The Communist Crimes

Individual and State Responsibility

edited by

Patrycja Grzebyk

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REVIEWERS *prof. dr hab. Józef Koredczuk*
dr Magdalena Wilczek-Karczewska

TRANSLATED AND EDITING BY *Paweł Madej*
TYPESETTING *Mateusz Miernik*
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WYDAWNICTWO INSTYTUTU WYMIARU SPRAWIEDLIWOŚCI
ul. Krakowskie Przedmieście 25, 00-071 Warszawa
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IN POLAND

Introduction

In terms of cruelty, communist crimes matched those of the Nazis, and their scale was much greater[1]. However, due to purely political considerations, communists never lived to stand their Nuremberg trials, either in 1945, nor in the post-Cold War times, i.e. after 1989.

There was not, and still is not, an international court that could put communist criminals to trial (except for the internationalized court in Cambodia – the Extraordinary Chambers in the Courts of Cambodia, whose jurisdiction, however, is limited to crimes committed between April 17, 1975 and January 6, 1979, i.e. during the existence of Democratic Kampuchea). The International Criminal Court (the only international criminal tribunal whose jurisdiction should, by definition, be global) may only hear cases for the crimes committed after the date of its statute's entry into force, i.e. after 1 July 2002. Therefore, the Court is of no use in prosecuting communist crimes committed before that date. However, as regards the crimes committed by the existing communist regimes, the Democratic People's Republic of Korea[2] and the People's Republic of China,[3] these countries are not parties to the ICC Statute and there are no signs that they would be willing to recognize the jurisdiction of the Court, while any initiative by the Security Council to transfer any

[1] S. Courtois, *Zbrodnie komunizmu*, [in:] S. Courtois et al., *Czarna księga komunizmu. Zbrodnie, terror, prześladowania*, Warszawa 1997, pp. 25–26.

[2] Human Rights Council, Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea, 7.02.2014, A/HRC/25/CRP.1.

[3] *Uighur Exiles Push for Court Case Accusing China of Genocide*, New York Times, 6.07.2020; cf. also https://www.globalr2p.org/publications/mounting-evidence-that-china-is-perpetrating-crimes-against-humanity-and-genocide-against-the-uighurs/ [accessed: 6.09.2020].

situations in these countries to the ICC would be simply vetoed, e.g. by China.[4] Thus, the crimes of today's communist regimes could be examined by the ICC only if they were committed in the territory of the States Parties, or at least entailed their consequences there.[5]

When it comes to the accountability of states, the International Court of Justice has no compulsory jurisdiction. It could only handle communist crimes in three scenarios. First, if the countries concerned reached a compromise to decide responsibility for communist crimes before the Court, which is a purely theoretical option. Second, if the proceedings were based on a judicial clause under an international treaty binding on a state concerned, e.g. under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[6] – in which case, however, the problem would arise as to the classification of communist crimes as genocide; or under the 1965 International Convention on the Elimination of All Forms of Racial Discrimination[7]. Third, if the states concerned submitted a declaration recognizing the compulsory jurisdiction of the ICJ – which is also a theoretical option only, as in the case of former communist states, those that actually made the declaration reserved that it did not apply to events prior to its date, i.e. in the case of Poland before 1990, Hungary – 1992,[8] while the present communist regimes have not recognized the ICJ jurisdiction as compulsory.

The allergic reaction of the Russian Federation (the successor of the USSR) to raising the question of the responsibility of the USSR authorities for the Katyn massacre and of the responsibility of contemporary bodies of the Russian state for the treatment of victims (and their families) was symptomatic and typical for communist states. The decision of the European Court of Human Rights to rule out any option to redress communist crimes is

[4] Other communist countries are Cuba, Laos and Vietnam, but recently there has been no information about international crimes for which responsibility could be attributed to these countries.

[5] It is on this basis, among others, that attempts are being made to persuade the ICC to deal with the crimes against the Uighurs, since repatriations, illegal arrests and deportations affect these ethnic groups in neighbouring states that are parties to the Statute, i.e. Cambodia and Tajikistan.

[6] 78 UNTS 277.

[7] 660 UNTS 195.

[8] The texts of the declarations are available at: https://www.icj-cij.org/en/declarations [accessed: 17.11.2020].

telling.[9] The sheer scale of claims that could be raised in connection with communist crimes partly explains the reaction of both the Russian Federation and the Court.

