVER-ENDING SEARCH FOR JUSTICE

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ABSTRACT

This article deals with the model for prosecuting Nazi crimes committed in Poland in the light of the model presently used in international criminal law. It tries to answer the question: should the investigation of crimes of international law be handed over to transnational tribunals? Should they be hybrid tribunals involving a national factor, or completely supra-national tribunals like the International Criminal Court? Is it legitimate to transfer jurisdiction over these matters to national courts? The case of unpunished Nazi crimes in Poland may give a partial answer to this question. Certainly, various attempts made after World War II, including procedures brought before Polish courts, have contributed to understanding the function of international criminal law, and finding the answer to the question of the best model for prosecuting crimes of international law. At present, we also have the experience of international criminal tribunals, in particular the ICC, which is an efficient machine for prosecuting crimes of international law. Interesting conclusions can be drawn from its functioning that could improve the work of Institute of National Remembrance (IPN) prosecutors, and shed new light on the considerations regarding the prosecution of Nazi crimes in Poland after World War II.

KEYWORDS

prosecution of war crimes, international criminal law, Nuremberg trials, Polish Supreme National Tribunal, Institute of National Remembrance, post-conflict justice

In the 21st Century the issue of prosecuting Nazi crimes¹ committed in Poland is still pending. It would seem that too many years have passed to continue the search for justice. However, since justice has not been delivered in due time – and what ‘due time’ is will be looked at in more detail later on – it seems that over 70 years later there is still an expectation that justice will be delivered, and bring the sense of justice having been done. Is it now too late? Nowadays, when we talk about ‘justice’ our mind’s eye is directed towards a courtroom. We share a feeling that this is the right place to look for justice. As such, criminal law and criminal trials assume the key role in delivering justice after crimes of international law have been committed – crimes such as genocide, crimes against humanity, war crimes and the crime of aggression (so called ‘strict form of legalism’); obviously, this is the justice in systematic ‘legal constraints’. However, this is just one of the views presented in literature: there are still other opinions, according to which courts should focus on administering justice, understood as determining the guilt or innocence of an individual and not delivering justice, a historical picture of past events, or a sense of revenge (so called liberal legalism).² In the Anglo-Saxon literature the inability of adversarial trials to search for the true account of events has also been underlined. Also during the International Criminal Tribunal for the former Yugoslavia (ICTY) trials it was observed that usually ‘history largely gives legitimacy to the Prosecutor and condemns the accused’.³ Thus, other forms of transitional justice instruments should (according to this conception) be applied, such as e.g. ‘truth and reconciliation commissions’. Generally, however, state authorities took over the functions of revenge and compensation that had traditionally belonged to the victim of a crime. In the case of crimes committed in Poland and against Polish citizens, however, they seem to have failed – on many levels and because of numerous reasons. P. Grzebyk wrote that in the post-war period, the lack of criminal-law response from law enforcement authorities of any of the states was an example of the selectivity of post-war international justice; moreover, the lack of response proved how political interests outweighed the needs of justice. It is also worth remembering that prosecution of war criminals became an obligation under international law: the Declaration of January 13, 1942 announced that the United Nations undertook to identify war criminals and ensure that they were tried and judgments were executed; also the Moscow Declaration of October 30, 1943 announced on behalf of 32 United Nations that war criminals ought to be aware of the

1 On distinguishing between ‘Nazi’ crimes and ‘German’ crimes see: K Małcużyński, *Norymberga, Niemcy 1946* [Nuremberg. Germany 1946] (Wiedza 1946) 66 who quoted Prosecutor Jackson saying that not the whole nation was responsible for the crimes; also A Kłafkowski, *Ściganie zbrodniarzy wojennych w Niemieckiej Republice Federalnej w świetle prawa międzynarodowego* [Prosecution of War Criminals in the German Democratic Republic in the Light of the International Law] (Wydawnictwo Poznańskie 1968) 10, 180 and J Lubecka, ‘Punishing German War Criminals in Poland’ in J Niechwiadowicz (ed), *German Camps, Polish Victims* (Support Poland Limited 2012) 12–18.

2 RA Wilson, *Writing History in International Criminal Trials* (CUP 2011) 3.

3 Ibid 5.

fact that they would be brought to the place where they had committed their crimes and judged there by the nations that had fallen victim to their violence.⁴

In this article, the efforts to deliver justice for the crimes of international law committed by the Nazis on the territory of Poland will be explained, as they took place in many different legal forums, as well as the reasons why they have so far failed to deliver complete results – ‘complete’ in this case meaning bringing to justice even a significant fraction of the perpetrators. The article will also deal with the question of if there are any legal obstacles to prosecution of Nazi crimes by the Polish authorities. It will show that there are both legal grounds to do it, and that it is being done in practice. It will also analyse the model of delivering justice after World War II in the perspective of the presently known solutions. Finally, the reasons which stand behind the continuous investigation of crimes committed over 70 years ago will be explained.

