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Hidden in the Glare of the Nuremberg Trial:
Impunity for the Wola Massacre as
the Greatest Debacle of Post-War Trials

Dr. Hab. Iur. Patrycja Grzebyk
University of Warsaw

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HIDDEN IN THE GLARE OF THE NUREMBERG TRIAL: IMPUNITY FOR THE WOLA MASSACRE AS THE GREATEST DEBACLE OF POST-WAR TRIALS*

Patrycja Grzebyk

University of Warsaw, patrycja.grzebyk@uw.edu.pl

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Abstract

During the Warsaw Uprising in August 1944 German soldiers within a few days murdered 30 000 – 65 000 civilians. The Wola massacre (the slaughter took place in Wola – one of boroughs of Warsaw) was described by a historian Alexandra Richie as ‘the largest single battlefield massacre of the Second World War’. Despite the fact that names of commanders responsible for conduct of hostilities in Warsaw were well known to historians and prosecutors (including Robert Jackson and Telford Taylor), none of the perpetrators belonging to German armed forces was prosecuted for crimes committed in Wola before any international or national court. Some of the main perpetrators, like Heinz Reinefarth, had even pursued a successful political career in Germany in post-war period.

The present article describes the circumstances of the Wola massacre, it discusses legal qualification of the Wola massacre as a war crime, a crime against humanity or as a genocide taking into account the wording of Hitler/Himmler’s order (‘Warschau wird glattrasiert’). The article refers to legal bases of responsibility of persons involved in the massacre, including responsibility of both - commanders and their subordinates. It explains main reasons behind non-prosecution of perpetrators of the massacre in the Nuremberg trial as well as in subsequent trials which took place before national courts in Germany and in Poland. It argues that the impunity of perpetrators of the Wola massacre is an example of the greatest debacle of the post-war trials and should impact our assessment of the post-war justice achievements. It proves that even in case of mass atrocities political interests could prevail over justice which creates an obstacle to the full reconciliation between societies.

Keywords

Nuremberg, subsequent Nuremberg trials, war crimes, genocide, crime against humanity, Wola

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1. Introduction

The Nuremberg Trial is a symbol of success as the ground-breaking trial in which major Nazi criminals faced justice. It granted some measure of satisfaction to the victims, and helped articulate the fundamental principles of international criminal law on which we still rely today.¹ However, a striking omission in the Nuremberg trial and in post-war national trials was the non-prosecution of persons responsible for the Wola massacre, i.e. the slaughter of civilians in Wola, a borough of Warsaw, during the Warsaw Uprising in 1944. According to various estimates, even up to 60 000 civilians were killed. The scale of the atrocity justifies the claim that it was 'the largest single battlefield massacre of the Second World War'.²

The objective of this paper is to outline the main facts concerning the Wola massacre, qualify the massacre as one of international crimes to which statutory limitations cannot be applied (war crime, crime against humanity, genocide), indicate legal bases of responsibility of perpetrators whose names were identified by historians, and explain the reasons for their impunity.

Discussion on the Wola massacre from the international law perspective could be valuable for four main reasons. Firstly, impunity for the Wola massacre is an example of selective, unsatisfactory justice which should impact our assessment of Nuremberg and post-Nuremberg trials. Secondly, the Wola massacre shows how political interests prevailed over justice and therefore raises questions about the hierarchy of priorities which international society should agree on after the conclusion of any war. Thirdly, also for political reasons, for decades the research on the Wola massacre could not be pursued and published in Poland and in other states occupied by the USSR after WWII. This explains the deafening silence over the victims and perpetrators. Fourthly, impunity of criminals and lack of recognition of their guilt by international and national judicial organs is still an obstacle to the full reconciliation between Polish and German societies. Therefore, it is worthwhile for both sides to understand the circumstances of the crime and for international society to draw conclusions useful in execution of international criminal justice.

2. The Wola massacre: the facts

Warsaw Uprising began on 1 August 1944. It lasted until 2 October 1944. Whether the decision to start the uprising was justified remains at the heart of heated debates.³ Regardless of their outcome, the uprising was eagerly awaited by the Polish population and also fully expected by the Nazi occupants.⁴ From the perspective of the occupants, the timing of the uprising was unfavourable, because their situation was difficult in particular on the eastern front. Nonetheless, historians note that the German command greeted the news of the uprising with "savage delight"⁵ (although others mention "furious anger")⁶, because it offered a convenient pretext for complete destruction of the city and thus a final

¹ See resolution General Assembly res. 95 (I), 11.12.1946 ("Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal").

² A. Richie, *Warsaw 1944. The Fateful Uprising* (2013) 255.

³ See more D. Gawin, *Spór o Powstanie. Powstanie Warszawskie w powojennej publicystyce polskiej 1945-1981* (2004) 9 ff; P. Dybicz, *Zakłamaną historią powstania* (2014) 9 ff.

⁴ N. Davies, *Rising 44. The Battle for Warsaw* (2004) 248.

⁵ *Ibid.* 249; Richie, *supra* note 2, 256.

⁶ L. M. Bartelski, *Powstanie warszawskie* (1967) 57.

solution to the Polish problem.⁷ This is reflected in the words allegedly spoken by Adolf Hitler⁸, and certainly written in an order issued by Heinrich Himmler, according to which every inhabitant must be killed and no prisoners should be taken. The plan was to raze Warsaw to the ground ('Warschau wird glattrasiiert') to serve as a cautionary tale for the rest of Europe.⁹

The uprising was part of a larger military operation (codenamed *Tempest*).¹⁰ The intention was for the Home Army, i.e. the Polish resistance forces under occupation¹¹, to liberate Warsaw from Nazi hands before the approaching Soviet army could reach the city.¹² If successful, this would allow for an attempt to rebuild a sovereign Polish state and help Poland escape a situation where one occupation would just be switched for another.¹³ Unfortunately, Operation Tempest failed, and the consequences of the uprising were tragic both for the city itself and for its residents. As for military casualties, it is estimated that approx. 16.000 soldiers died, 28.000 were wounded, and 15.000 were captured.¹⁴ Yet what is missing from these numbers is the primary victims of the uprising: the civilians. Civilian casualties of the uprising are estimated at between 150.000 and 200.000.¹⁵ Almost 550.000 civilians were deported to different camps during and after uprising. In consequence, when the uprising ended, there were approx. 1000 people left in the ruins of the entire city of Warsaw in comparison to 900.000 population of Warsaw before the uprising.¹⁶

The uprising was the immediate reason why the Soviet offensive halted just outside the city limits. Despite pleas from the Polish government in exile, the Polish Committee of National Liberation (PKWN) and Winston Churchill, the Red Army command refused to help, and forbade even its Polish units to offer any assistance to the insurgents.¹⁷ With full knowledge and consent, the Red Army allowed the

⁷ See Heinrich Himmler's speech on September 21, 1944 at Jägerhöhe: "The moment is a difficult one. [But] from the historical point of view, the action of Poles is a blessing. We shall finish them off... Warsaw will be liquidated, and this city, which is the intellectual capital of a sixteen- to seventeen-million strong nation that has blocked our path to the east for seven hundred years, ever since the first battle of Tannenberg, will have ceased to exist. By the same token...the Poles themselves will cease to be a problem for our children and for all who will follow us..." (English citation after Davies, *supra* note 4, 249).

⁸ According to e.g. testimonies of Bach-Zelewski and Ernest Rode, see Sz. Datner, K. Leszczyński, *Zbrodnie okupanta hitlerowskiego na ludności cywilnej w czasie powstania warszawskiego w 1944 r. (w dokumentach)* (1962) 303; J. Sawicki, *Przed polskim prokuratorem* (1968) 29, 67. See also A. Przygoński, *Powstanie Warszawskie w sierpniu 1944 r. Tom I* (1988) 224-225.

