

Institute of National Remembrance

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The Pacification of the Warsaw Uprising. Criminals have remained unpunished.No criminal of the Second World War has been sentenced in Germany for crimes against humanity or genocide.



Each anniversary of the outbreak of the Warsaw Uprising poses a

continuously recurring question whether the perpetrators of those crimes, which were often unimaginable and unprecedented in human history, were punished accordingly to their deeds. The question about the criminal liability of the perpetrators is not accidental, for at least two extremely different reasons. On the one hand, for many citizens of our country, the Second World War is as distant psychologically as, for example, the January Uprising or the Battle of Grunwald. The events of August 1944 are among those that should be commemorated but are not related to any current day-to-day concerns.

On the other hand, particularly over the recent period, many people have realised that as far as international law is concerned, including civil law, the last world war still influences contemporary affairs—e.g. due to the fact, as it is often mentioned in Poland, that Germany has not paid war reparations, or that civil lawsuits against the German state have been filed by descendants of the victims of crimes committed in Greece or Italy.

Unfortunately, the voices stating that from the point of view of criminal law, the German criminals and their allies have remained virtually unpunished are either non-existent or barely heard.

Polish People's Republic's use of victims for political games

According to the basic principles of the democratic rule of law, each defendant has the right to a fair trial. Unfortunately, the rights of the victims are often neglected, particularly the right to justice, understood as the state's obligation to prosecute and try the perpetrator of a crime

against a citizen of a given country. The victim should have the right to compensation, both in terms of criminal and civil law.

As regard to the obligation to prosecute and try perpetrators of war crimes against Polish citizens, such a duty lay with the communist government at the time. All the law enforcement and judicial authorities in Poland were subject to it. It is obvious that there was no democratic rule of law in the Polish People's Republic. Nonetheless, it seemed that due to the fundamental ideological premises, according to which Fascism/Nazism was viewed as a criminal system, and in the face of findings that about 6 million Polish citizens had been killed during the war, such a phenomenon as the prosecution of war criminals would not have been restricted or used in political games. Unfortunately, it can be stated bluntly that, not only did the Polish People's Republic fail in such trivial matters as the production of reaper rope or the organisation of bottle return schemes, but it was absolutely incapable of managing extremely important issues , such as the prosecution of war criminals. This is terrifying, as the communists had massive capabilities to do so. At that time, many of the perpetrators were in Poland or in POW camps in the Soviet Union. The witnesses were also still alive. Therefore, looking from the perspective of a prosecutor or the law enforcement authorities, everything necessary was in place for an effective trial.

There is a need to mention a number of facts. Initially, it seemed that the communists in Poland took the matter seriously. One of the first legal acts that they issued as part of a "package" that was supposed to

provide a general basis for their rule in Poland, was the Decree of 31 August 1944, the title of which, from the legislative perspective, is a Baroque peculiarity: “Concerning the Punishment of Fascist-Hitlerite Criminals Guilty of Murder and Ill-Treatment of the Civilian Population and of Prisoners of War, and the Punishment of Traitors of the Polish Nation”. It was issued by the Polish Committee of National Liberation, a puppet organisation wholly dependent on the Soviets. Not only was the title of the legal act bizarre, but so were some of its regulations. For instance, Article 1, which included a curious phrase: “who, meets the needs of the German state or its allied state”. Moreover, it should be mentioned that it is quite ironic that the decree spoke of the “punishment for traitors of the Polish Nation”, while it was adopted by no-one other than such traitors, who would have never gained power in Poland in democratic elections without Soviet tanks.

On many occasions, the decree was used as a basis not only for executing German criminals from the SS or the Wehrmacht, but also Polish heroes of the anti-communist underground. It is also ironic that the fundamental part of the aforementioned decree is still binding and is cited as one of the legal bases by the prosecutors of the Institute of National Remembrance in investigation procedures concerning German crimes committed during the occupation of Poland.

Nazis, or successful propaganda

Also the Decree of 10 November 1945 on the Central Commission and District Commissions for Investigation of German Crimes in Poland, whose aim was to collect and examine materials concerning German

crimes committed during the war, could give hope that the perpetrators of war crimes would be effectively tried. Although I may risk over-interpreting the aforementioned institution, I will state that the communists' loss of will to prosecute the perpetrators of the said crimes is even shown by the successive versions of the name. The original name was the Central Commission for Investigation of German Crimes in Poland. Over the years, the crimes ceased to be "German crimes", but became "Hitlerite crimes", to eventually become "Nazi crimes".