The model adopted for prosecuting Nazi crimes after World War II assumed a shared forum: actions towards bringing the perpetrators of Nazi crimes to justice were undertaken in all the available legal forums. Crimes of international interest were prosecuted by an international tribunal (the first one in history): the Military International Tribunal in Nuremberg conducted trials of the Nazi leaders. The most serious crimes of Polish national interest were chosen to be tried in the special tribunal forum – the Supreme National Tribunal – the rest of the Nazi crimes were left to be tried before common courts – both German courts, including those established by the Allies, and also Polish courts. Establishing an international criminal tribunal, whose jurisdiction had priority and which became a procedural forum for the crimes whose prosecution was in the interest of the four victorious states, was characteristic of the model of delivering justice after a great international conflict. The Tribunal, necessarily, had only a limited jurisdiction: only those Nazi crimes that were in the interest of the whole European area were to be prosecuted. The crimes, it was decided, had to be directed against the whole of Europe and not only against one nation. Therefore, only a select few of the crimes committed on the territory of Poland and against Polish citizens were prosecuted by the Military International Tribunal in Nuremberg. Thus, the ‘internally’ committed crimes were to be prosecuted by national courts. The main prosecutor in Nuremberg, Robert Jackson, even wanted the trial to be only focused on the crime against peace.⁵ For political reasons, and for the sake of cooperation on the part of the Soviet Union in the ‘international criminal tribunal project’, many cases were abandoned (e.g. the Warsaw Uprising, the Katyn crimes).⁶

4 A Klafkowski 129.

5 P Grzebyk, *Hidden in the Glare of the Nuremberg Trial: Impunity for the Wola Massacre as the Greatest Debacle of Post-War Trials* (Max Planck Institute 2019b) 7, 11.

6 P Grzebyk (2019b) 13 and P Grzebyk, ‘Unintended or Deliberate – the Omission of the Wola Massacre in the Nuremberg and Post-Nuremberg Trials’ in E Habowski (ed), *Wola 1944. Nierozliczona zbrodnia a pojęcie ludobójstwa = Wola 1944: an Unpunished Crime and the Notion of Genocide* (Instytut Solidarności i Męstwa im. Witolda Pileckiego 2019) 311.

On a national level, trials were held both in Poland and Germany. Different models were used in two German states: the courts established by the Allies in the occupational zones in Western Germany investigated Nazi crimes. Also Western German authorities brought some of the perpetrators before the courts throughout the 60s and 70s.⁷ However, the trials held in Western Germany were rightfully described as an ‘evasion of justice’.⁸ The real scale of this evasion may be seen in the fact that, for razing the entire city of Warsaw to the ground, only four soldiers were found guilty, and they were convicted to deprivation of liberty for periods ranging from 6 months to 9 years.⁹ In Eastern Germany, the model of prosecution of Nazi crimes also raised reservations: the occupying Soviet authorities set up military courts in which hearings were held without public oversight.¹⁰ These courts were subject only to the Soviet military administration and simultaneously applied both German and Soviet law.¹¹ However, while the previously mentioned courts tried 80,000 people, these tried only 744. Finally, during the so-called Waldheim trials, 3324 people were tried – in speedy, 20-minutes long trials and according to the collective responsibility principle.¹²

The crimes committed within the territory of Poland were also (simultaneously and in parallel) prosecuted by the Polish national authorities. At the national level of prosecution, Special Criminal Courts were instituted just after the Red Army entered Polish territory – these courts were also responsible for prosecuting war criminals in a special accelerated procedure.¹³ In 1945 the Main Commission for the Investigation of Hitlerite Crimes began

7 Although the numbers of the war criminals vary: according to Western Germany archives 80,000 perpetrators were found guilty, according to Eastern Germany archives it was only 5,234 – see: A Klafkowski 136.

8 See P Marti, *Sprawa Reinefartha. Kat Powstania Warszawskiego czy szacowny obywatel* [The Reinefarth Case. A Hangman of the Warsaw Uprising or a Respectable Citizen] (Świat Książki 2016) 171–174; H Radziejowska, ‘The Memory of Wola Massacre of 1944: New Sources and Areas of Research’ in E Habowski (ed) 390; K Friedla, ‘Mit obrachunku z przeszłością. Ściganie zbrodni nazistowskich i wojennych w radzieckiej strefie okupacyjnej Niemiec i Niemieckiej Republice Demokratycznej’ [Accounting Myth with the Past. Prosecution of Nazi and War Crimes in the Soviet Occupation Zone of Germany and the German Democratic Republic] (2016) *Zagłada Żydów. Studia i materiały* 12, 493–494 describing the research conducted by Henry Leide, who proved how instrumentalised the criminal trials conducted by the Allies were, and how they were used for political purposes, as well as analysing the background and recruitment of former Nazis who cooperated with the Stasi. According to the research, from the very beginning, the prosecution of Nazi crimes in the German Democratic Republic was the responsibility of the Stasi and special services. They were also involved in prosecution of National Socialist crimes.

9 H Radziejowska 390.

10 A Klafkowski 71 who at that time regretted the GDR’s rejection of the Nuremberg law.

11 K Friedla 494 From 1945 to 1947 according to official Soviet reports, 65,138 persons who were accused of belonging to Nazi organizations were interned, from which the Soviet military courts had sentenced in total 17,175 persons – and until 1950: even 80,000.