⁹ See also Davies, *supra* note 4, 249; Bartelski, *supra* note 6, 58. In this context, the message of Hans Frank to Lammers (cited in T. Cyprian, J. Sawicki, *Ludzie i sprawy Norymbergii* (1967) 246-247) should be noted, in which he stressed that burning of houses is the best mean to deprive partisans of the support and that after crushing uprising, Warsaw will be razed to the ground.

¹⁰ J.M. Ciechanowski, *Powstanie Warszawskie* (2004) 177 ff.

¹¹ See more on Polish Home Army and so-called Polish Secret State in: J. Karski, *My Report to the World: Story of a Secret State* (2013) *passim*; T. Bór-Komorowski, *The Secret Army* (1984) *passim*.

¹² P. Rozwadowski, *Warszawa 1944-1945* (2006) 45 ff.

¹³ T. Bór – Komorowski, *Powstanie Warszawskie*, 8th ed. (2004) 13; H. Zamojski, *Tragiczne decyzje. Jak wywołano Powstanie Warszawskie? Dlaczego szefowie oddziałów KG AK protestowali przeciwko decyzji gen. Bora-Komorowskiego* (2013) 27 ff; J. K. Zawodny, *Powstanie Warszawskie w walce i dyplomacji* (2005) 241; A. Solak, *Warszawa '44. Popiół i łzy* (2014) 26 ff.

¹⁴ J. Kirchmayer, *Powstanie Warszawskie* (1969) 423.

¹⁵ See e.g. *ibid.* 424. Rozwadowski, *supra* note 12, 177; L. Dzikiewicz, *Udział Rosji w hekatombie Warszawy 1944* (2013) 287.

¹⁶ See original photos of destroyed Warsaw at http://www.miastoruin.pl/index_en.html (all links were accessed 31.05.2018).

¹⁷ P. Rozwadowski, A. Ignatowicz, *Boje o Warszawę. Warszawskie Termopile 1944* (2007) 104 ff; compare with T. Sawicki, *Wyrok na miasto* (2011) 83; A. Przygoński, *Stalin i Powstanie Warszawskie* (1994) 39 ff; T. Żenczykowski, *Samotny bój Warszawy* (1990) 59 ff; S. Jacyński, *Armia Czerwona nad Wisłą: polityczna czy militarna postawa wyczekująca?* in S. Lewandowska, B. Martin (eds.), *Powstanie Warszawskie 1944* (1999) 168 ff.

city to be levelled, because it helped the Soviet Union to assume control over the city and the entire state of Poland more easily.¹⁸

Himmler, with full support from Heinz Guderian, assigned the task of quashing the uprising to troops under the command of Erich von dem Bach-Zelewski. When the uprising broke out, Bach-Zelewski was not in Warsaw but in Sopot instead. Before he made it to the city on 5 August in the afternoon, fighting the uprising was the responsibility of Heinz Reinefarth. Reinefarth had at his disposal the forces of Wehrmacht, the police and the SS.¹⁹ On 4 August in Skierniewice, Reinefarth conferred with the commander of the 9th Army Nikolaus von Vormann and decided to attack the western boroughs of Warsaw, i.e. Wola and Ochota, the following day. His objective was to gain access to the axis of the streets Wolska and Chłodna, through the park of Ogród Saski all the way to the Brühl's Palace (residence of Governor Fischer) and to forces of general Stahel and general Rohr surrounded by the insurgents. Oskar Dirlewanger was working to achieve the same objectives, and the coordination of the operation was in the hands of major Völker.

Historians note that until 4 August, no major fighting took place in Wola, and there was no large-scale murder of civilians. The situation changed radically on 5 August 1944.²⁰ Instead of engaging the Home Army troops, of whom relatively few were present in Wola²¹, the German forces started to systematically murder civilians and to carry out, very conscientiously, the above-referenced Himmler's order. Men, women, children, doctors, nurses, nuns, patients in hospital – they were all murdered.²² People were brought outside from buildings, lined up, and then executed with machine guns. It was then verified if everyone was dead, and the remaining survivors were all killed, with no exception made for newborns and babies.²³ Waława Szlacheta said in her testimony given on 28 May 1945:

"Lying there, I saw and heard that the German soldiers were walking among the people on the ground, kicking them to check who was still alive. Those who were, got killed off with single pistol shots. I was lying on my belly, but my head was resting against a food basket, so I could observe a little of what was happening around me. Thus I saw a German soldier (I didn't recognize the division) kick a woman lying next to me who was still alive, and then shoot her. Then I saw how a soldier approach a pram in which my neighbour Jakubczyk's twins who were a few months old, were lying and shoot them. The entire day I heard the moans of the dying."²⁴

Mass executions were organized in places located far from active fighting, for instance in the square near Park Sowińskiego, in the square in front of the forge in Wolska street, in the courtyard of the

¹⁸ Sawicki, *supra* note 17, 21; E. Duraczyński, ZSRR a Powstanie Warszawskie, in: M. M. Drozdowski (eds.), *Międzynarodowe aspekty Powstania Warszawskiego 1944 roku* (2004) 170; L. Dzikiewicz, *Zbrodnia Stalina na Warszawie* (1994) *passim*; *idem*, *supra* note 15, 148 ff.

¹⁹ See description of all forces of which Reinefarth's Group was composed at http://www.info-pc.home.pl/whatfor/baza/niemcy_w_powstaniu2.htm. Compare with Datner, Leszczyński, *supra* note 8, 295.

²⁰ K. Leszczyński, *Heinz Reinefarth* (1961) 25-27.

²¹ *Ibid.*, 27. Zob. również P. Gursztyn, *Rzeź Woli. Zbrodnia nierozliczona* (2014) 52.

²² Richie, *supra* note 2, 255 ff; W. Bartoszewski, *Dni walczącej Stolicy. Kronika Powstania Warszawskiego* (2004) 56; A. D. Sławińska, *Przeżyła to. Wola 1944* (2015) 52 ff; S. Lewandowska, Ludność cywilna w powstaniu warszawskim in: Lewandowska, Martin, *supra* note 17, 140; Gursztyn, *supra* note 21, 160.

²³ Bartelski, *supra* note 6, 83-5. See also testimonies of witnesses in: Datner, Leszczyński, *supra* note 8, 42 ff.

²⁴ IPN GK 166/1100/5. Translation by 'Chronicles of Terror Witold Pilecki Center for Totalitarian Studies', available at <http://www.zapisyterroru.pl/dlibra/publication/245/edition/233/content?navq=aHR0cDovL3d3dy56YXBpc3I0ZXJyb3J1LnBsL2RsaWJyYS9yZXN1bHRzP3E9d2FjJUM1JTgyYXdhK3N6bGFjaGV0YSZhY3Rpb249U2ltcGxlU2VhcmNoQWN0aW9uJm1kaXJpZHM9JnR5cGU9LTYmc3RhcnRzdHI9X2FsbCZwP3R3PTA%3D&navref=MjQ1OzIzMyA0Nm7NDQ5>. See also A. Richie, *Warsaw 1944: Hitler, Himmler, and the Warsaw Uprising* (2013) 272.

