

Jerzy Gumkowski, Tadeusz Kułagowski: *Zbrodniarze hitlerowscy przed Najwyższym Trybunałem Narodowym*, Warszawa 1961, Wydawnictwo Prawnicze, s. 265 * *Les nazis criminels devant le Tribunal National Suprême* * *Гитлерфашистские преступники перед Верховным Народным Трибуналом* * *Nazi Criminals before the Supreme National Tribunal*

Tadeusz Cyprian, Jerzy Sawicki, Mieczysław Siewierski: *Prokurator ma głos*, Warszawa 1962, Iskry, s. 261 * *Le procureur accuse* * *Прокурор выступает с речью* * *Prosecutor has the floor*

Tadeusz Cyprian, Jerzy Sawicki: *Siedem procesów przed Najwyższym Trybunałem Narodowym*, Poznań 1962, Instytut Zachodni, s. 384 * *Sept procès devant le Tribunal National Suprême* * *Семь процессов перед Верховным Народным Трибуналом* * *Seven Trials before the Supreme National Tribunal*

1. Three publications dealing with the trials carried on before the Supreme National Tribunal in Poland appeared, almost at the same time, on the booksellers' shelves.

One of them gives the texts of all the sentences passed by the Tribunal in the cases of Arthur Greiser, Amon Goethe, Louis Fischer and others; Rudolph Hoess, 40 mem-

bers of the Oświęcim camp crew, Albert Forster and Joseph Bühler. The second one throws light upon the procedure of the trial, analyzes the evidence material, characterizes the silhouettes of the accused, and it also presents in brief the contents of the sentences pronounced in the four trials given. Finally, the third of the publications contains fragments of the prosecution speeches delivered during the trials of all the cases at the Tribunal, and also at the trial of the Majdanek camp crew before the Special Criminal Court (from November 27 to December 2, 1944).

The character of the books differs. The first one makes available the source material indispensable in the research work on the period of Hitlerite occupation and on the problems concerning recent history. The second book (which is based not only on the documents contained in the files and on the contents of the sentences but also on the materials from outside of the court and on the authors' reminiscences) brings the reader into the atmosphere in which the trials were carried on. The third of the books is meant for the readers at large though it may also be useful in the research work. The fragments of the prosecution speeches contained in it, often fascinating because of their form, touch ingeniously upon the key problems in the domain of the international and the criminal law. All three publications — in spite of their different character and in spite of the diverse circles of readers they are meant for — complement one another. After all, it is but natural considering the relationship of the pleas of the parties involved in the trial with judicature.

So it is worth dwelling upon the juridical problems contained in the prosecutors' speeches and in the sentences. Certainly not upon the whole of the juridical problems touched upon there, for that would be impossible because of the rich and vast extent of the topic. We shall confine ourselves only to two questions bound with each other, and, namely, to the question of the responsibility for acting in a group and to that of the responsibility for acting in carrying out an order. For such were the key questions for estimating the penal responsibility for the crimes committed in the period of war and occupation. And these problems have run throughout all the trials — from the case of the Majdanek camp crew and on through the case of Bühler — the premier of the so-called General Government.

2. The problem of the responsibility for acting in a group was nothing new in the criminal law. It has long since been a subject of doctrinal concern, it found its allocation in penal codes and — clear enough — it was not strange to judicature. But the practice of fascism and above all that of Hitlerism had put it on quite another plane.

They were not groups opposing state authority and in conflict with the law of their own country and with their people, but they were unions called upon by the state or enjoying its support and protection; they were organizations determining jointly or carrying out the policy of the state and committing crime within the dignity of law.

What weighed heavy was the immensity of the problem — the number of the groups which took part in carrying out the crimes. For it was not a question of groups of few, few tens or few hundreds of participants, it was a case of tens and hundreds of thousands and even millions of people.