12 In total: 12,000 war criminals were found guilty, see A Klafkowski 135; K Friedla 498.

13 J Lubecka, ‘Rozliczenie zbrodni niemieckich w Polsce, ze szczególnym uwzględnieniem Małopolski. Stan badań, perspektywy badawcze’ [Settlement of German Crimes in Poland, with Particular Emphasis on

prosecuting Nazi crimes committed in the territory of Poland (obviously including crimes committed against persons of Jewish nationality).¹⁴ Regarding the effect of the works of the Commission *inter alia*, 7 trials were conducted before the Supreme National Tribunal (SNT) and 49 accused stood trial.¹⁵ Regardless of the fact that the Main Commission functioned as a justice body of the Peoples' Republic of Poland many of its activities corresponded to the universal needs and interests of Polish society and the nation.¹⁶ It is not possible to say that no action was taken by the Tribunal. Thousands of witnesses were interviewed, mainly during hearings before the Supreme National Tribunal, and delegations of Polish prosecutors were twice sent to Germany. One cannot ignore the SNT's capital contribution to documenting crimes.¹⁷ However, prosecution before the SNT cannot be assessed as fully effective – not only because prosecutors did not have any liberty in selecting cases and perpetrators, but also because many suspects could not be physically brought before the Tribunal because of lack of consent for their extradition. Nonetheless, many suspects were extradited¹⁸ – as e.g. on the 25th of May 1945 Rudolf

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- Lesser Poland. Research Status, Research Perspectives] (2012b) *Zeszyty Historyczne WiN-u* 21(35), 77.
- 14 The Main Commission for the Investigation of German Crimes in Poland was established on the basis of Dekret z dnia 10 listopada 1945 r. o Głównej Komisji i Okręgowych Komisjach Badania Zbrodni Niemieckich w Polsce [Decree, dated 10 November 1945, on the Main Commission for the Investigation of German Crimes in Poland] [1945] *JoL* 51, 293 and thereafter functioned on the basis of the Ustawa z dnia 6 kwietnia 1984 r. o Głównej Komisji Badania Zbrodni Hitlerowskich w Polsce - Instytucie Pamięci Narodowej [Act of 6 April 1984 on the Main Commission for the Investigation of Crimes against the Polish Nation – Institute of National Remembrance] [1984] *JoL* 21, 98 and now it is ustawa z dnia 18 grudnia 1998 r. o Instytucie Pamięci Narodowej - Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu [2019] *JoL* 1882, t.j. On the crimes committed against persons of Jewish nationality see J Hackmann, 'Defending the «Good Name» of the Polish Nation: Politics of History as a Battlefield in Poland, 2015–2018' (2018) *Journal of Genocide Research* 20(4), 594 – although the author does not share opinions expressed in the text.
- 15 See: T Cyprian, J Sawicki, *Siedem wyroków Najwyższego Trybunatu Narodowego* [Seven Judgments of the Supreme National Tribunal] (IZ 1962); J Lubecka, 'Der Prozess Gegen Rudolf Höß. Verlauf und Juristische Aspekte' in E Heitzer, G Morsch, R Traba, K Woniak (ed), *Im Schatten von Nürnberg. Transnationale Abndung von NS-Verbrechen* (Metropol Verlag 2019) 158.
- 16 See: Ł Jasiński, 'Sprawiedliwość i Polityka. Działalność Głównej Komisji Badania Zbrodni Niemieckich / Hitlerowskich w Polsce 1945–1989' [Justice and politics. Activities of the Main Commission for the Investigation of German / Nazi Crimes in Poland 1945–1989] (2018) *Dzieje Najnowsze* 50(1), 317.
- 17 J Sawicki, *Przed polskim prokuratorem. Dokumenty i komentarze* [Before the Polish Prosecutor. Documents and Comments] (Iskry 1958) 89–90; A Klafkowski 211.
- 18 The numbers are given e.g. by W Bułhak, 'In Search of Political Justice: From the Main Commission for the Investigation of German Crimes in Poland to the Institute of National Remembrance' in M Brechtken, W Bułhak, J Zarusky (eds), *Political and Transitional Justice in Germany, Poland and the Soviet Union from the 1930s to the 1950s* (Wallstein 2019) 183: *Of the 4,000 or so applications for extradition received in the American Zone of Occupation, about thirty per cent concerned Poland. This was the largest group of extradited persons in terms of their number and percentage. Somewhat fewer than four hundred people were extradited from the British Zone. Relatively small groups, counted in no more than double figures, were brought over from the French and Soviet Zones.*

Höß was extradited to stand trial before the SNT.¹⁹ The Tribunal conducted trials of perpetrators that were held prisoner in Poland.²⁰ In practice, these were the crimes that were practically and politically ‘correct’ to be prosecuted. All the cases chosen to be tried had to be confirmed by the communist party. In the post-war period, most trials of ‘less spectacular perpetrators’ were also held before common courts: e.g. the trial of Jürgen Stroop, responsible for the destruction of the Warsaw Ghetto, took place before common courts; it was the Provincial Court in Warsaw that sentenced the former governor of East Prussia, Erich Koch, to death.²¹ The proceedings before the SNT were suspended when no more extraditions could be performed – and this is given as the reason why the Tribunal ceased operations.²² Later, as J. Lubecka observes, after the signing in December 1970 of an agreement normalizing relations with the Federal Republic of Germany, all the pending cases were neglected and discontinued – there was no special authority to deal with them, nor was there any political will to prosecute Nazi crimes. In addition, after signing this agreement, the Polish side agreed that Nazi crimes should be prosecuted primarily by the German Center for the Investigation of National Socialist Crimes in Ludwigsburg (*Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung Nationalsozialistischer Verbrechen*).²³

Since 1998, prosecution of all crimes committed during the Second World War has been again taken over by the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (IPN – the re-named Main Commission).²⁴ Art. 45 of the IPN act stipulates that investigations in the cases of Nazi crimes, communist crimes, other crimes against peace, humanity or war crimes, perpetrated on persons of Polish nationality or Polish citizens of other nationalities between 8 November 1917 and 31 July 1990, are commenced and conducted by the prosecutor of a departmental commission. The investigations and later trials (before common courts) are conducted on the basis of the Code of Criminal Procedure (CCP)

19 J Lubecka (2019) 165.

20 T Cyprian, J Sawicki (1962).

21 In the period from 1944 to 1960 – 4,500 German war criminals were found guilty. See: L Kubicki, *Zbrodnie wojenne w świetle prawa polskiego* [War Crimes under Polish Law] (PWN 1963) 179–184; J Lubecka, ‘Strafgerichtsprozesse deutscher Kriegsverbrecher in Kleinpolen 1945 bis 1950 mit besonderer Berücksichtigung der Tätigkeit des Obersten Nationalen Gerichtshofs’ in S Rosenbaum, A Dziurok, P Madajczyk (eds), *Die deutsche Minderheit in Polen und die kommunistischen Behörden 1945–1989* (Ferdinand Schöningh Verlag 2017) 40 et. subseq.