Ursus factory at Skierniewicka street, at Franaszek factory, Pfeiffer factory, the tram depot at Młynarska street, a square along Górczewska street, at the corner of Zagłoby street, and at the church of St. Wojciech.²⁵ It is estimated that in just a few days, mainly 5–7 August 1944, 30 000 – 65 000 civilians were murdered.²⁶ On 5 August alone, on what came to be called the Black Saturday, it is estimated that 20 000 civilians were exterminated.²⁷

The main reason for the discrepancies in the estimates of the number of victims is the fact that a *Verbrennungskommando Warschau* (a special unit formed by the SS; it consisted of Polish civilian men, who were forcibly impelled to do this work and who were mostly executed after their job was done) was hard at work burning thousands of bodies. Probably to limit the risk of disease rather than to eliminate the traces of the atrocities committed in the city.²⁸ After the war, the weight of the victims' ashes was used to estimate the number of those who died.²⁹ Taking into account lapse of time from the moment of burning bodies till weighing of ashes, final estimations based on the weigh of ashes always can be contested to some extent.

The German tactic changed on 6 August, when Bach-Zelewski ordered that only men should be killed, and that civilians should be captured and sent to the transition camp in Pruszków. However, the slaughter of civilians continued, just in other locations (Hala Mirowska), closer to the front which had by then moved towards the central borough of Śródmieście.³⁰

3. The legal qualification of the Wola massacre under international law

Considering the scale of the atrocity and the status of the victims (primarily civilians), and considering the clear intent of murdering the victims on purpose, the Wola massacre qualifies under international law not only as a war crime (murder of civilian population in occupied territory, as well as plunder of public and private property, wanton destruction of the city, devastation not justified by military

²⁵ See Kirchmayer, *supra* note 14, 258 ff; K. Móraski, K. Oktabiński, L. Świerczak, *Wola Warszawskie Termopile 1944 r. Przewodnik historyczny po miejscach walk i straceń z dni powstania warszawskiego*, (1994) 16 ff.

²⁶ See summary of historians' estimations in Gursztyn, *supra* note 21, 305 ff.

²⁷ Bartoszewski, *supra* note 22, 56.

²⁸ See e.g. testimony of Stanisław Adamczewski of 29 April 1946 before judge Halina Werekó, delegated to the Commission for the Investigation of German Crimes: "A unit of *Verbrennungskommando* workers, who were used to burn corpses, was quartered on the second floor of the house we lived in. I heard from them that the bodies of all the persons shot in our yard had been burnt. They also said that a lot of corpses had been burnt in the yard of the house at Wolska Street 4. A large pile of human bodies was burnt in the Staszic Foundation's garden on a heap of coal which used to be stored there. They said that the Foundation's garden had also been used as an execution site to shoot residents of nearby houses from the Karolkowa Street side." (IPN GK 166/1100/5, available at: http://www.zapisyterroru.pl/dlibra/publication/123/edition/111/content?navq=aHR0cDovL3d3dy56YXBpc3l0ZXJyb3J1LnBsL2RsYWJyYS9yZXN1bHRzP3E9YWRhbWN6ZXdza2kmYWN0aW9uPVNpbXBsZVNIYXJjaEFjdGlubiZtZGlyaWRzPSZ0eXBIPS02JnN0YXJ0c3RyPV9hbGwmcD0w&navref=MTIzOzExMSAxNTI7MTQx&format_id=2) or of Jan Grabowski of 30 January 1946: "We were putting the corpses on two piles until nightfall. One pile was about 20 meters long, the other was 15 meters long, they were about 10 meters wide, and 1.5 meters high (as high as it was possible to throw a body). After the German who had allegedly brought the order to stop murdering Poles had left, and while I was carrying the corpses, the gendarmes were still following the workers carrying bodies, still killing those still alive. At nightfall, the group of workers forced to carry corpses that I had joined was herded by the gendarmes to Elekcyjna Street near Sowińskiego Park, where there were even more corpses than in front of the forge; I believe that there were at least two thousands of them." See also T. Klimaszewski, *Verbrennungskommando Warschau* (1960) *passim*.

²⁹ Leszczyński, *supra* note 20, 34.

³⁰ *Ibid.* 34-35.

necessity)³¹ but also as a crime against humanity. This latter qualification was applied by the Polish Central Commission for the Investigation of Hitlerite Crimes in Poland.³²

The Article 6(c) of the Charter of the International Military Tribunal names as examples of crime against humanity e.g. murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war. Therefore, acts committed in Wola (systematic extermination of civilians) could be qualified as crime against humanity connected with the war of aggression and war crimes for which the Third Reich was responsible.

In view of Himmler's order to raze the city and annihilate its population, contemporary case law suggests that an argument could also be made that the Wola massacre qualifies as genocide. It would be necessary to demonstrate that the objective of murder of the population in Wola and in Warsaw's other boroughs was to destroy a national group as such. In this context, the case is far from clear-cut.

On the one hand, Himmler's word about the final solution to the Polish problem (to be achieved by destroying the city and its population) support the argument that the objective of the Wola massacre was to murder a fraction of a specific national group. On the other hand, and in a broader perspective, it must be noted that the general German plan was for Poles to continue to exist, albeit as a nation that is subordinated and enslaved – as opposed to Jews, whose complete extermination was planned.³³

For the German command, exterminating Poles was not a military objective in itself. The residents of Warsaw were murdered in connection with a military operation, with the intention of breaking the insurgents' will to fight. Had the uprising ended, the atrocities would likely have stopped too, although it is impossible to know that for certain. After all, Germans began to recognize the status of Home Army soldiers as combatants and stopped killing civilians not because they suddenly remembered the principles of the law of war, but simply because this proved a more effective approach to fighting a guerrilla war.

In view of contemporary case law, murder committed even in a very small territory (Srebrenica) can be qualified as genocide, even if the number of victims represents only a small proportion of the overall number of members of the national group.³⁴ With regard to the Wola massacre, and more generally

³¹ See article 6 (b) of the IMT Charter, August 8, 1945.

³² See Letter of May 24, 1968 from the Polish Ministry of Justice, Central Commission for the Investigation of Hitlerite Crimes in Poland to the General Prosecutor Dr. Nohm in Schleswig-Holstein, Germany, Zh/II/Ds/67/64.

³³ Compare with W. Jarząbek, Czy polityka okupacyjna Niemiec wobec Polaków w czasie II wojny światowej była ludobójstwem?, 24:2 *Rocznik Polsko-Niemiecki* (2017) 72, 76 ff, where the author stresses that the aim of the German authorities was to exterminate 80% of the Polish population. Therefore, the German policy towards Polish citizens was genocidal.

³⁴ See ICTY, *Prosecutor v. Krstić*, 2.8.2001, IT-98-33-T, para. 590: "the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area. Indeed, the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue. In this regard, it is important to bear in mind the total context in which the physical destruction is carried out"; and also with the ICTY, *Prosecutor v. Jelisić*, 14.12.1999, IT-95-10-T, para. 83: "The Trial Chamber notes that it is accepted that genocide may be perpetrated in a limited geographic zone". See however, ICJ, Judgment, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26.2.2007, para. 199: "the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. In the words of the ILC, "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe" (ibid.). The area of the perpetrator's activity and control are to be considered. As the ICTY Appeals Chamber has said, and indeed as the Respondent accepts, the opportunity available to the perpetrators is significant (Krstić, IT-98-33-A, Judgment, 19 April 2004, para. 13). This criterion of opportunity must however be weighed against the first and essential factor of

to the destruction of Warsaw, the victims did not constitute the majority of Polish national group under control of the Nazi forces, and were not the sole part of that group that the Nazis could be able to exterminate. Besides, the charge of genocide would have to invoke genocide retroactively, since the Convention on the prevention and punishment of the crime of genocide was adopted on 9 December 1948.³⁵ Considering that the International Military Tribunal decided not to refer to Holocaust as genocide, precisely to avoid being accused of applying the law retroactively, this qualification should not be used with regard to other crimes committed before 1948. Nonetheless, some scholars continue to argue that the convention could be applied retroactively under certain circumstances.³⁶