It is unbelievable how easily the government of communist Poland yielded to, as it is called nowadays, the German narration. Therefore, the entire world knows full well that war crimes, crimes against humanity and genocide from the last world war were not committed by the Germans, but by the almost mythical Nazis. There is no need to mention that the word "Nazism" has no national connotations. The term itself sounds so abstract that virtually anyone can be a Nazi. As shown in practice, even the victims or their descendants.

Hence my opinion that the spread of the terms "Nazism" and "Nazis" is one of the greatest propaganda successes to occur in the modern world. It is surprising that the term "Nazi crimes" is still used in free Poland and, through its use in the wording of the Act on the Institute of National Remembrance, has even become a statutory term. This has resulted in the IPN prosecutors being legally bound to use it in their procedural decisions. In many cases, this has led to protests by the addressees of those decisions. In their letters, to which I was obliged to

respond personally on many occasions, they use bitter words, demonise the IPN prosecutors and hurl the worst possible accusations at them. The facts are actually trivial. Procedural decisions simply require the use of statutory terms. And this is how the legislative authority has chosen to name the crimes committed by the Germans and citizens of their allied states against Polish citizens during the last world war.

Investigation instead of prosecution

According to the biblical principle that 'they will be recognised by their fruit', conducting an evaluation requires us to examine the effects of undertaken actions . Therefore, what were the results, in terms of legal proceedings, of the actions taken by the prosecutors and judges employed in the former commissions for investigating crimes?

Unfortunately, they were very poor, but let us be clear, due to structural and organisational reasons, the results couldn't have been any different. While explaining this issue, to avoid quoting numerous boring provisions, I shall return to the name of the institution. This was the Central Commission for Investigation of Crimes, not the Commission for the Prosecution of Crimes, as it is now. The difference is fundamental. The former did not have full prosecutorial rights, and primarily had no right to file indictments to the court. Its role was limited to investigating cases and collecting evidence. Then, when it was decided that the evidence was sufficient for an indictment, the case was submitted to the public prosecutor's office. There, a prosecutor whose day-to-day job consisted in dealing with totally

different kinds of investigations, examined the evidence submitted by a totally different prosecutor in terms of the possibility to file the indictment. These two facts augured badly for the entire procedure.

Such a solution was ineffective for two mundane reasons. Cases related to war crimes, genocide and crimes against humanity are not easy. They are nearly always interdisciplinary in nature and result from facts occurring in a specific historical context. Without the knowledge of that context, a prosecutor or a judge is not able to correctly assess a particular crime being the subject of the case. Moreover, due to the substantive criminal law provisions in a situation where international criminal law regulations are also taken into consideration, and due to reasons related to evidence, which is often totally different from the evidence in investigations routinely carried out by prosecutors, it is very easy to make a mistake.

It is also important to notice that the complexities of such investigations are not covered during the prosecutor's or judge's training period. It is even possible to graduate from a law school without coming across these regulations. It is also worth noticing that over the years, as the witnesses started growing older or died, clear and unequivocal evidence became increasingly scarce. These were the reasons why the role of the Commission for Investigation was marginal under the Polish People's Republic.

Even in the late 1940s and until the end of the 1950s, the law enforcement and prosecution authorities and courts of common jurisdiction were quite busy dealing with cases related to German

crimes in occupied Poland. The most famous trials include one of the executioners of the Warsaw Uprising – Paul Otto Geibel, SS and Police Commander of the Warsaw District. He was responsible, *inter alia*, for the massacre of the population of the Warsaw city centre. In 1954, he was sentenced to life imprisonment by the Warsaw Provincial Court.

At this point, there is a need to mention that apart from Geibel, virtually none of the German criminals responsible for genocide and war crimes from the time of the Warsaw Uprising were tried. Quite the contrary– Heinz Reinefarth, who commanded the policing operation in Wola, became a respected citizen of the Federal Republic of Germany after the war. He was elected mayor of Westerland, on the island of Sylt. No one knew or wanted to know about his criminal past. It was only in 2014 that a plaque commemorating the Warsaw Uprising and crimes committed by the former mayor of that town was placed on the town hall.