Additional difficulty was brought on by the fact that the expanse of the crimes committed and the number of groups that carried them out brought about a far-advanced "division of work". Separate functions performed by the members of the groups are often far from the criminal-like effect. However, they were the links of a chain leading to most heavy crimes. And their participants were involved in the gigantic assembly-line-like action of destruction in the operating of which one action brought about another.

Old legal conceptions, the paths grooved by practice were inadequate for the needs and proved useless and helpless in the face of new pathologic social phenomena shaped

by Hitlerism. Everything had to be built up from its foundation. The more so that Polish law-courts came to bring action against the Hitlerite criminals still in the time of war operations when it was impossible to resort to other countries for their experiences.

By no means was that easy. The path to be passed ran in between two precipices. On one hand there was danger that the conceivable emotional tensions, the feeling of being done great wrong and injustice and the desire of requittal that had swollen up in the people would drive judicature back toward collective responsibility. On the other hand the affects of the habits, of the standards existing, and of the ordinary [practice — meanted with being driven back toward solutions close to traditional ones, and so — in the face of new problems — as a matter of fact-with being led astray.

From our point of view it is not essential whether the solutions accepted then, are in all their particulars in accord with the viewpoints shaped later and with the judicature of the years that followed. It is in fact an obvious thing that the achievements of Polish Juridical practice, the resorting to the experiences of other countries, the influence of international judicature, and the position of the doctrinel worked out must have enriched, bettered and developed a number of theses adopted in the first pioneer-like period of bringing action against the Hitlerite criminals. On the other hand however it is essential that the direction of the solutions was right, that it turned out to be in accord with the solutions adopted much later in the sentence of the Nuremberg trial, for way was seen clear to attune individual responsibility and the subjective guilt with the liability to punishment for participating in the activity of criminal groups.

In the cardinal question concerning the grounds for penal responsibility of the members of groups cooperating in the crimes legalized by law, the indictment, and the Tribunal in its wake, gave a clear and no ambiguous an answer: „What happens when a criminal-like group.... take hold of a state, the legislature, and issue laws serving the moral interests of the group? I affirm — said the prosecutor — that such law is not binding and may be the object of supervision of any civilized country... There is no difference of opinions today... as to the fact that there are fundamental elementary moral principles which are binding for all the nations, which are over and above the law, which cannot be unpunishably infringed”².

Lastly, the problem deeply disturbing the world then, namely, that of the difference between the responsibility by right of participating in a group and the collective responsibility. Again, the statement of the public prosecutor must be referred to. He brought up the question that the responsibility for activity in a group is no collective responsibility. It is a responsibility for the action in a community and for that of the community... At the collective responsibility... a group quite casual is sentenced... whereas at the responsibility for the action of a group the members of the group are prosecuted. He who joins a group takes upon himself full responsibility for whatever that group does. Thus it is not the responsibility of a quiltless one. There is but one possibility of being exempt from the responsibility and that is by a conscious and explicit cutting away from it by withdrawing from the group³.

¹ This problem is fully discussed by L. Kubicki in his work entitled *Crimes of war in the cevelopment of Polish law* which is in press now.

² *Prosecutor has the floor*, p. 71—72. Also compare with the attitude of the Tribunal in the *Seven sentences of the Supreme National Tribunal*, p. 56.

³ *Prosecutor has the floor*, p. 67. The attitude of the judicature was the fact that he who joined a group involuntarily and as well the one who joined it voluntarily but who later did not carry out the criminallike objects of the group, bears no penal responsibility by right of belonging to the group. On such grounds some of the members of the crew in the Oświęcim camp of extermination were exempt from penal responsibility.

3. Considerable difficulties were brought on too by the question of the way of acting in executing the order of a superior. In Hitlerite Germany the principle of leadership and hierarchical subordination was carried out to its full.

The question of the responsibility of the one executing the criminal-like order roused no essential doubt on the part of the law. It had been a path long since wiped clear. Juridical estimation was still so much more facilitated that even the regulations of the German military code required no obedience on the part of a soldier. But, as a matter of fact, the question was authoritatively decided for the Polish judicature by way of the Decree of August 31, 1944, for this Decree had clearly stated that action or non-action on the grounds of an order did not exempt one from penal responsibility.