4. Possible legal bases of the responsibility of perpetrators of the Wola massacre

Many various legal grounds for individual responsibility can be ascribed to a wide array of persons with regard to the Wola massacre. Firstly, the persons who gave and transmitted the order to destroy the city of Warsaw and to slaughter its inhabitants could be held responsible. The judgment of the International Military Tribunal is very clear in assigning responsibility to persons who issue criminal orders.³⁷ The case law of the Tribunal and of other courts clearly stipulates that an order does not have to be directed at specific persons (it is only necessary to demonstrate that the persons were subordinated)³⁸ and does not have to be specific.³⁹

The order to kill the inhabitants of Warsaw was definitely issued by Himmler, and also – if we believe the words of Himmler and other military commanders – Hitler himself. With regard to criminal orders, the persons who further transmit the order and thus implement it can also be held responsible.⁴⁰ The order to kill the inhabitants of the city was transmitted in the Wehrmacht from Guderian⁴¹ via Reinhardt and Vormann to Bach-Zelewski and Reinefarth. Stahel, who was surrounded by the insurgents, also played a role in transmitting the order (and also used civilians as human shields). The proper transmission of the order was via SS (where the order was executed by Dirlwanger's unit) and the police under the command of Geibel at the time. With regard to Reinefarth, Bach-Zelewski testified that upon seeing an execution of civilians, he personally spoke to Reinefarth and pointed out that

substantiality. It may be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met.”

³⁵ 78 UNTS 277.

³⁶ See more in W. Schabas, *Retroactive Application of the Genocide Convention*, 4 *University of St. Thomas Journal of Law and Public Policy* (2009-2010) 36; K. Karski, *Zasada lex retro non agit a międzynarodowe prawo karne: kilka refleksji na tle genezy pojęcia*, in J. Nowakowska-Małusecka, I. Topa (eds.), *Międzynarodowe i europejskie prawo karne – osiągnięcia, kierunki rozwoju, wyzwania* (2015), 45.

³⁷ See excerpts of the Nuremberg judgment in case of Keitel, Kaltenbrunner, Frank, Dönitz, Raeder, Jodl, Bormann, International Military Tribunal (Nuremberg), *Judgment and Sentences, 1 Oct. 1946*, 41 AJIL (1947) 282, 284, 289, 304, 308, 315-316, 330.

³⁸ See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18.9.2004, Geneva 25.1.2005, para. 555, http://www.un.org/news/dh/sudan/com_inq_darfur.pdf. See also ICTY, *Prosecutor v. Kordić & Cerkez*, 26.2.2001, IT-95-14/2, para. 388 and 17.12.2004., para. 28, and also ICTR, *Prosecutor v. Akayesu*, 2.9.1998, ICTR-96-4, para. 483.

³⁹ See IMT Judgment in reference to Wilhelm Keitel who was found guilty of ordering crimes despite the fact that his orders were not precise and only encouraged to cruelty (e.g. “it should be remembered that a human life in unsettled countries frequently counts for nothing and a deterrent effect can be obtained only by unusual severity”).

⁴⁰ See *USA v. Wilhelm von Leeb et al. (High Command Case)*, 27-28.10.1948, in: United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XI (1947-1949) 510; see also International Military Tribunal (Nuremberg), *Judgment and Sentences*, *supra* note 39, 308 (in reference to Raeder), 315 (in reference to Jodl). Compare however with *USA v. Wilhelm List et al (The Hostages Case)*, 19.2.1948 in: United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XI (1947-1949) 811, 1287 (in reference to Kurt von Geitner).

⁴¹ Rode testified that Guderian refused to revoke Hitler's order because the order was clear and revocation is impossible. Sawicki, *supra* note 8, 68.

there was chaos and his troops were shooting at the civilian population. According to Bach-Zelewski, Reinefarth stressed that he was under clear orders to take no prisoners and to kill each and every resident of Warsaw. When Bach-Zelewski asked if that also applied to women and children, Reinefarth responded in the affirmative. Bach-Zelewski claimed that at that moment, he revoked Himmler's order.⁴² This would suggest that Reinefarth, while not the original commander to issue the order to kill all inhabitants, was nonetheless the person with primary responsibility because of how eagerly and conscientiously he implemented that order.

Another ground of responsibility of commanders (superior responsibility) is failing to prevent or repress the perpetration of international crimes.⁴³ This responsibility arises when the superior knew, or should have known, or had information which should have enabled him to conclude in the circumstances prevailing at the time, that crimes were being or had been committed. As for Reinefarth, the German prosecutor's office claimed that he had no knowledge of the crimes that were being committed beyond the line of fire where he was positioned. This is hardly convincing. It is difficult to believe that in an area with only occasional fighting breaking out with the insurgents, the commander would fail to notice mass executions and piles of burning bodies, and to realize that a relatively large fraction of his troops is murdering civilians instead of fighting.⁴⁴ On the other hand, the fact remains that Reinefarth could only be held responsible for the atrocities committed by the units that were under his actual control. He cannot be blamed for failing to prevent the crimes committed by units over which he had no real control. The findings of the German court and the testimony given by Bach-Zelewski⁴⁵ suggest that he was not in fact in control of the units commanded by Kamiński (located mainly in the borough of Ochota) and by Dirlwanger. Yet, should difficulties arise in proving that such criminal orders were issued and by whom, Dirlwanger and Alfred Spilker, who was in charge of the Gestapo Sonderkommando, would be held responsible for failing to prevent the crimes committed by their units.⁴⁶

The responsibility of Bach-Zelewski for failing to prevent crimes would be more difficult to demonstrate. According to his testimony, he witnessed crimes being committed against civilians, but immediately forbade further commission of such crimes when confronted with this situation.⁴⁷ Yet in the same testimony, Bach-Zelewski lied about the date of his arrival to Warsaw: he claimed to have arrived on 15 or 16 August, but it had been determined that he was present in the city on 5 August in the afternoon.⁴⁸ Testimony given by Guderian says clearly that Bach-Zelewski had full awareness of the crimes being committed by the German forces, at least with regard to destruction and pillaging.⁴⁹ Even if he really took steps to prevent the crimes, the issue remains of the commander's responsibility for punishing those guilty of the crimes. Bach-Zelewski emphasized in his testimonies before Polish

⁴² Cyprian, Sawicki, *supra* note 9, 251; Sawicki, *supra* note 8, 27.

⁴³ In reference to crimes committed during the WWII the most important case is: Yamashita 327 U.S. 1 (1946). See more in William H. Parks, 'Command responsibility for war crimes' (1973) 62 *Military Law Review* 1, 22. Nowadays this kind of command responsibility is mentioned in Article 86 Additional Protocol to Geneva Conventions of 12 Aug. 1949 for the protection of war victims, Geneva, 8.6.1977, 1125 UNTS 3; Article 28 the International Criminal Court Statute, 17.7.1998, 2187 U.N.T.S. 90.

⁴⁴ Leszczyński, *supra* note 20, 11; N. Sennerteg, *Kat Warszawy* (2009) 55 ff.

⁴⁵ See Sawicki, *supra* note 8, 252-4.

⁴⁶ Gursztyn, *supra* note 21, 343.