Unfortunately, in the post-war period, the communist authorities were much busier convicting their opponents from the pro-independence underground in trials that most often had little to do with justice. Furthermore, Polish patriots were kept in the same prisons or even cells as German criminals.

The only truly important fact was the establishment of the Supreme National Tribunal and the Prosecution Office of the Supreme National Tribunal under the Decree of 22 January 1946. This was a specialised authority that employed very experienced people who had great legal expertise. It is worth mentioning that the judges included Emil

Rappaport, an outstanding pre-war judge and professor of law. The good reputation of the Tribunal is confirmed by its legacy in the form of its verdicts. The Tribunal is appreciated despite the fact that it was also, at least theoretically, supposed to try people responsible “for the disaster of September [1939] and fascisization of state life”.

Unfortunately, it was only active for two years and managed to judge only the most serious crimes. Only seven trials were held before the Tribunal. These include such important ones as the cases of Arthur Greiser – the Reich Governor of Warthenland, Amon Göth – the commandant of the Kraków-Płaszów concentration camp, also responsible for the liquidation of the Krakow and Tarnów ghettos, Ludwig Fischer – the Governor of the Warsaw District of the General Government, and three other members of the occupation authorities of Warsaw, Rudolf Höß – the commandant of the Auschwitz concentration camp, 40 members of the Auschwitz concentration camp personnel, Albert Forster – the Gauleiter of Danzig-West Prussia, and Josef Bühler – the state secretary of the General Government authorities and Hans Frank’s deputy. This was only the tip of the iceberg.

German courts made the decisions

When describing the communist government’s poor track record in the field of prosecuting war criminals, I use the word “abdication”. As you know, the word means a monarch’s premature resignation from the throne and cessation of the royal rights. Such is the case of the communist government (which also controlled the judiciary) and their actions in regard to the prosecution of war criminals.

From the 1960s to the period just before the abolition of the Polish People's Republic, there was a surprising practice – the files on the ongoing investigations against war criminals were sent to West Germany. Having collected evidence that was sufficient to file an indictment, the prosecutors and judges employed by the aforementioned commissions for the investigation of crimes stated, for reasons unknown, that the person in question was certainly in the Federal Republic of Germany. Therefore, the files, often the originals, were handed to West German law enforcement authorities. In most cases, they were received by a specialist prosecution unit, commonly known, due to the location of its headquarters, as the Ludwigsburg Central Office.

At this point, it has to be clearly stated that the said action was totally against the law, as there were no legal regulations that would allow criminal proceedings to be concluded in such manner. To make the matter appear legal, they made references to a specific provision of the Criminal Procedure Code, which actually never provided for suspending an investigation due to the files being sent abroad, and suspended the investigation. What is really shocking is the fact that no one was ever interested in the further course of the case. Relevant enquiries were sent only sporadically. The Germans informed the Polish authorities on the progress of the case on very rare occasions.

The files continued to be sent even when the scarce pieces of information on the cases showed that the actions taken by the German authorities were ineffective. The fact that the Germans often issued

curious decisions against the interest of the Polish victims did not lead to any reflection that could stop such activities.

The West German judiciary failed to deal with the cases concerning crimes against Poles committed during the last world war. “Veil of oblivion”, “judgements of God”, “biological limitations”, “criminal proceedings wasting late life”, “decent people”, “not fouling one’s nest” were just a few of the shocking theories functioning in the Federal Republic of Germany after the war had ended, and despite the fundamental principles of the rule of law, they were reflected in the sentences of West German courts or prosecutors’ decisions to discontinue proceedings against specific criminals. This is surely against the image of the state that managed to deal with the criminal legacy of the Second World War, that the Federal Republic of Germany has carefully created and cultivated.

On many occasions, I was able not only to learn about particular decisions, but also carry out their in-depth analysis for professional purposes and due to my participation in scientific conferences.

The image implied by these materials is more than grim. Let me begin with the statement that in none of the examined cases, maybe apart from a single exception, did I see the submission of evidence from Poland lead to the conviction of a perpetrator for crimes against citizens of our country. Of course, there might be more cases in Germany that concluded in perpetrators being convicted, but the fact that the IPN prosecutors have been very busy carrying out relevant checks since 2009 – i.e. for nearly 10 years – proves that the final

number of convictions will be rather low.

The first 89 cases that I examined were investigations into the mass murders of Poles committed by Germans from 1 September 1939 until about November 1939, mainly in the Polish part of Pomerania, the western area of Greater Poland and Upper Silesia.