The pursuit of justice for communist crimes also encounters a number of obstacles in domestic courts, for example due to the statutes of limitations, the need to assign liability on the basis of participation in a criminal enterprise, the accused invoking the national and international law norms in force when a crime was committed, or missing tools for the extradition of suspects. Sometimes domestic courts get overzealous to classify any violations of the law by communist officials as international crimes, such as crimes against humanity. However, the fundamental problem that the courts face is whether to apply, and possibly how to define, the concept of "communist crimes." This concept is missing in international law, although it is used in scholarly literature, or even introduced into national legal systems. An example is Polish law, where the Act of 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation in its Article 1 (1) (a) uses the term 'communist crimes' (in the context of "recording, collecting, storing, processing, securing, making available and publishing documents of state security authorities, produced and accumulated from July 22, 1944 to July 31, 1990, as well as the documents of the security authorities (…) of the Soviet Union").[10]

Article 2 of the Act defines communist crimes (for the purposes of the Act) as

> actions performed by the officers of the communist state between November 8, 1917 and July 31, 1990 which consisted in applying reprisals or other forms of violating human rights in relation to individuals or groups of people or which as such constituted crimes according to the Polish penal act in force

[9] Janowiec and Others v. Russia, Complaints No. 55508/07 and 29520/09, Fifth Section judgment of 04/16/2012 and Grand Chamber judgment of October 21, 2013.

[10] Journal of Laws of 2019, item 1882 as amended. Noteworthy, the Act of 4 April 1991 amending the Act on the Main Commission for the Investigation of Nazi Crimes in Poland – the Institute of National Remembrance (Journal of Laws of 1991, No. 45, item 195) used the term "Stalinist crimes", which was defined as "crimes to the detriment of individuals or groups of the population, committed in the period up to December 31, 1956, by the authorities of the communist state, or inspired or tolerated by them."

> at the time of their perpetration. As communist crimes are also regarded the actions of those officers in the period in question in the preceding sentence which bear the hallmarks of the unlawful acts defined in art. 187, 193 or 194 of the ordinance of the President of the Republic of Poland, dated July 11, 1932 – the Penal Code or Article 265(1), Article 266(1, 2, or 4), or Article 267 of the Act dated 19 April 1969 – the Penal Code, performed in relation to the documents within the understanding of Article 3(1 and 3) of the Act dated 18 October 2006 on the disclosure of information relating to the documents of the state security authorities from the period between 1944 and 1990 and the contents of those documents (Journal of Laws of 2013, item 1388) to the detriment of the persons referred to in the documents. 2. As conceived of by the Act, the communist state officer is a public functionary, as well as a person who was granted equal protection to that of a public functionary and in particular, a public functionary and a person who performed executive functions within the statutory body of the communist parties.

The separate classification of communist crimes in the Polish legal order was aimed at adopting specific limitation rules and excluding the application of amnesty and abolition (Article 4). What is characteristic, however, is that the category of communist crimes was not introduced into the Polish Penal Code of 1997.[11]

Communist crimes may cover a number of violations, some of which may now be classified as international crimes, such as crimes against humanity or crime of genocide, which, unlike war crimes (which communist authorities also committed, as evidenced by the above-mentioned Katyn massacre), can also be committed in peacetime. Unfortunately, the activity of the USSR, among others, made most communist crimes fall outside the definition of genocide, as political and social groups that were mainly attacked by communist regimes were not listed among the groups protected against genocide.[12]

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[11] Consolidated text, Journal of Laws of 2022 r., item 1138.

[12] The narrow character of the definition of the crime of genocide was one of the main disputable points in the negotiations between the United Nations and Cambodia, as the UN did not want to agree to extend the definition of genocide to crimes against political or social groups, thus most of the crimes committed by the Khmer Rouge could not be qualified as such.

On the other hand, the definition of crimes against humanity has undergone a significant evolution and thus questions arise as to what definition should be applied to specific periods in which communist crimes were committed.

The above-mentioned issues are discussed by the authors of this publication, who indicate each time that the subject of communist crimes raises a number of legal doubts that should be clarified. The part devoted to communist crimes in the world begins with a series of articles on the problems related to the prosecution of communist crimes committed in Cambodia (Wang), Albania (Asllani), and Hungary (Hoffman, Gubrynowicz). The chapters that follow discuss the case law of the European Court of Human Rights, which had to deal with the problem of the communist party reactivation in Romania (Górski) or prosecution of the border guards of the German Democratic Republic (Strzępek). The part on communist crimes in Poland opens with an article on the Polish initiative to establish an international criminal tribunal to handle such cases in the region (Masło). The possibilities of bringing the Polish United Workers' Party to justice (Kuczyńska) and the practice of Polish courts, which qualify communist crimes as crimes against humanity (Wierczyńska) are also discussed, along with the options to exclude the statute of limitations for communist crimes (Lachowski). Further on, there is a presentation of the prosecution of the independence underground after 1945, where the authors discuss the legal qualification of members of the independence underground in the light of international law, which is important for assessing the lawfulness of the actions of the communist authorities fighting against this movement (Perkowski, Waszkiewicz); and court crimes (Paszek, Zdrójkowski), including the difficulties in extradition (Karowicz-Bienias).