⁴⁷ Cyprian, Sawicki, *supra* note 9, 251. Historians seem to confirm Bach's claims, see R. E. Conot, *Justice at Nuremberg. The First Comprehensive dramatic account of th trial of the Nazi leaders* (1983) 278.

⁴⁸ Cyprian, Sawicki, *supra* note 9, 252. Sawicki, *supra* note 8, 19, 245.

⁴⁹ Sawicki, *supra* note 8, 89-90.

prosecutor in Nuremberg that he had ordered the killing of Kamiński, who was infamous for his exceptional cruelty in pacifying the borough of Ochota.⁵⁰ Yet Reinefarth not only went unpunished but was actually rewarded when on 9 September 1944 Bach-Zelewski put forward an application for him to be given the Oak Leaves to his Knight's Cross of the Iron Cross.⁵¹ Bach-Zelewski also supported the application submitted by Reinefarth on 10 September 1944 to decorate Dirlewanger.⁵²

Besides the question of commanders issuing criminal orders, or failing to exercise appropriate control over their troops, there is also the issue of responsibility of the persons directly implementing the orders. Since the Nuremberg trials, an order is not considered enough to escape punishment, but merely enough to lessen punishment.⁵³ Guderian insisted that at the time of the Warsaw uprising, a refusal to carry out an order would equal imprisonment or even death.⁵⁴ Yet even he confirmed that an order to murder, in whatever form, should not have been obeyed in view of section 47 of the German military criminal code.⁵⁵ Nonetheless, even though both historians and German prosecutors have compiled lists of names of the soldiers in Reinefarth's command who participated in the murders, none of them were punished for their role in the Wola massacre.

5. Impunity in the glare of the Nuremberg trial

Based on London Agreement of August 8, 1945, representatives of most of the states occupied by Nazi Germany were excluded from the proceedings in International Military Tribunal, even though these states had been the first to argue in favour of bringing the criminals to justice.

On the initiative of Poland and Czechoslovakia, on 13 January 1942 in St. Jacob's Palace in London, nine states that had suffered German occupation (Belgium, France, Greece, Luxembourg, Netherlands, Norway, Yugoslavia, Poland and Czechoslovakia) proposed that, in order to avoid revenge and to satisfy the need for justice of the civilised world, one of the key objectives of the war should be bringing the perpetrators of crimes before an organised judicial authority.⁵⁶ In response to the London Declaration, representatives of the US, UK and USSR affirmed the position that Nazi criminals should face a court of law.⁵⁷ It was hardly an obvious solution: proponents of executing the criminals without bringing them to organized justice had initially wielded significant support.⁵⁸ For most states of occupied Europe, it must have come as a shock that even though their populations had suffered the greatest losses during World War II, and even though the initiative to bring the criminals to justice had

⁵⁰ Davies, *supra* note 4, 332; Sawicki, *supra* note 9, 35.

⁵¹ Datner, Leszczyński, *supra* note 8, 390.

⁵² *Ibid.*, 405-8.

⁵³ See article 8 IMT Charter.

⁵⁴ Sawicki, *supra* note 8, 82.

⁵⁵ *Ibid.*, 83.

⁵⁶ The guests of the conference were representatives of the UK, USSR, USA, China, South African Union, Australia, Canada, India and New Zealand. See J. J. Heydecker, J. Leeb, *Proces w Norymberdze* (2006) 79.

⁵⁷ United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948) 93 ff.

⁵⁸ See e.g. W. R. Harris, *Tyranny on Trial. The Evidence at Nuremberg* (1954) 7 ff, B. F. Smith, *Reaching Judgment at Nuremberg* (1977) 22 ff; B. B. Ferencz, 'Remarks Made at Pace University School of Law on October 23, 1993' 6 *PaceIntLRev* (1994) 55, 56; I. Brownlie, *International Law and the Use of Force by States* (1968) 161, G. Dean, Preface, in: *The Case Against the Nazi War Criminals, Opening Statement for the United States of America by Robert H. Jackson and Other Documents, with Preface by Gordon Dean of Counsel for United States* (1946) V; *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10 by Telford Taylor, Brigadier General, U.S.A. Chief of Counsel for War Crimes* (Washington, D. C., 15 August 1949) 2.

been theirs, they had no formal say in the proceedings as judges and prosecutors of the IMT were appointed only by four Great Powers (France, UK, USA and USSR).

The situation of Poland at the time was complicated, because it had two governments competing for power: the government in exile and the communist-backed Provisional Government of National Unity. When the UK officially recognized the Provisional Government of National Unity on 6 July 1945, the Polish member of the United Nations War Crimes Commission Tadeusz Cyprian lost his mandate, because he had been appointed by the government in exile.⁵⁹ The new communist authorities signed the London Agreement on 25 September 1945, which allowed them to formally appoint a delegate to the Commission. They did so in October 1945. The delegate was Tadeusz Cyprian initially and later Maciej Szerer. However, these delegates were not allowed to bring forward any new evidence to be used by the prosecutors in the Nuremberg trials.⁶⁰ Thus precisely in the period when the Commission was deciding who would be sitting on the defendant's bench in the Nuremberg trials and drafting the preliminary indictment (finalized on 6 October 1945 and formally filed on 14 October), there was no Polish representative among its membership.⁶¹ Moreover, since the start of the uprising, the communication channels had been broken and the news of the atrocities, including the Wola massacre, had not reached the authorities in the UK.⁶² Thus the Commission was not able to add this information to the indictment. In result, Robert Jackson cited data on the cheeses and wines pillaged in France but made no mention of the hundreds of thousands of civilians murdered in Warsaw, which outraged Polish commentators of the events.⁶³

The Polish delegation in Nuremberg was doing its best to change this unfavourable situation. However, it was only made up of four members: Stefan Kurowski, Jerzy Sawicki, Stanisław Piotrowski and Tadeusz Cyprian. Moreover, the delegation struggled with hostility regarding its presence in Nuremberg.⁶⁴ The Polish delegates arrived there on 19 November 1945 and were originally granted permission to stay for 10 days only, to submit the documentation they had brought (the permission was subsequently extended by one month).⁶⁵ The documents included evidence of the liquidation of the ghetto in Warsaw, of the concentration camps, of the Warsaw Uprising and of general Nazi terror.⁶⁶ It was impossible for the prosecution to thoroughly review the documentation, even if it could have been properly registered as evidence.⁶⁷ Besides, the four Great Powers were reluctant to grant any official status to the Polish delegation, for fear that it would encourage other states to send in their

⁵⁹ T. Cyprian, *Faktyczna i prawna sytuacja delegacji polskiej na proces norymberski*, in *Norymberga – nadal otwarty rozdział w historii. W XXX rocznicę wyroku Międzynarodowego Trybunału Wojskowego* (1977) 114. He claims that he resigned from participating in the work of the Commission on 11 July. Por. K. Małcużyński, *Oskarżenia nie przyznają się do winy* (1989) 75.

⁶⁰ Cyprian, *supra* note 59, 111, 114. Cyprian claims that he came back to the Commission on 5 September. However, Mieczysław Szerer argued that Cyprian had been the Polish delegate since July, and starting in August 1945, Szerer took the position of delegate and Cyprian was his deputy (Mieczysław Szerer, *Wypowiedź w sprawie referatu prof. T. Cypriana*, in: *Norymberga – nadal otwarty rozdział w historii*, in: *Norymberga – nadal otwarty...*, *supra* note 59, 125.

⁶¹ Cyprian, *supra* note 59, 111 L. Kubicki, *Zbrodnie wojenne w świetle prawa polskiego* (1963) 49.

⁶² Cyprian, *supra* note 59, 119; Cyprian, Sawicki, *supra* note 9, 166.