Unfortunately, these atrocities are relatively unknown to the inhabitants of the other parts of Poland, although the total number of victims in Pomerania itself is estimated at 30,000-50,000. Let me remind you that most of these crimes were not committed by members of the SS, Gestapo or the Police, but ordinary Germans, most often members of a paramilitary organisation named Selbstschutz. Formally speaking, they were citizens of the Second Polish Republic of German descent, who inhabited lands near the border between the two countries.

Though the evidence collected by the Commission was usually very reliable, the decisions in regard to those cases that were made in Germany were not only defective, but also very peculiar. A case in point is the execution of 17 Poles who were killed as hostages in the woods near Karpno, district of Kościerzyna, on 16 September 1939. After the materials were sent from Poland, the Freiburg im Breisgau Prosecution Office started proceedings – case No. 13 Js 37/77. As a result, on 5 September 1980, the decision was made to discontinue the case. The prosecutor stated that there was no possibility to ascertain whether the execution was illegal because “it had been a response to an attack on railway installations, and the action in question caused

significant damage". Even more astoundingly, the West German prosecutor was aware that his thesis about an attack on railway installations was not supported by evidence, as it was mentioned by a single, not very reliable, witness.

The prosecutor carried on defending the perpetrators by claiming that the participants in the execution "believed that such an attack had occurred and hence warned the survivors not to carry out further sabotage". As you can see, according to the German prosecutor, taking hostages for fabricated reasons was perfectly permissible. Even if there had been some truth to the claim, in his opinion, collective responsibility was admissible and justified. I think the same procedural decision would have been issued by a prosecutor under the Third Reich.

In other cases, the perpetrators were acquitted due to alleged contradictions in the testimonies of Polish witnesses, most often differences regarding unimportant details. This resulted mainly from the fact that they were testifying about 20 years after the crime. The German authorities also pointed to their relative unreliability resulting from the fact that they were victims. On many occasions, testimony by the suspect's relatives or co-suspects' explanations were deemed more credible.

There was only one case where the perpetrators of a murder were convicted of killing Polish citizens of Jewish descent. In this case, the court had no doubt that the perpetrators had acted out of base motives related to racial hatred.

Insufficient regulations

When browsing through individual cases, one is also tempted to say that certain legal solutions in the legislation of the Federal Republic of Germany were included with the very purpose of preventing the perpetrators of war crimes from being effectively tried. This conclusion was drawn, for example, from an analysis of yet another group of German court judgements which dealt with actions, which, based on the definitions of genocide and crimes against humanity adopted under the international criminal law, should, in the IPN prosecutors' opinion, be classified as crimes not subject to the statute of limitation. The judiciary of the Federal Republic of Germany concluded specific cases exactly on the grounds of limitation.

Is, therefore, the concept of genocide or crime against humanity alien to the legal system of the Federal Republic of Germany? Nothing further from the truth. The definitions are present in it. However, it was deemed that such regulations were not binding during the Second World War, and thus may not apply to crimes committed at that time. In the opinion of German courts, the opposite approach would result in a breach of the fundamental principles of rule of law – i.e. *lex retro non agit* and *nullum crimen, nulla poena sine lege* (the law is not retroactive and there is no crime, no penalty without a law). Therefore, the definitions apply, but only to actions following their adoption in the German law. This is how no criminal active during the last world war has been sentenced in Germany for crimes against humanity or genocide.

This leads to the question as to why they were left unpunished. One of the issues commonly raised by researchers, is the fact that a large proportion of the German society was directly involved in crimes during the war or was at least enthusiastic about the actions taken by the NSDAP, including those of a criminal nature.

An important example is the case of judges and prosecutors who later held the same posts in the Federal Republic of Germany as they had done under the Third Reich.

A further explanation for the impunity of the German criminals is the international factor. There was simply a political shift and it was the USSR that became the chief enemy of the West. The Federal Republic of Germany became an important ally that could not be destabilised. Holding war criminals accountable for their deeds could lead to a popular dissatisfaction in West Germany because it would turn out that it pertained to a significant percentage of the population at the time.

Despite appearances, in legal terms ,the Second World War is not a closed chapter.. Will it be so only after both the last witnesses and the last victims who survived that time have passed away? Or when their last oppressors have died or have been tried?

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