22 T Cyprian, J Sawicki, *Oskarżamy. Przemówienie wstępne Waclawa Barcikowskiego* [We Accuse. The Opening Statement by Waclaw Barcikowski] (Przełom 1949) 266.

23 The contemporary authors expressed a negative assessment of the headquarters in Ludwigsburg’s activities - only in 1965 did it extend the examination of archives outside the territory of the Western Germany and agreed to use the Polish legal assistance. See: A Klafkowski 220; J Lubecka (2012b) 71.

24 Ustawa z dnia 29 kwietnia 2016 r. o zmianie ustawy o Instytucie Pamięci Narodowej - Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu oraz niektórych innych ustaw [Act of 29 April 2016 amending the Act on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation and some other acts] [2016] JoL 749 consolidated text.

of 1997. Annually, the IPN prosecutors conduct around 300 investigations in the cases of Nazi crimes.²⁵ As A. Rzepliński explains, the IPN prosecutors established ‘a monopoly’ to prosecute Nazi crimes, communist crimes, and other crimes against peace, humanity, or war crimes committed in the Polish territories during a 50 year period – from the invasion of Poland by the Third Reich on 1st September 1939 to the transition from the Communist political system to a democracy under the Constitutional Act of 31st December 1989.²⁶ The same author cites numbers relating to the caseload dealt with by the IPN:

Polish authors calculate that the prosecution of Nazi crimes in Poland involved by the end of the summer of 1980 between 80,000 and 100,000 people, and by the end of December 1977 at least 17,919 persons were convicted under the decree of 31 December 1944. [...] At the end of February 2004, IPN prosecutors had conducted 1295 investigations, including 335 (25.9%) in Nazi crime cases, 878 (67.8%) in Communist crime cases, and 82 (6.3%) in cases concerning other crimes: war crimes and crimes against humanity.²⁷

Thus, even during the current time, trials can be held before common courts – and therefore it cannot be said that the search for justice has been completed, as investigations are still pending. Similarly, just after the war, as well as presently, the substantive law on the basis of which the charges are formulated are the provisions of decree of 31 August 1994 on the punishments for Nazi criminals guilty of murders and tortures inflicted upon civilians and prisoners and for traitors to the Polish Nation.²⁸ On this point, from the perspective of substantive criminal law, one can debate on the retroactive application of the substantive law of the decree – which is, as a rule, forbidden.²⁹ On the other hand, the procedural provisions in play are always based on the up-to-date code of criminal

25 J Lubecka (2012b) 72.

26 A Rzepliński, ‘Prosecution of Nazi Crimes in Poland in 1939–2004’ [speech at The First International Expert Meeting on War Crimes, Genocide, and Crimes against Humanity, organized by International Criminal Police Organization – Interpol General Secretariat] (2004) 3, <<https://web.archive.org/web/20160303222313/http://www.gotoslawek.org/linki/FirstInternationalExpertMeetingOnWarCrimes.pdf>> accessed 6 Dec 2019.

27 Ibid; E Kobińska-Motas, *Ekstradycja przestępców wojennych do Polski z czterech stref okupacyjnych Niemiec. 1946–1950* vol 1-2 [Extradition of War Criminals to Poland from four German Occupation Zones. 1946–1950 Vol. 1–2] (IPN-GKBZpNP 1992) 19.

28 Obwieszczenie Ministra Sprawiedliwości z dnia 11 grudnia 1946 r. w sprawie ogłoszenia jednolitego tekstu dekretu z dnia 31 sierpnia 1944 r. o wymiarze kary dla faszystowsko-hitlerowskich zbrodniarzy winnych zabójstw i znęcania się nad ludnością cywilną i jeńcami oraz dla zdrajców Narodu Polskiego [Announcement of the Minister of Justice of December 11, 1946 regarding the publication of a uniform text of the decree of August 31, 1944 on the sentence of fascist Nazi criminals guilty of murder and ill-treatment of civilians and prisoners of war and of the traitors of the Polish Nation] [1946] JoL 69, 377.

29 T Cyprian, J Sawicki, *Nieznana Norymberga. Dwanaście procesów norymberskich* [Unknown Nuremberg. Twelve Nuremberg Trials] (Książka i Wiedza 1965) 24.

provisions, according to the principle of catching the trial ‘in flight’ by the provisions of the new procedural law.