⁶³ Cyprian, *supra* note 59, 118. Por. Małcużyński, *supra* note 59, 70.

⁶⁴ Cyprian, Sawicki, *supra* note 9, 111; Małcużyński, *supra* note 59, 79.

⁶⁵ One item of evidence submitted by the Polish delegation based on the article 21 of the IMT Charter was the following document: The Republic of Poland, *German Crimes against Poland, Official Report of the Polish Government to be submitted to the International Military Tribunal* prepared by Manfred Lachs with the help of Aleksander Bramson, see T. Cyprian, J. Sawicki, *Przed trybunałem świata* (1962) 21.

⁶⁶ Cyprian, *supra* note 59, 112.

⁶⁷ About the tremendous problems related to submitting evidence to the IMT, see Małcużyński, *supra* note 59, 72-3.

delegations as well. In fact, this is exactly what happened, although – in contrast to Poland – the Czech, Yugoslavian and Greek representatives stayed only for brief periods.⁶⁸

The members of Polish delegation had proved helpful quite fast, when Stanisław Piotrowski found the journal of Hans Frank in the archive. The journal became crucial evidence in the trial. Good personal relations between the Polish delegates and several persons involved in organizing the trial as well as the delegates' extensive language skills eventually earned them a degree of appreciation.⁶⁹ Nonetheless, they were not allowed to act as prosecutors or as *amicus curiae*.⁷⁰ They were only allowed to provide support for the Great Powers' prosecutors, without a right to present evidence in the courtroom.⁷¹ On a positive note, they had access to a large variety of documents, and Jerzy Sawicki, who was a prosecutor, was able to question certain persons (e.g. Bach-Zelewski). This was valuable in view of future proceedings at the national level.

There were also problems going beyond the general issues faced by the Polish delegation as far as the crimes committed during the Warsaw Uprising were concerned. Political obstacles stood in the way of properly drawing attention to them. The main prosecutor in Nuremberg, Robert Jackson, wanted the trial to focus on the crime against peace. He was almost obsessively concentrated on demonstrating that Germany and its allies committed the crime of aggression by starting a war of aggression, and that this crime was the source of all the evil that followed. He was successful in his efforts. The International Military Tribunal held: "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole".

The focus on aggression meant that all the other crimes were considered secondary, and that included even the Holocaust.⁷² In a situation where the enormity of Holocaust only served as backdrop to demonstrating the guilt of the defendants, it was futile to try drawing the attention to the slaughter of the population of one city in occupied Europe.

The indictment and evidence with regard to the crimes committed in the territory of Poland, with the exception of the September 1939 campaign, were in the hands of a prosecutor appointed by the Soviet Union.⁷³ For obvious reasons, his primary objective was to emphasize the crimes committed in the Soviet territory, including the brutality against partisans.⁷⁴ He had to rely on Erich von dem Bach-Zelewski, who had been responsible for fighting against the partisan forces, and who was willing to testify against the defendants in Nuremberg.⁷⁵ He was the key witness in terms of demonstrating the role of the German army in the atrocities.⁷⁶ While the defendants got into a heated argument with Bach-Zelewski in the courtroom, accusing him of having more blood on his hands than they did⁷⁷, it

⁶⁸ Cyprian, Sawicki, *supra* note 9, 113.

⁶⁹ Cyprian, *supra* note 59, 110.

⁷⁰ Art. 15 (e) IMT Charter.

⁷¹ Cyprian, *supra* note 59, 120-1.

⁷² M. R. Marrus, A Jewish Lobby at Nuremberg: Jacob Robinson and the Institute of Jewish Affairs, 1945-1946, 27 *Cardozo Law Review* (2006) 1651, 1652.

⁷³ Cyprian, *supra* note 59, 117-118.

⁷⁴ G. N. Aleksandrow, *Norymberga wczoraj i dziś* (1974) 8.

⁷⁵ A. Półtorak, *Norymberski epilog* (1968) 58-9; Heydecker, Leeb, *supra* note 56, 354.

⁷⁶ T. Taylor, *The Anatomy of the Nuremberg Trials. A personal Memoir* (1993) 243, 258.

⁷⁷ Półtorak, *supra* note 75, 154-5; Conot, *supra* note 47, 274-5, 282; Heydecker, Leeb, *supra* note 56, 359.

was not in the interest of the prosecution to dwell on the crimes committed by the witness, lest it should have diminished his credibility. The situation was similar with regard to Guderian⁷⁸, and even Reinefarth was interned in the same wing as the witnesses in the Nuremberg Tribunal. The Soviet prosecutor was also aware that any discussion of how the uprising was quashed would tarnish the image of the Soviet Union, e.g. by questioning the position the Red Army took towards the city during the struggle. Moreover, if the case of Katyń came to light, it would certainly damage trust between prosecutors appointed by the Great Powers.⁷⁹ (In Katyń, the Soviets had murdered thousands of Polish prisoners of war and civilians previously held in the camps in Kozielsk, Starobielsk and Ostaszków. The Soviet plan was to insist that the crimes had been committed by Germans.) Finally, the Polish delegates, following the instructions they received from the communist Polish authorities, did not particularly push for attention to be given to the atrocities committed during the Warsaw Uprising.⁸⁰

While there was no hope that the Wola massacre and other atrocities committed during the uprising would receive proper attention during the trial in Nuremberg, there was some consolation in the fact that the trial before the International Military Tribunal was expected to be the first of many. Yet the cooperation between the Great Powers sufficed only for this one trial. Moreover, the end of proceedings in Nuremberg marked a radical shift in the atmosphere surrounding the idea of trying the criminals, in particular those that had been members of the military, with drastic impact on extradition policy.⁸¹ The Cold War had already started. The experience of former enemy soldiers could be valuable for both sides of a new conflict. Moreover, in military circles, the idea of prosecution of enemy armed forces' members for their involvement in war of aggression or war crimes was much criticized as an obvious example of victor's justice and a dangerous precedent.

An option remained to try those responsible for the Wola massacre before the national courts in Poland. There was an abundance of evidence, because the Central Commission for the Investigation of German Crimes (later renamed Central Commission for the Investigation of Hitlerite Crimes), established by Polish authorities on November 10, 1945⁸² began collecting evidence immediately after the end of the war, following the full protocol necessary to render the evidence usable in court.

Polish authorities decided in January 1946 to create a special court to try main Nazi criminals - the Supreme National Tribunal⁸³. Seven trials were held before it with regard to the crimes committed by Nazis in Poland.⁸⁴ The work of the Supreme National Tribunal may have influenced the proceedings

⁷⁸ Aleksandrow, *supra* note 74, 12.

⁷⁹ See more W. Schabas, The Katyn Forest Massacre and the Nuremberg Trial, in: Morten Bergsmo, Cheah Wui Ling and Yi Ping (eds.), *Historical Origins of International Criminal Law*, Vol. 3 (2015) 249 ff.

⁸⁰ Dzikiewicz, *supra* note 15, 284.

⁸¹ Kubicki, *supra* note 61, 54 ff.

⁸² Polish Journal of Laws of 1945, no. 51, item 293. The Minister of Justice was a chairman of the commission and he appointed other members of the commission as well as chairmen of district commissions whose role was among others appoint other members of district commission. In addition, Minister of Public Security had a right to delegate his representatives for the purpose of cooperation (Article 2). The role of the Central Commission was to (a) analyze and collect resources concerning German crimes committed in 1939-1945 in Poland or abroad against Polish citizens or persons with Polish nationality and foreigners who were during the mentioned period in Poland; (b) management of work of district commissions and other similar institutions and cooperation with the Institute of National Remembrance; (c) announcement of resources and results of analysis concerning German crimes and dissemination of them in Poland and abroad as well as sharing them with similar foreign institution (Article 3); Commission (central and district ones) had a right to conduct investigation, including collection of testimonies – commission had court's competences and was obliged to apply Polish criminal procedure.