This study consists of works prepared in connection with the scientific conference on communist crimes organized by the Institute of Justice in November 2020. Thus, it is not necessarily comprehensive or exhaustive; still, the authors hope that their contributions will, firstly, signal the scale of legal problems in the administration of justice for communist crimes, and, secondly, inspire further research, which is necessary and urgent, given the age of both criminals and, above all, victims, who are still waiting for justice to be delivered.

Patrycja Grzebyk

IN THE WORLD

JIA WANG

How a communist revolution was tried in court? The challenges posed by the trial of former Khmer Rouge leaders at the Extraordinary Chambers in the Courts of Cambodia

Introduction

Communist crime remains a concept that is not sufficiently defined by law although it has been informed by its colloquial usages in countries that have experienced extensive human rights violations committed by previous governments or political parties that allegedly followed communist ideology in different manners. This paper aims to present the structural connection between crimes committed by one well-known former communist regime, the Democratic Kampuchea, and the current international criminal law based on the judicial practice conducted at the Extraordinary Chambers in the Courts of Cambodia (the ECCC). The structural connection is established based on three aspects:

1. the scope of individual criminal responsibility as recognised via the joint criminal enterprise doctrine (the JCE doctrine);
2. mental elements of crimes, especially the mental element of crimes against humanity as applied at the ECCC;
3. potential complete or non-complete defences for atrocity crimes.

All these aspects help to further clarify the standard of attribution of responsibility for communist crimes.

1. Individual Criminal Responsibility as Recognised via the JCE Doctrine

International criminal law is founded upon the principle of individual criminal responsibility. The judicial deliberation at the ECCC reveals that the assessment of individual criminal responsibility for crimes at a massive scale faces a particular challenge, which is to establish the sufficient link between offences committed by foot soldiers or lower level officers and the leaders who are in charge or responsible for the making of overall policies. Since *Tadić*, the joint criminal enterprise doctrine has been installed in international criminal law to punish the individuals that are far away from the crime scene but play critical roles in designing and ordering the commission of crimes.[1] According to the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (the ECCC Law), the ECCC is established to "bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes […] committed during the period from 17 April 1975 to 6 January 1979."[2]

It is not difficult to predict that pinning these senior leaders down for crimes committed by cadres that were left with large discretionary powers at zone and district levels in the Democratic Kampuchea can be very difficult because the central policies of the Communist Party of Kampuchea (the CPK) often adopted a very general and brief language that only set out revolutionary goals, lacking references to the commission of specific offences, i.e. torture, execution and overwork. More importantly, some of the offences were not the goals, but the means of realising a revolutionary ideology. The Chambers at the ECCC debated the common purpose of the communist revolution launched by the CPK and noticed the following key findings. Firstly, at the latest, by June 1974 until December 1977, there was a plurality of persons, referring to the CPK leaders as the members of the JCE, who *shared a common purpose to "implement rapid socialist revolution through a 'great leap forward' and defend the Party against internal and external enemies,*

[1] *Tadić* (IT-94–1-T) Opinion and Judgement, 7 May 1997, paras 196, 202, 204.

[2] Article 2 (new) of the ECCC Law as amended and promulgated on 27 October 2004.

by whatever means necessary."[3] Secondly, the JCE doctrine, especially the JCE I, requires not just any common purpose, but a *criminal* common purpose. The Chambers at trial and appeal are divided on finding the criminality of the previously mentioned revolutionary common purpose. The Trial Chamber holds the opinion that "*this common purpose was not in itself necessarily or entirely criminal*", and it is sufficient to hold the accused responsible if the *implementation* of the common purpose *resulted in and/or involved* crimes.[4] The Supreme Court Chamber overruled the Trial Chamber's interpretation regarding the criteria of finding a common purpose criminal and holds the following opinions: 1) the criminal common purpose is at the core of the JCE doctrine; 2) it is not enough that those who agree to act in concert merely agree to pursue any common purpose; 3) what is required is that they agree to a common purpose of a criminal character;[5] 4) the criteria for deciding which crimes are encompassed by a common purpose are of great relevance. […] *if attaining the objective of the common purpose may bring about the commission of crimes, but it is agreed to pursue this objective regardless, these crimes are encompassed by the common purpose because, even though not directly intended, they are contemplated by it.*[6]

The narrative within the common purpose of the CPK revolution, especially its revolutionary goal and defence against external threats, appears similar with the narratives employed by other communist crimes committed in socialist states where individual interests were sacrificed or ignored in pursuit of national security or other state interests. The Supreme Court Chamber's final opinion, that a common purpose should be deemed criminal as long as the commission of crimes are contemplated although not intended by the objective of the common purpose, provides convenience to the future convictions in similar scenarios. However, one critical challenge remains. Whether a specific offence is contemplated by the common purpose or committed in pursuit of the common purpose would become indeterminate

[3] *NUON Chea and KHIEU Samphan* (002/19–09–2007/ECCC/TC) Case 002/01 Judgement, E313, 7 August 2014, para 777.