There is no doubt that the crimes in question can still be investigated at the present time: no procedural premises stand in the way. Since the crimes were committed on the territory of the Republic of Poland, pursuant to Art. 5 of the Criminal Code (CC) the Polish penal act is applicable and the nationality of the perpetrator is of no consequence. Secondly, Nazi crimes, which under international law constitute crimes against peace, humanity or war crimes, do not become statute-barred – which is obvious both in international and Polish law. Even final decisions issued in Germany releasing defendants from criminal responsibility cannot bar prosecution, although in the European Union the international *ne bis in idem* principle applies: a legally binding ruling that terminates proceedings in any Member State of the European Union must be considered as valid as if it had been issued on the territory of the Republic of Poland. However, this principle applies only under several specific conditions that are not met in all cases. The main principle, established by the Court of Justice of the European Union in the case of Kossowski, is that a decision of the public prosecutor terminating criminal proceedings and finally closing the investigation procedure against a person,

*cannot be characterized as a final decision for the purposes of those articles when it is clear from the statement of reasons for that decision that the procedure was closed without a detailed investigation having been carried out; in that regard, the fact that neither the victim nor a potential witness was interviewed is an indication that no such investigation took place.*³⁰

It is clear from many decisions of the German authorities that the body of evidence gathered in the cases showed many proceedings were discontinued even though the suspicion that the suspect had committed the act with which he was charged ‘could not be excluded’³¹ – which leads to the conclusion that such a decision does not constitute the *res iudicata* situation.

Only one procedural premise stands in the way of investigating crimes committed during World War II: in principle, criminal proceedings may be conducted exclusively against living persons. However, Art. 45(4) of the IPN act provides that the circumstance referred to in article 17 § 1(5) CCP – the death of the accused – cannot constitute an obstacle to the conduct of proceedings by a prosecutor of the IPN. The objective of an investigation into Nazi crimes is not only to punish the offender (and, in light of the data of commission of the crimes falling within the competence of the Institute, numerous offenders are actually deceased), but also to clarify the circumstances of the case, and in particular to determine the victims. Once this goal is accomplished, proceedings are on

30 See Judgment of CJUE C486/14 [2016] EU:C:2016:483 point 54..

31 Reasons for decision of discontinuation of proceedings in the case against H. Reinefahrt”, case no. V/31/ 411 E – 165/58, Federal Archives in Ludwigsburg.

the basis of Art. 17 CCP, (because the suspect is dead). In most of the cases (if not all) presently being prosecuted by the IPN, too many years have passed to make it possible for the perpetrator to face a real trial³² – which is obvious in criminal procedure, but hard to understand for the victims. However, at the present time, the mechanism established by the IPN is the only, and the final, possibility to investigate these never-before investigated crimes. It is important to underline that a *sui generis* assignment of guilt occurs in a decision on discontinuance of criminal proceedings - which allows for pointing to the perpetrators and acknowledging the victims. In this situation, it is not a legally binding determination of guilt, and there exists no doubt as to the fact that, in legal categories, a person against whom preparatory criminal proceedings were instigated and thereafter discontinued continues to be innocent in the eyes of the law.

By the way of example, the case of the Warsaw Uprising is currently being investigated – three investigations conducted so far have been merged into this investigation: the case of murders of patients in hospitals in the Old Town, massive killings of the civilian population of Polish, Jewish and Russian nationality, and presently its scope covers all the crimes committed during the Uprising: against children, patients, women and men, as well as prisoners of war. It is an investigation ‘in a case’ (*in rem*) and not against a certain person (*in personam*), as no charges have ever been presented to anybody. The IPN also investigated such cases as: the Gestapo-inspired mass murder in Jedwabne on 10 July 1941, the kidnapping of Polish children for ‘Germanization’ at the *Lebensborn* establishment, the deportation of some 20,000 inhabitants of the Żywiec Area to the General Government province in 1940, the mass killings of Polish citizens of Jewish nationality during the liquidation of the so-called Lublin Ghetto, the killing by the Germans of 25 professors of Polish schools of higher education, members of their families and persons living in the same household, in Lwów in July 1941, the homicide of about 350 people by German soldiers on 8 August 1944 in the ruins of the Grand Theatre in Warsaw.³³ In these closed cases it often established that they were discontinued because of a *res iudicata* premise: in the justification one of such decisions to discontinue it was explained that

*undoubtedly the person responsible for the crimes in question was General Governor Hans Frank as the perpetrator inspiring the actions of others and tolerating the criminal behavior of the Gestapo officers subordinate to him. [...] He was tried and sentenced to death in the Nuremberg trial.*³⁴

However, in the above cited decision the prosecutor in charge of the case did not provide

32 See M Cherif Bassiouni, ‘Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights’ in M Cherif Bassiouni (ed), *Post-Conflict Justice* (Ardsey 2002) 41–42.

33 A Rzepliński 7 et subseq.

34 The IPN decision on discontinuation of proceedings in the case of alleged crimes of Hans Frank, of 29 May 2006, case no. S 42/05/Zn.

a legal basis for recognizing that the IMT verdict in Nuremberg establishes *res iudicata* for the Polish judiciary. Such basis should be Art. 114 § 1(2) CC, which provides that although, as a rule, a decision issued abroad does not constitute an obstacle to the initiation or conduct of criminal proceedings for the same offense before a Polish court, this rule does not apply to the decisions of international criminal tribunals acting on the basis of international law binding on the Republic of Poland. As a result, if the perpetrator of the crime is judged by an international tribunal, in the territory of the Republic of Poland this judgment has the status of *res iudicata* and it is impossible to proceed again with the same case against the same person [art. 17 § 1(7) CCP]. In other cases, investigations conducted by the IPN prosecutors ended with discontinuation because of the death of the perpetrator, although additional considerations regarding the form and nature of criminal responsibility of the perpetrators were presented:

*The accused's liability concerned various forms of committing crimes. They were tried both for committing crimes and for directing the activities of other persons for whom they were responsible pursuant to Art. 6 of the Nuremberg IMT Statute. It resulted from the fact that these people, by committing war crimes, acted in the implementation of a joint plan, i.e. a conspiracy to commit these crimes. In the course of the proceedings, it was also established that all the accused were involved in the development and implementation of this plan and in the plot as leaders, instigators of instigators and helpers.*³⁵

Why, despite so many efforts to prosecute World War II criminals, is there still a sense of impunity of them in the Polish society?³⁶ Why was prosecution of war criminals so ineffective in the immediate post-war period? Does prosecution by the IPN meet its intended goals? Should it continue? And here, the question of purposefulness comes into play.