⁸³ Polish Journal of Laws of 1946, no. 5, item 45.

⁸⁴ F. Rafałowski, La poursuite des criminels nazis en Pologne à la lumière des règles du droit international et du droit interne polonais, in: *Nuremberg - Un Chapitre de l'histoire toujours ouvert* (1980) 213; P. Grzebyk, The Role of the Polish Supreme National Tribunal

before the International Military Tribunal. The first judgments of the tribunal entered few months before the International Military Tribunal gave its ruling.⁸⁵ Interpretation and translation services were available during the proceedings, and prominent lawyers (including Robert Jackson) were invited to observe them. Jackson himself was not present in Warsaw, but Telford Taylor sat on the trials as an observer, and later went on to play a vital role as a prosecutor in the so-called subsequent Nuremberg trials. The plan was for one of the trials before the Supreme National Tribunal to focus on the destruction of Warsaw, including the issues connected to the Warsaw Uprising and the destruction of the ghetto in 1943.⁸⁶ However, the likely defendants in that trial – Erich von dem Bach-Zelewski, Erich von Manstein, Heinz Guderian, Heinz Reinefarth and Erich Koch – were not extradited to Poland.⁸⁷ As of 1947, the two countries that held them (the UK and the US) stopped extraditing Nazi criminals to Poland, with very few exceptions.⁸⁸ The likely reason was that they had considerable 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 blocks.⁸⁹

Only representatives of civilian administration - Fischer and Geibel were sentenced (to death and to life in prison, respectively) among others for the role they played in quashing the Warsaw Uprising. However, the focus of the trials was generally on the crimes committed during the occupation of Warsaw in general, and not on the Wola massacre specifically. This is unsurprising with regard to Fischer at least, in that he had no control of the civilian administration at the time of the slaughter of the residents of Wola.⁹⁰

With regard to Bach-Zelewski and Reinefarth, the option of having a trial *in absentia* was considered by Polish authorities. While this approach was allowed under the legal regulations that governed the operation of the Supreme National Tribunal⁹¹, eventually a decision was made to not pursue this solution. The reasons remain unclear. They may have been similar to the reasons why the Soviet prosecutor avoided discussing the crimes committed during the Warsaw Uprising. Firstly, a trial completely focused on the Uprising would necessarily lead to explaining why in August 1945 the Soviets watched the destruction of Warsaw from the right bank of the Vistula. Secondly, some members of the Home Army refused to lay down arms when Nazi German capitulated, and instead

Tribunal in the Development of Principles of International Criminal Law, in: Morten Bergsmo, Cheah Wui Ling, Yi Ping (eds.), *Historical Origins of International Criminal Law*. Volume 2 (2014) 603 ff.

⁸⁵ See judgments of Polish Supreme National Tribunal in case of *Artur Greiser* 9.7.1946, The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XIII (1949); and in case of *Amon Leopold Göth*, 5.9.1946, The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. VII (1948).

⁸⁶ Telford Taylor included in his first trial programme of 14.03.1946 a case concerning destruction of Warsaw. He planned to prosecute Heinz Guderian and Nikolaus von Vormann as two principal defendants, as well as 12 others, including Oskar Dirlwanger. At the end, Taylor resigned to start proceeding concerning destruction of Warsaw as he was convinced that this case would be prosecuted in Polish courts. See K. J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011) 64, 67.

⁸⁷ Erich von dem Bach-Zelewski was, however, deposed before the Tribunal in the trial of Fischer *et al.*; T. Cyprian, J. Sawicki, *Siedem wyroków Najwyższego Trybunału Narodowego* (1962) xi; Sawicki, *supra* note 8, 244.

⁸⁸ Cz. Pilichowski, *Aktualne podstawy prawne ścigania w aspekcie tzw. prawa norymberskiego oraz bilans karania zbrodniarzy hitlerowskich w latach 1944-1975* in: *Norymberga – nadal otwarty rozdział w historii* (1977) 178-180. Sawicki, *supra* note 8, 11.

⁸⁹ Ph. Marti, *Sprawa Reinefartha. Kat powstania warszawskiego czy szacowny obywatel* (2016) 94.

⁹⁰ See testimonies of Joseph Bühler in: Sawicki, *supra* note 8, 270.

⁹¹ Cyprian, Sawicki, *supra* note 87, XVI. See also J. Kirchmayer, "Zbrodnie hitlerowskie dokonane podczas Powstania Warszawskiego", in *Ekspertyzy i orzeczenia przed Najwyższym Trybunałem Narodowym. Część I, Agresja III Rzeszy Niemieckiej na Polskę i okupacja hitlerowska w Polsce w świetle prawa międzynarodowego* (Ministerstwo Sprawiedliwości, Główna Komisja Badania Zbrodni Hitlerowskich w Polsce, Warszawa 1979) 159 ff.

continued the armed struggle against the new communist authorities. In turn, these authorities declared the Home Army to be a group of bandits, and an uprising organized by these “bandits” could not be upheld as a symbol of martyrdom of the Polish people. The Uprising itself was portrayed in a negative light, as a political error.⁹² The new authorities preferred fighting against the resistance to prosecuting Nazi criminals⁹³; in fact, Nazi criminals sometimes were useful to the authorities because of their knowledge of how the resistance operated.⁹⁴ Assisting the communist authorities was a path towards impunity.

Under the principle of *aut dedere aut iudicare*, the perpetrators of Nazi crimes who were not extradited to Poland should have been brought before justice initially by the states that occupied Germany, and later by Germany itself (primarily the Federal Republic of Germany, because this is where most of those responsible for the Wola massacre resided). While the approach to the crimes committed during World War II in Germany was changing and German courts were increasingly more likely to allow these issues to come before them⁹⁵, the case of Reinefarth was actually an example of either incompetence or an intentionally protective stance towards him of the German and other Western authorities.

Reinefarth was not qualified as war criminal in denazification procedure⁹⁶ (which the courts often used as an excuse for inaction)⁹⁷, and actually claimed that his conduct when he served as the commander of Kostrzyn nad Odrą, which had gotten him arrested, was evidence of his anti-fascism.⁹⁸ He became an advisor to the American authorities on Soviet military strategy. In 1951, he was elected mayor of the town of Westerland on the island of Sylt, where he proceeded to win the subsequent mayoral election in 1957 too. In 1958, he became a member of the Schleswig-Holstein Landtag, and served until the end of the term (1962).⁹⁹ Even though proceedings against him were instituted on several occasions, each time they had to be discontinued due to absence of evidence.¹⁰⁰ When an investigation was opened in 1961 by the prosecutor's office in Flensburg, following an application from the Central Office of the State Justice Administrations for the Investigation of National Socialist Crimes in Ludwigsburg, Reinefarth thought it prudent to take leave from this office. In 1963, the town revoked his appointment as mayor. Despite Reinefarth's grim expectations, the outcome of the investigation was favourable to him, and the German prosecutor's office asked for the case to be closed due to the absence of evidence of his guilt.

⁹² See more J. Rabiński, *Skompromitować Powstanie. Zmagania komunistycznej propagandy z Powstaniem Warszawskim 1953-1956* (2012) 51 ff; J. Z. Sawicki, *Bitwa o prawdę. Historia zmagania o pamięć Powstania Warszawskiego 1944-1989* (2005) 25 ff.