[4] Ibid., para 778.

[5] *NUON Chea and KHIEU Samphan* (002/19–09–2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016, para 789.

[6] Ibid., para 807.

when seen in light of the inconsistent patterns of offences across the whole country. For instance, during the Democratic Kampuchea, some victims reported that population movement was enforced with extreme measures while others reported differently.[7] More importantly, the Supreme Court Chamber's interpretation about finding the criminal common purpose of the JCE is very similar with a particular type of the JCE responsibility, known as the JCE III, which the ECCC had decided not applicable.[8] Adopting a broad interpretation of the common purpose of the JCE would potentially conflict with the court's previous decision.

2. Complex Mental Element of Crimes against Humanity

In case 002/01, the two accused were convicted for crimes against humanity of murder in relation to the population movement policies. In particular, they were convicted for a particular type of murder referred as *dolus eventualis* murder.[9] *Dolus eventualis* refers to the mental element of murder which includes not only the intent to kill or inflict serious injury, but also a reckless disregard of human life. In other words, it is sufficient for the accused to be aware of the risk that his action might bring about serious consequences for the victim, given the violence or conditions to which the victim would be exposed.[10] Following this line of interpretation of the law, it is expected that the Chambers should assess whether the population movement policy *should normally* cause the death of the victims. This point is indeed where the Chambers should consistently apply its human rights approach of interpretation and also assess the overall conditions vis-à-vis the state's obligations in that circumstances. The revolutionary context and perceived external threats by the CPK would become more relevant and important when a human rights

[7] Ibid., paras 449–455.

[8] *IENG Thirith, IENG Sary and KHIEU Samphan* (002/19–09–2007-ECCC/OCIJ (PTC38)) Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise, D97/15/9, 20 May 2010 [78].

[9] *NUON Chea and KHIEU Samphan* (002/19–09–2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016, para 410.

[10] A. Cassese et al., *Cassese's International Criminal Law*, Oxford 2013, p. 99.

approach is adopted in the finding of crimes against humanity. However, neither of the two Chambers substantively enquired which factors played more importantly role in causing the death during the population movements. Was the population movement policy wrongfully designed or were the deaths in the process of population movement inevitable results of the devastated conditions of life after the war? According to the judgement, it is clear enough that the Trial Chamber attributes the responsibility for the deaths due to conditions and the lack of assistance during population movements to the accused by applying the *dolus eventualis* murder in case 002/01.[11]

The application of *dolus eventualis* murder in case 002/01 might provide further convenience towards conviction of the CPK leaders, but risks of an overly broad interpretation, which set the standard of attribution of responsibility extremely low. Regarding the question of whether a person can be held criminally responsible for some results that his or her acts did not intend but would normally cause, the Supreme Court Chamber reviewed extensively the practice at international tribunals and domestic jurisdictions across all continents and legal traditions worldwide.[12] And it concluded that,

> The review of the practices in the above-mentioned jurisdictions thus discloses that, while there is no uniformity as to whether killings with less than direct intent to kill are considered as 'murder' (or the equivalent term in the relevant language), the causing of death with less than direct intent but more than mere negligence (such as *dolus eventualis* or recklessness) incurs criminal responsibility and is considered as intentional killing. Given that the crime of murder, in international law, is defined as intentional killing, it must be understood that it encompasses direct intent as well as killing with *dolus eventualis*/reckless killing.[13]

This finding appears formalistic in the sense that it only examined the wordings or formal regulations, but ignored the substantial rationale behind

[11] *NUON Chea and KHIEU Samphan* (002/19–09–2007/ECCC/TC) Case 002/01 Judgement, E313, 7 August 2014, paras 553–559.

[12] *NUON Chea and KHIEU Samphan* (002/19–09–2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016, paras 392–410.