The answer to the first two questions requires explaining both practical and political reasons. Firstly, the model of prosecuting Nazi crimes in Poland was marked by a practical inability to investigate these crimes. Not only in Poland was it marked by the reality of the Cold War – a lack of cooperation between the two zones, and even open hostility where Nazi trials were used as a proxy for conducting a fight. In Poland, among practical reasons the lack of state apparatus was visible. After the War, state authorities, courts, and prosecutors' offices, had to be re-established. As in many cities there was not a single building left untouched by the war, there was no space for their activities – e.g. at that time the Supreme Court was moved to Łódź. Many lawyers lost their lives, as they were among those most prosecuted by the Nazi occupation forces (there is information that almost 50% lost their lives)³⁷. In many cases, advocates did not want to act as counsel for

35 The IPN decision on discontinuation of proceedings in the case of alleged crimes committed in Ghetto in Styr, of 9 April 2013, case no. S 37/11/Zn.

36 Of course justice cannot be treated as a tool of politics and 'a history as a battlefield' – see Hackmann 587.

37 J Lubecka (2017) 42.

German defendants – the cruel memory of the crimes committed against their relatives, friends and nation was still too fresh.

Even more influential were the political reasons. As Poland became an occupation zone of the Soviet Union, decisions as to the areas of interest of judicial authorities had to be ‘confirmed’ by the communist party. Therefore, e.g., an investigation into the crimes committed during the Warsaw Uprising – the capital city of Poland was totally destroyed, to the last building – was initiated only in 1972 and concerned only crimes committed in several hospitals. For political reasons also, Nazi suspects were not extradited from Germany, as the Allies were not willing to cooperate with Poland – which had ended up in the Soviet zone.³⁸ The Allies were not willing to pass on information about their methods of investigation. Also the suspects often claimed that they were in possession of some key information regarding sensitive issues. Moreover, cooperation with the Soviets could have led to serious issues in the political fields of the Western states.³⁹ There were also rumors that some of the accused had entered into an agreement with special services in exchange for refusing to surrender them to Poland.⁴⁰ In the eyes of contemporary authors, the authorities of Western Germany did not take any legal actions that could facilitate the prosecution of German war criminals in Poland (or in the Eastern Germany). Because of many reasons no *in absentia* trials were held: although before the Supreme National Tribunal they were possible this possibility had been never used. On the other hand, Eastern Germany cooperated with the Polish authorities frequently – special services regularly exchanged data and information about Nazi criminals – in order to obtain data of ‘compromising content’ regarding West German citizens.⁴¹

The second question about purposefulness cannot be answered strictly in the affirmative: in general, it is no longer reasonable and necessary to conduct investigations into Nazi crimes in present times. The time for prosecution of Nazi crimes has passed. The search for justice was important for many reasons. It should have been a part of the so called trans-conflict justice (or transitional justice⁴²). According to this theory, the societies who experienced the trauma of international or civil war must see justice

38 Poland identified over 12,000 criminals it requested to be extradited; till 1950s eventually about 2,000 German criminals were extradited to Poland, that is only 15%, see A Klafkowski 266–267 and later: MA Druml, ‘The Supreme National Tribunal of Poland and the history of international criminal law’ in M Bergsmo, C Wui Ling, Y. Ping (eds), *Historical Origins of International Criminal Law* Vol. 2 (Torkel Opsahl Academic EPublisher 2014) 600.

39 As P. Marti wrote, the Allies supposed that they had significant experience in fighting against the Soviets, and thus could be useful for the UK and the US if a conflict broke out between the two blocs: see P Marti 94.

40 L Kubicki 54.

41 K Friedla 502-503.

42 See P Gulińska-Jurgiel, ‘Post-War Reckonings: Political Justice and Transitional Justice in the Theory and Practice of the Main Commission for Investigation of German Crimes in Poland in 1945’ in M Brechtken, W Buthak, J Zarusky (eds), *Political and Transitional Justice in Germany, Poland and the Soviet Union from the 1930s to the 1950s* (Wallstein 2019) 196.

done to the perpetrators of these crimes in order to be able to function as a normal society again. The trials in cases of crimes of international law allow us to learn about the true course of events that played a role in establishing historical events, and fulfil the ‘right to the truth’. They give objective knowledge to all the victims and allow them to face the criminals who stand in the court’s stalls. Such trials give an opportunity to ‘point a finger’ at the guilty: they show who is to blame, and for exactly what actions.⁴³ In consequence of establishing an objective truth, a national collective memory can be built.⁴⁴ Criminal trials become a tool of building and accepting the memory of events. There is even a human right which is considered to be the right to the truth. The role of criminal trials interplays with the role of historians, giving them the possibility to listen to the victims and witnesses. Criminal trials held after the incriminating events help historians to gain access to witnesses, documents and materials – as gathering of such elements is done under state authority, they become a tool of ‘writing history’.⁴⁵