⁹³ A. K. Kunert, W majestacie „prawa” PRL. Powojenne represje wobec dowódców Powstania Warszawskiego, in: K. Krajewski, T. Łobuszewski (eds.), *Powstanie Warszawskie. Fakty i mity* (2006) 127 ff

⁹⁴ Gursztyn, *supra* note 21, 353.

⁹⁵ It is worth remembering that the authorities of the Federal Republic of Germany announced on 5.5.1960 that the statute of limitation would be applied to all crimes committed during the WW II (therefore 20 years after the ending of the WW II, on 8.5.1965 there will be no legal possibility to start proceeding against any Nazi criminal). This deadline was then prolonged till 31.12.1969. Thanks to the Polish efforts, the General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (A/RES2391 (XXIII), 26.11.1968, the Convention entered into force on 11.11.1970, 754 UNTS 73), see more in A. Klafkowski, *Ściganie zbrodniarzy wojennych w Niemieckiej Republice Federalnej w świetle prawa międzynarodowego* (1968) 215 ff.

⁹⁶ Marti, *supra* note 89, 102 ff.

⁹⁷ H. Sołga, *Niemcy o Niemcach. Bilans ścigania zbrodniarzy hitlerowskich w Republice Federalnej Niemiec* (1988) 22.

⁹⁸ Davies, *supra* note 4, 547.

⁹⁹ He was representative of the Gesamtdeutscher Block/Bund der Heimatvertriebenen und Entrechteten.

¹⁰⁰ Sawicki, *supra* note 8, 12; Sennerteg, *supra* note 44, 299 ff.

Documents filed in evidence numbered in the thousands. Some of them had been supplied by the Polish Central Commission for the Investigation of Hitlerite Crimes. The German prosecutor's office decided that the Wola massacre was a fact, but that it was impossible to determine with certainty who had ordered it, because of the absence of a written order and the conflicting witness testimony. It was also impossible to determine whether the persons who committed the crime were actually in Reinefarth's command. The conclusion was that there is practically no eyewitness testimony where the witnesses were able to draw direct conclusions as to the service or force to which the perpetrators belonged.¹⁰¹ It was also noted that whatever executions or rapes took place, they must have been committed by individual persons.¹⁰² For the German prosecutor's office, the fact that not all men were murdered (since there were survivors), and that there are discrepancies between the number of victims indicated by the Polish authorities and those noted in the German reports meant that there was no order to kill all residents of Warsaw.¹⁰³ The prosecutor's office also addressed the issue of what Reinefarth said in a conversation with Vormann, in which he complained about not having enough ammunition for all inhabitants of the city ("What are we to do with those who are arrested? We have more arrested than ammunition". Vormann: "Get everything out of Warsaw. Warsaw will be destroyed. Bach has the order").¹⁰⁴ This was explained by the necessary brevity of the note, and justified as being motivated by wanting to ensure that the troops "accompanying the escapees from the city who were being evacuated westwards" are properly equipped. It must be taken into account, the prosecutor noted further, that Polish women and children not only acted as liaisons and carried ammunition but also took active part in the fighting. In result, it was difficult to determine under the circumstances which measures used against the opponent fit within the scope allowed by international law. In consequence, according to German court the majority of crimes committed during the Warsaw Uprising fit the definition of legally acceptable (at that time) conduct of hostilities.

Reinefarth died in 1979. He had never been brought to any court to face any charges. It is thus hardly surprising that his family protested when Reinefarth's name was listed alongside his crimes on a commemorative plaque installed on the 70th anniversary of the Warsaw Uprising.

As for the other perpetrators, Kamiński was killed by German forces for insubordination (according to the testimony given by Bach-Zelewski).¹⁰⁵ Dirlewanger was most likely killed by Poles, who had received the information about his whereabouts from the French resistance.¹⁰⁶ Bach-Zelewski was sentenced for killing a single person during the Night of the Long Knives. He never faced any charges for the crimes committed in Warsaw. He died in a hospital in 1972. Stahel died on 30 November 1952 in a prison operated by the Soviet Main Directorate of State Security in Włodzimierz, although other sources list his date of death as 1955. Stahel's family too threatened to take legal action against the Warsaw Uprising Museum for calling Stahel a criminal at an exhibition in Berlin. The family claimed that logic and the law dictate that Stahel, who was never convicted with a final and binding judgment, should not be referred to as a criminal. Finally, the commanders of lesser significance were, in their

¹⁰¹ B 162/ 19819 (Teil 1).

¹⁰² B 162/ 19819 (Teil 1, Teil 2)

¹⁰³ B 162/ 19819 (Teil 2).

¹⁰⁴ Bartelski, *supra* note 6, 87-8; A. K. Kunert, *Rzeczpospolita Walcząca. Powstanie Warszawskie 1944, Kalendarium* (1994) 40; Marti, *supra* note 89, 67.

¹⁰⁵ Datner, Leszczyński, *supra* note 8, 374-5.

¹⁰⁶ Davies, *supra* note 4, 548.

great majority, never held responsible for the crimes. On the contrary, they enjoyed respect in post-war Germany.

6. Conclusions: there is no reconciliation without truth and punishment

In the borough of Wola in Warsaw, during just a few days in 1944, mainly on 5–7 August, approximately 40 000–60 000 people were killed. Because of the scale of the atrocity and the status of victims, the massacre can be qualified as one of the greatest crimes against humanity and war crimes committed in one single event during World War II.

The persons responsible for the massacre were those who ordered it (Hitler, Himmler), those who transmitted the criminal order (Guderian, Reinhardt, Vormann, Bach-Zelewski, Reinefarth, Stahel, Geibel), those who failed to prevent the commission of crimes (e.g. Bach-Zelewski and Reinefarth), as well as the thousands of German soldiers (including Ukrainian forces forming part of Wehrmacht) who executed the order to annihilate the population of Warsaw. None of them (with Fischer and Geibel – representative of German civilian administration - being exceptions to some extent) faced justice for their crimes. German authorities invoked legal reasons of their non-prosecution, but the fact is that political issues played a major role in this decision. Bach-Zelewski was an important witness during the Nuremberg trial, and therefore the Great Powers decided not to prosecute him to prevent undermining his credibility and exposing the Soviet Union. Moreover, in Nuremberg the focus was on the crime against peace. The crimes against civilians (including the responsibility of their perpetrators) were pushed to the side.

For many years, there was no willingness in Germany to acknowledge the role its citizens played in the crimes committed during the Warsaw Uprising. Only recently, gestures such as the speech by Petra Reiber, mayor of Westerland (the position which Reinefarth held for years after World War II), given in 2014 in Warsaw, in which she apologized for Reinefarth's crimes, appeared.¹⁰⁷ However, the victims and their families still expect formal recognition of the Wola massacre as an international crime which states were and still are obliged to punish taking into account the imprescriptibility of war crimes and crimes against humanity and the fact that still some members of German forces engaged in Warsaw uprising may be alive. The failure to address those needs of victims prevents full reconciliation between Polish and German nation and also proves that the question of responsibility for the World War II crimes is not a closed chapter in international criminal justice history.

¹⁰⁷ See e.g. http://samorzad.pap.pl/depesze/wiadomosci_centralne/141317/Wyznanie-winy---Burmistrz-Westerlandu-Petra-Reiber-przeprasza-Polakow.



Max Planck Institute
LUXEMBOURG
for Procedural Law

4, rue Alphonse Weicker
L-2721 Luxembourg
www.mpi.lu