[13] Ibid., para 409.

dolus eventualis responsibility, which is well demonstrated by the French Criminal Code and was also noted by the Supreme Court Chamber, although very briefly. Here, it affirmed:

> The French Criminal Code requires direct intent for the crime of '*meurtre*'. Nevertheless, it is not required that the perpetrator had a precise intent to kill; it is sufficient that the perpetrator wilfully committed acts in the knowledge that they *should normally* cause the death of the victim. The Supreme Court Chamber notes that, depending on the circumstances, this comes close to the notion of *dolus eventualis*. In addition, in France, the crime of '*homicide praeter intentionnel*' covers situations in which the perpetrator intentionally commits acts of violence against the victim, which, in turn, lead, as an unintended result, to the victim's death.[14]

According to the previous observations of the Supreme Court Chamber, the result of deaths shall not be the only decisive element towards responsibility. It is rather inflicting or engaging in a *normally* life-endangering situation that should be punished as murder. This brings us back to the question raised at the beginning of this section of the paper. The Chambers at the ECCC ought to contextualise and specify how the population movements were the substantial cause of the deaths, especially in comparison with other external factors, if the concept of *dolus eventualis* murder is adopted.

3. Potential Defences for Communist Crimes

At the ECCC, the defences of necessity and just cause have been considered by the Chambers up to different extents. The accused leaders of the CPK, especially KHIEU Samphan, has tried in many occasions to explain to the court and the public about the security threats faced by the newly united Vietnam at the end of the Vietnam War and the complexed social transformation

[14] Ibid., para 392.

process envisaged by the CPK.[15] None of the revolutionary objectives intended the devastation of the country, especially the huge loss of the population. These defences were dismissed by the Chambers at the ECCC. In the case of necessity, since the Supreme Court Chamber has strictly claimed that the JCE doctrine must be based on criminal purpose, it practically closed the door for further consideration of the necessity defence because it is convincing enough to claim that one can do no good if the intent was evil. In the case of just cause, although the Supreme Court Chamber did not reject straight away that it might be considered as a mitigating factor if not a complete defence, the general rule to consider just cause as mitigating factor is often dismissed in the name of upholding the affirmative prevention goal of international criminal justice. This may be well justified in the cases that primarily focus on the violations of laws of war. In the cases that focus on human rights violations, especially when both the elements of crimes and mode of liability are interpreted broadly to capture offences that are not intended by the revolution, the ECCC cannot simply rely on similar goals such as affirmative prevention to dismiss the just cause defence. It will only serve to provoke more sceptical attitudes towards international criminal justice by casting doubt over their adherence to substantial justice.

The author is not suggesting that communist crimes are excusable or justifiable by making a case for defences of the crimes such as the ones charged at the ECCC. Critiques highlighted in the previous two sections do not necessarily lead the author to conclude that the convictions at the ECCC regarding the revolutionary polies of the CPK are unfair or unjust, although the Chambers have broadly interpreted some of the very important legal doctrines and definitions of crimes. One result or risk of these broad interpretations at the ECCC is that the true defence or the rationale of the revolution has been overlooked by such an important legal forum. One important objective of international criminal justice is to make sure that the same acts will not be

[15] *KHIEU Samphan* (002/19–09–2007-ECCC-SC) KHIEU Samphan's Defence Appeal Brief against the Judgement in Case 002/01, F17, 29 December 2014, paras 232–233; E.R. Gottesman, *Cambodia After the Khmer Rouge: Inside the Politics of Nation Building*, New Haven 2003, p. 17; KHIEU Samphan, 'Chapter 5: Democratic Kampuchea' in the book *Considerations on the History of Cambodia from the Early Stage to the Period of Democratic Kampuchea*, filed at the ECCC with dossier number E3/16, p. 14.

repeated in the future. Without sufficiently addressing the possible defences or excuses for some of these offences committed in pursuit of righteous or sometimes even laudable goals, we always risk repeated commission of these crimes whenever threats or crisis are presented in the future.

Moreover, it would be pretentious to dismiss the consideration of national security and other state interest in the assessment of responsibility for offences committed to realise the greater good for the whole society, because they are still invoked by contemporary policy making. Very often at the time of serious social crisis, people choose to sacrifice their individual interest for the sake of serving a sort of collective interest. In the trials of former leaders of the Democratic Kampuchea, the key ought to be debating whether the invoked external threats were reasonably perceived. Similarly, in the prosecution or punishment of other communist crimes elsewhere in the world, a holistic and historic view must be applied. Adopting stricter interpretations or allowing more space for the defence of necessity and just cause could be substantially helpful to ease the sceptical concerns towards prosecution and punishment of the crimes committed in particularly difficult historical times.