Seen from this perspective, it is clear that investigations conducted by the IPN in present times cannot play the multiplicity of roles traditionally held by criminal trials in cases of crimes of international law during the post-war period. Moreover, they can be concluded only in one manner: by discontinuing the investigation because of the death of the suspect. There are only two remaining reasons why they may be important in the present times, although these do not play as important a role as the earlier described factors. Firstly, the changing political situation changed the possibilities and willingness to cooperate. The judicial authorities are finally able to establish the objective facts of many crimes. The archives in Germany are finally open, and many influential historians wish to help the Polish authorities in researching the facts. The decisions given by the IPN will end in many cases what P. Grzebyk calls ‘the deafening silence over the victims and perpetrators’.⁴⁶ As it turns out, we do not yet know everything about the facts of many crimes. Moreover, Nazi crimes can be investigated alongside and jointly with communist crimes – which was not possible in the times just after the War. Questions can be posed about why in many cases the prisoners of the Nazi concentration camps were sent directly to gulags; or why war prisoners of the Maczek Army were not allowed back into Poland – they had to wait many years and were finally held prisoner and investigated in Poland. Secondly, as was explained earlier, in the decision on discontinuation of criminal proceedings, some sort of assignment of guilt takes place. Thus, society and relatives can no longer claim that this person was ‘uninvolved’ in the perpetration of crimes and that it is defamation to blame them.⁴⁷ What is also important, is that the relatives of victims

43 Similarly J Lubecka (2012b) 69-70.

44 See BF Havel, ‘Public law and the construction of collective memory’ in M Cherif Bassiouni (ed), *Post-Conflict Justice* (Ardsey 2002) 383, 389; J Wawrzyniak, *Veterans, Victims, and Memory: The Politics of the Second World War in Communist Poland* (Peter Lang Edition 2015) 21.

45 RA Wilson 1.

46 P Grzebyk (2019b) 2.

47 As happened when, during events marking the 70th anniversary of the outbreak of the Warsaw Uprising

can finally learn the identity of these criminals. However, all these reasons – although important – lose relevance and become less and less important as the number of victims of these crimes still alive diminishes.

It is worth mentioning that criminal investigations into Nazi crimes are not only being held in Poland: in 2015 in Germany four new Oświęcim trials were launched before the courts in Detmold, Hanau and Neubrandenburg (here the case is postponed by the ‘indisposition’ of the 95-year old perpetrator) and Kiel. Three men and one woman were to stand before the German courts, accused of complicity in crimes committed in the Nazi extermination camp Auschwitz. To date, only one trial in Detmold has ended. A former guard of the extermination camp in Auschwitz, Reinhold Hanning was accused of complicity in the murder of 170,000 people, convicted and sentenced to five years imprisonment.⁴⁸ In 2011 a trial against Iwan (John) Demianiuk was concluded, and in 2015 – against Oskar Gröning. After the high-profile Demianiuk trial, in which he was sentenced to 5 years in prison, many German commentators expressed the opinion that there would be more such trials in the future. These few examples of late trials of people involved in Nazi crimes clearly illustrate the still ‘uncomfortable legacy’ of many unpunished Nazi crimes that can be observed in Germany. Prosecuting Nazi crimes in Germany had an additional characteristic: both German states had chosen and developed different strategies in the process of settling accounts with their Nazi past, and above all, they had constantly competed with each other in this field in the fight for image and acceptance in the international arena. It is claimed that after the unification 25 years needed to pass in order to conduct fair and thorough trials of Nazi criminals.⁴⁹ It seems that both societies – German and Polish – perceive the issue of Nazi crimes as ‘unfinished business’. Also, both societies realize their own goals of building collective memory and dealing with the ‘ghosts of the past’.

The final part of the analysis is looking for a general model of dealing with crimes in the post-war period nowadays and evaluating the role of national and international justice. The analysis of the model of prosecuting Nazi crimes after World War II in Poland may be related to the model of prosecuting all such crimes of international law: genocide, crimes against humanity and war crimes. The model used in Poland after World War II may become a part of the discussion on the current model for prosecuting crimes of international law: should they be handed over to supranational tribunals? Should they be hybrid tribunals involving a national factor or completely supra-national tribunals like the ICC? Is it justified to transfer jurisdiction over these matters to national courts? The case of unresolved Nazi crimes in Poland may give a partial answer to this question. On the other hand, the present experience of the international criminal justice may be helpful for the prosecution of such crimes in Poland. At present, we also have the experience of

protests were organized by the family of Heinz Reinefarth claiming that he had never been convicted of any crimes, see H Radziejowska 390.

48 See K Friedla 489.

49 Ibid 490-491.

international criminal tribunals,⁵⁰ in particular the International Criminal Court, which is an efficient tool for prosecuting crimes of international law. Interesting conclusions can be drawn from its functioning that could improve the work of IPN prosecutors and shed new light on the considerations regarding the prosecution of Nazi crimes in Poland after World War II.