But that was not the point of the problem. It was not a case of estimating the action of the one executing an order in the terms of the regulations of law but in the terms of estimating its moral principles, of the moral right of punishment, of the moral sense of punishment. A whole army of people executing orders and numerous developed mass groups took part in carrying out the mankilling methods of Hitlerism. Are they themselves too in any extent — alongside the victims of their deeds — being brought to trial before the court to bear responsibility for the crimes committed, — the victims of the top order-givers? Do they bear responsibility only because they feared the consequences apt to follow with relation to them?

It was clear that the thing could not be adjudicated in the terms of the responsibility for executing an order, for that did not come in tact with reality; such solution was opposed to by the moral and juridical consciousness of people. That had to be expressed and put forth from the aspect of the principles of moral responsibility and from the aspect of law. And, though seemingly obvious and simple, — by no means was it easy. It was a fact after all, that the order was given and that the perpetrator took action in executing it. So in such scope too had the problem to be solved on the new grounds.

The problem was taken up by the spokesmen of the indictment and by the Tribunal. And the taking hold of the problem concerning the criminal-like groups became the starting point for its solution.

The prosecutor seems to have depicted his thought most successfully when, opposing the line taken by the defense, he said: „What has that plot done, what have these people done in the space of so many years? First, they have degraded man in front of his people, then the people in front of their state, they have degraded the state in front of the party, the party in front of the police, they have subordinated the police to the SS, they have degraded the SS in front of Himler, Himler in front of Hitler, and in such turn they want to account for all that. And as Hitler was brought before the ordeal of God, they consider that in such a way they are themselves exempt from responsibility..... You cannot make your own idol, you cannot get down on your knees, you cannot voluntarily creep in dust in front of the idol... and then cast off yourself the responsibility for the disgrace of your own. Here the order at the moment of committing a crime is not decisive — decisive here is the moment of accepting and acknowledging the binding supremacy of führer... No one of them is held responsible for executing the order. That would be a false way of putting the problem”⁴.

This proposition was put forward even as early as during the first trial which was carried on before the Tribunal (in Greiser's case). The prosecutor had then strassed that: „If a man joins a... group which binds itself to be absolutely obedient and to observe

⁴ Therein too, p. 160—161.

discipline, and if he agrees with the world outlook of the group and with its methods, he thereby also accepts in advance the responsibility for the executing of the orders by the group⁵.”

Such attitude was accepted in the judicature of the Supreme National Tribunal⁶. In the last trial which went on before the Tribunal — in Bühler’s case — generalizing as if the hitherto judicature it was ascertained so: „The problem of the order or the criminal-like precept as that of a circumstance excluding or extenuating the guilt, concerns in principle the legal groups, for in the case of criminal-like groups the delinquency of the order or the precept comes from the character of the group...”⁷.

In its judicature the Tribunal stressed too the fact that there was no place for understanding the supposed impotency in the face of the order since the perpetrator „wanted nothing other than but to obey the leaders of Hitlerism...”⁸.

4. In justifying one of the sentences the Tribunal raised the point that the purpose of its action is not only to fix the guilt of the accused and to ascertain the Hitlerite crime on the grounds of documents, but also to ascertain authoritatively the principle that every man in future will be held responsible for violating the generally accepted rules of human co-living and the elementary principles of morality irrespective of the fact as to whether they are defined by any juridical or conventional term or not also irrespective of by whom and where the crime was committed.

The Tribunal expressed its view that Generalizing of the consciousness of such state of things can bring the effects desired and become the guaranty for similar crimes not to be repeated any more in the history of mankind⁹.

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⁵ Therein too, p. 70.

⁶ *Seven trials before the Supreme National Tribunal*, p. 16, 58.

⁷ Therein too, p. 135.

⁸ Therein too, p. 135.

⁹ Therein too, p. 56.