Conclusions

In conclusion, the concept of communist crime has not been fully grasped by or incorporated into international criminal law which is primarily concerned with crimes against humanity, genocide, war crimes, and aggression. However, there is a growing trend to incorporate more human rights violations into the scope of international crimes. The trial of former Khmer Rouge leaders at the ECCC provides some examples of broad interpretations that may be followed along that path. This paper briefly summarises some potential challenges that have been raised against the ECCC and might arise in the process of further prosecution and punishment of other communist crimes. The first challenge would be to identify the criminal common purpose, especially when the implementation of central policies varies from region to region within one country, or when the communist ideology does not specifically refer to any criminal offences. Inconsistent patterns of offences across the country in the Democratic Kampuchea suggest that some offences might not be intended

or even foreseen by the articulated revolutionary policies. However, the ECCC attributes the overall responsibility for all results of the revolutionary policies to the senior leaders based on the broad interpretation of the joint criminal enterprise doctrine. The second challenge is to assess the overall situation and find out the causal link between contributing factors and the actual offences. The *dolus eventualis* murder as applied at the ECCC remains controversial primarily because it risks of violating the principle of culpability by attributing results that could not be foreseen or normally would not be caused by the acts in question to the accused individuals. Last but not least, on top of the broad interpretations to attribute responsibility in regards of mode of liability and elements of crimes, future prosecutions of communist crimes would also have to deal with defences for various communist ideologies to present a balanced view. This balance does not have to be as accurate as mathematics or quantified in the sense that which factor contribute to what particular offences. The key is to engage all potential contributing factors to the overall situation. Perhaps the conviction would not be changed at the ECCC had the Chambers chosen to express opinions and comment on the raised defences of necessity and just cause in a more sufficient manner, but that judicial deliberation would have appeared much less flawed and a lot more than merely symbolic.

DORINA NDREKA ASLLANI

Dilemmas in using international law for pursuing communist crimes – the Albanian case

Introduction

In 1991 with Albania's transition to democracy and market economy, many people expected the country to face in a clear and direct mode the transitional justice process, especially to proceed with the punishment of all those persons who had committed crimes during the communist period and the respective reparation of the victims. According to Posner and Vermeule, when the old regime is extremely repressive, the demand for justice is usually stronger.[1] These expectations were not fulfilled in Albania, due to several difficulties related to practical and legal matters. These difficulties were not overcome with the passing of time, although the number of victims seeking justice was very high, causing the country to face after 30 years, still an unfinished transitional justice process.

Transitional justice emerged as a special concept, during the 1980, after the democratization processes in Latin America, and afterwards drew more attention with the end of communist regimes in Central East European Countries.[2] Since then, the notion has come to describe an ever expanding range of mechanisms and institutions, that aim to redress past wrongs, vindicate

[1] E.A. Posner, A. Vermeule, *Transitional Justice as Ordinary Justice,* "Harvard Law Review" 2003, vol. 117.

[2] C. Binder, *Introduction to the Concept of Transitional Justice*, [in:] *Transitional Justice: Experiences from Africa and the Western Balkans*, W. Feichtinger, G. Hainzl, P. Jurekovič (eds.), Wien 2013; T.O. Hansen, *The vertical and horizontal expansion of transitional justice Explanations and implications for a contested field*, [in:] S. Buckley-Zistel, T. Koloma Beck, C. Braun, F. Mieth (eds.), *Transitional Justice Theories*, London 2014.

the dignity of victims and provide justice in times of transition.[3] Transitional justice has received special attention by the United Nations which defines it as "*the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.*"[4]

A pioneer in initiating transitional justice laws in the Balkans in the early 90s, Albania failed to successfully implement them, as the leadership saw the lustration process as a political means to crush the opposition and consolidate its power.[5] Amy states that the Albanian communist crimes are not confronted by the country, based on the legacy of state violence as a cultural heritage of communism. According to this author, every attempt to document the crimes of communism runs into this problem: almost every person named as a "perpetrator", under the socialist constitution and the penal code of 1952, was following the laws of the country and the orders of their superiors. "*The judge who signed an execution order, the interrogator that conducted torture, the shooters in an execution squad –they were, literally, doing their job*."[6] The involvement of a large number of Albanians with the former regime was another significant obstacle. According to Human Rights Watch, one in four Albanians collaborated with the communist secret police.[7] This fact created a serious obstacle, since there would be public resilience towards criminal prosecution.

The adherence at the European Convention on Human Rights, other Council of Europe Human Rights Treaties, UN relevant treaties, has compelled Albania to undertake important commitments regarding transitional justice. These norms of international law are incorporated in the Albanian domestic legal system. The domestic legal acts in the country must be consistent in them and the country should guarantee their implementation. The paper is based

[3] S. Buckley-Zistel, T. Koloma Beck, C. Braun, F. Mieth, (ed.) *Transitional Justice Theories*, London 2014.

[4] United Nations, Security Council, Report of the Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 2004.

[5] R.C. Austin, J. Ellision, *Post-Communist Transitional Justice in Albania*, "East European Politics and Societies" 2008, vol. 22(2), p. 373–384.

[6] L.E. Amy, *The Problem of Hoxha: Communist Heritage and the Demands of the Dead*, Conference, "Të mohuar nga regjimi": burgjet, sistemi i internim-dëbimeve dhe puna e detyruar në Shqipërinë e viteve 1945–1990", Tirana 2018.