In relation to the above mentioned questions, several conclusions can be presented. International criminal courts nowadays seem to be a necessary solution. Although it would seem that national courts are better placed to investigate crimes committed in their territory, both the practical reasons as well as political ones in cases of dealing with certain crimes speak in favour of the international justice system. From a practical point of view after a conflict the state apparatus is frequently non-existent, and there are practical reasons why the state itself cannot conduct trials on such a scale as would seem necessary. Moreover, the new judicial systems established after a war may not be fully functional; it may be influenced by other states (in the case of Poland it was a case of a new occupation). Political reasons may stand in the way of extradition of perpetrators: other states may refuse to extradite nationals or residents – whereas an international tribunal has special powers at their disposal to force cooperation (as provided by the ICC Statute⁵¹). From a theoretical point of view it has been proved that international criminal trials have produced historical narratives that have been much farther reaching than national courts. International courts obtain documentary archives from all the interested governments and

50 M.A. Drumbl writes: *Eerie parallels arise between prosecutions conducted under the Polish decrees and those conducted over 50 years later in Rwanda under the gacaca legislation, which was also simultaneously used to prosecute both genocide-related offences and persons pretextually alleged to have collaborated in or denied genocide [...]* *The work of the Tribunal also contributes to the typological study of perpetrators of mass atrocity*, see MA Drumbl 600-601.

51 In accordance with Art. 87(7) Rome Statute of ICC, where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council. In response, the Security Council may take measures within its powers [this is also referred to in the Agreement concluded between the International Criminal Court and the UN in Art. 17 (3)]. On the other hand, the Assembly of States Parties to the Statute may apply general means of pressure applied by states in international relations, e.g. to decide on the application of common economic or political sanctions. Sanctions for non-cooperation in the practice of the International Criminal Court were used after the arrest warrant against the former president of Sudan Al-Bashir was issued. The International Criminal Court ‘complained’ to the Assembly of States Parties to the Rome Statute of the Union of six states in which the former president was staying that refused to execute the arrest warrant; they were Malawi in 2011, Chad in 2013, Democratic Republic of Congo in 2014, Djibouti, and Uganda in 2016 (in each case the non-cooperation was also notified to the UN Security Council, which presented the situation in Sudan for consideration Court). In several other cases, after finding a lack of cooperation consisting in refusing to arrest Al-Bashir, the International Criminal Court found this fact, but taking into account the unique circumstances of the case, he did not decide to present it to the Assembly of States Parties to the Rome Statute of the Academy of Fine Arts and the UN Security Council (this concerned South Africa in 2017 and Jordan in 2019).

sides of a conflict. At the same time, criminal trials are often criticised as ‘overly complex, excessively technical, and obsessed with minor procedural details’,⁵² which makes them ‘boring’ for observers and commentators. Also, it came to be called a ‘central mistake’ to confuse the need to bring one man to trial with the need to produce a clear narrative of war crimes and atrocities for the history books and to prove certain versions of history (in the case of Slobodan Milosević tried before the ICTY).⁵³ Moreover, international criminal courts are influenced by political reasons more than they would be ready to admit. As was mentioned above, the Nuremberg trials were not free from the political influence of the Soviet Union (for the sake of the functioning of the first instance of an effective mechanism of international criminal justice) and the ICC in many cases cannot avoid such accusations (as in the case of discontinuation of an investigation into the situation in Afghanistan in the first instance). As soon as political interference becomes visible, a mechanism of delivering justice may lose credibility. In order for criminal procedure to be trustworthy it must stay clear of any political influence and remain grounded in the domain of law. On the other hand, sometimes it is political influence that makes it possible for international criminal justice to exist.

Even if an international court exists, and has jurisdiction over some cases – the most grave and important – the national courts should play (as far as they are practically able to do so) an important complementary role. Usually, international courts are not designed to fulfil important tasks of transnational justice such as conflict-resolution, reconciliation and deterrence. Such functions of justice should be fulfilled by a national justice system. Thus, each forum of justice plays different roles and these roles are intertwined. As an international criminal court deals with the most heinous crimes of international interest, national courts hold trials of minor war criminals, more rooted in the local circumstances: this connection of the roles played by the two forums of justice can be seen as dealing with ‘monumental history’ by international justice and by national courts dealing with ‘microhistories’; obviously, the national courts also should perceive the ‘micro-stories’ of individuals through the prism of the monumental history, and gather materials that could contribute to historical research.⁵⁴ L. Kubicki observed that proceedings against individual persons can never give a proper and full picture of war crimes committed during World War II, and consideration only of the facts of an individual case does not allow for proper assessment. Also in national forum there is a need to undertake extensive source research, aimed at potentially gathering the full evidence regarding the circumstances of the crime – as only in the light of this general information does it become possible to properly analyze the crimes committed in Poland.⁵⁵ There are also other connections between these two mechanisms of delivering justice. Characteristic of the relation between international trials and national trials – both after World War II and nowadays – is the influence of

52 RA Wilson 11.

53 Ibid 1.

54 Ibid 112.

55 L Kubicki 45.

the concepts used in the international forum on national law and jurisprudence. In the Nuremberg trials, legal concepts of criminal enterprise and command responsibility were used – and later the Polish Supreme National Tribunal and common courts utilised the same legal notions.⁵⁶

R. Lemkin complained that although some elements of justice have been done in Nuremberg, the Allies did not want to establish a rule of international law that would prevent and punish future crimes of this type – they ‘refused to envisage future Hitlers’.⁵⁷ Finally, since the International Criminal Court operates, this failure has been repaired. The elements of the most heinous crimes of international law have been described in the Rome Statute, playing a preventive role, as well as defining and developing international criminal law in this area. Nowadays, the influence of international criminal courts on the concepts functioning in national law cannot be neglected: such notions of criminal law and procedural criminal law as the irrelevance of state immunity of perpetrators or the understanding of the notion of command responsibility have become part of national law. Thus it is clear that the principles of prosecution of crimes of international law have been evolving and are still evolving both on national and international level as these two are linked and in constant communication.

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