[7] Human Rights Watch, Human Rights in Post-Communist Albania, 1 March 1996, 1606, available at: https://www.refworld.org/docid/3ae6a7f30.html [accessed: 7.07.2020].

precisely on this important premise, and tries to assess how international law could help the country with the indictment of the responsible perpetrators for the communist crimes.

In the first part of the paper there will be a short description of the main communist crimes and their legal classification; in the second part there is a presentation of the main international law norms and mechanisms in proceeding communist crimes, based on international law; the third part will deal with the domestic legislation and trials conducting in Albania regarding the crimes committed during the communist regime. By confronting these two different paths, the paper tries to assess how international law can aid Albania in prosecuting communist crimes. Albania has accessed the UN Convention on the Genocide[8], the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[9], the International Covenant on Civil and Political Rights.[10] Taking this in consideration and the position of international law in the internal domestic legal system, Albania has an obligation to precede with the prosecution of communist crimes, despite domestic legal framework, the lack of political will and a strong public resistance.

1. Communist Crimes

Žalimas has drafted an exhausted list of the most relevant crimes to qualify the acts of the communist regimes, which include mainly[11]:

1. wilful killing;
2. torture or inhuman treatment;
3. wilfully causing great suffering, or serious injury to body or health;

[8] Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948. The Republic of Albania has acceded at this Convention on 22.03.1956.

[9] Adopted and opened for signature, ratification and accession by General Assembly Resolution 2391 (XXIII) of 26 November 1968. The Republic of Albania has acceded on 19.05.1971.

[10] Adopted by the General Assembly of the United Nations on 19 December 1966. The Republic of Albania has acceded on 1991.

[11] Some of the crimes included by the author are omitted, since his list included acts committed by a foreign country, which did not happen in Albania.

4. extensive destruction and appropriation of property;
5. intentional attacks against civilian objects;
6. intentional attacks against buildings dedicated to religion, education, art, science or historic monuments, hospitals;
7. rape and sexual violence;
8. employment of weapons prohibited by international law.[12]

This list compared with the data of the Institute for the Study of the Crimes and Consequences of Communism in Albania, is almost fully compatible with the crimes committed in Albania during the communist regime.[13] These crimes are generally included in the category of crimes against humanity. However, there have been political attempts[14], and also courts decisions[15] and authors that consider some of these acts as genocide.[16]

The key element of the crimes against humanity distinguishing them from ordinary crimes is their *massive and systematic character*, i.e. they have to be committed as a part of widespread campaign of violence against civilian population that may be also called as a general criminal context.[17] The definition of Genocide according to the 1948 Convention includes only acts directed against a national, ethnical, racial or religious group and does not mention political, economic or other similar groups. The Parliamentary Assembly of the Council of Europe, in its Resolution No. 1481(2006), has noted that the crimes of the communist regimes "*were justified in the name of the class*

[12] D. Žalimas, *Crimes committed by the Communist Regimes from the Standpoint of International Legislation: The Lithuanian Case Study*, The Institute for the Study of Totalitarian Regimes Conference on the Crimes of Communist Regimes, February 24–26, Prague 2010.

[13] Annual Report 2018, Institute for the Study of the Crimes and Consequences of Communism in Albania – Raporti Vjetor 2018, Instituti i Studimit të Krimeve dhe Pasojave të Komunizmit në Shqipëri.

[14] On December 22, 2010, it was reported that the European Commission had turned down a request from six Eastern European states to treat Soviet crimes "*according to the same standards*" as those of Nazi regimes. More information on: https://www.loc.gov/item/global-legal-monitor/2010-12-30/european-union-rejection-of-eastern-european-states-call-to-hold-communist-crimes-to-same-standard-as-nazi-crimes/ [accessed: 17.11.2020].

[15] Budapest Metropolitan Court, 25.B.766/2015/117, Biszku Judgment of 17 December 2015: "*statements were: closely related to the communist ideology and period and reach such a "threshold" that in its scale and gravity they can be assimilated to genocide…*"

[16] D. Žalimas, op. cit.

[17] B.I. Bonafè, *The Relationship between State and Individual Responsibility for International Crimes*, Leiden 2009, p. 99–104, cited by: D. Žalimas, op. cit., p. 9.

struggle theory and the principle of dictatorship of the proletariat."[18] Based on this interpretation the acts of communist regimes towards the resisting part of their societies, could be considered as genocide. This is based on the fact that the population in all former communist countries was divided based on the principle of "*war between different classes of population*"[19], between those who were good citizens and abide by the imposed laws, and those who defined those laws that were part of different intellectual, ethnic, wealth background.

This interpretation is not in conformity with the specifics of the UN Genocide Convention, but the importance of this definition is not only formal from a strictly legal point of view, it has direct legal consequences, regarding the possibility to initiate criminal prosecution if it is possible to assert that the criminal activities performed by one or more perpetrators during the communist regime in Albania, can be classified as genocide. The crimes against humanity were not provided for in the Criminal Code during the communist regime. On the other hand, the fact that the genocide crime, is regulated by both criminal legislation in Albania, during and after the fall of communism,[20] will help to avoid the lack of legal provision of the crime, as one of the main defence arguments of persons prosecuted for these crimes.

2. International Criminal Law in prosecuting Communist Crimes

Criminal trials are one of the main transitional justice mechanisms, and their primary aim is to punish perpetrators for the violations of human rights during the past in accordance with domestic or international criminal law. There are

[18] The Parliamentary Assembly of the Council of Europe, Resolution No. 1481(2006) on Need for International Condemnation of Crimes of Totalitarian Communist Regimes.

[19] The "*war between classes*" was provided not only in political discourse, but also in the legal framework of the Country. Law No. 5591, dated 15.06.1977, the Criminal Code of the Socialist Republic of Albania, provided: "*The criminal legislation of the People's Socialist Republic of Albania expresses the will of the working class and other working masses; it is a powerful weapon of the dictatorship of the proletariat in the class war.*"

[20] Article 71, Law No. 2868, dated 16.03.1959, "*The Criminal Code of the Popular Republic of Albania*"; Article 54, of Law No. 5591, dated 15.06.1977, "*The Criminal Code of the Socialist Republic of Albania*"; Article 73, of Law No. 7895, dated 27.01.1995, Criminal Code of the Republic of Albania.

two main tools to pursue criminal offenders for communist crimes: International Criminal Law and Domestic Law. Before the creation of the International Criminal Court with the Rome Statute, the international community in post conflict or post war states, has established criminal tribunals, usually in those cases where there was a concern that the internal judiciary or government, was not able to fulfil its obligations regarding the rule of law, like in Rwanda and former Yugoslavia. There have been no international tribunals for the prosecution of communist crimes, because there is a general consensus as showed by the way of action of different countries after the fall of communist regimes, that these crimes should be pursued by domestic courts. International organizations, like UN[21], OSCE[22], Council of Europe[23] and even European Union,[24] have focused their actions in guiding the states into taking actions about criminal proceedings through their domestic legal system.

The track followed by states have been very different from each other, based on which was thought as the most appropriate by the political elites. Chile and several other newly democratized nations have decided to sacrifice justice for reconciliation.[25] Since 1990, Chile has offered blanket amnesty to the prior repressive regime members while still instituting an investigation into the crimes of that regime.[26] Albania has followed a different approach and has not issued any amnesties to those who had committed crimes during communist regime, promising always to proceed with criminal prosecution. Despite not adopting any amnesties the actual prosecution of communist

[21] UN Office of the High Commissioner for Human Rights (OHCHR), *Rule of Law Tools for Post-Conflict States: Prosecution Initiatives*, 2006, HR/PUB/06/4, available at: https://www.refworld.org/docid/46cebb6c2.html [accessed: 17.11.2020].

[22] Vilnius Declaration of the OSCE Parliamentary Assembly and Resolutions Adopted at the 18th Annual Session AS (09) D1E, 29 June to 3 July 2009.

[23] Council of Europe Resolution No 1096 (1996) of the Parliamentary Assembly of the Council of Europe, on the Measures for the Dismantling of the Former Totalitarian Communist System; Resolution 1481/2006 of the Council of Europe Parliamentary Assembly.

[24] Resolution P6_TA(2009)0213, European Parliament, "*European Conscience and Totalitarianism*"; European Parliament resolution of 19 September 2019 on the importance of European remembrance for the future of Europe (2019/2819(RSP)).

[25] C. Krauthammer, *Truth, Not Trials; A Way for the Newly Liberated To Deal with the Crimes of the Past,* "The Washington Post", 9.09.1994, cited by: M. Gordon, *Justice On Trial: The Efficacy Of The International Criminal Tribunal For Rwanda*, "ILSA Journal of International & Comparative Law" 1995, vol. 1, iss. 1, art. 10.

[26] M. Gordon, op. cit.

perpetrators has been almost non-existent. The few criminal processes of this kind[27] have been unsuccessful and have undermined public confidence and lowered its expectations, failing to help the country settle accounts with its violent past.

Specific conventions of International Law compel the contracting states to prosecute human rights abuses. Some of the most important ones that were in force before 1991 are:

- The Convention on the Prevention and Punishment of the Crime of Genocide of 1948, in which Albania is a member since 1955, in Article IV expresses the member state's duty to prosecute persons committing genocide regardless of their position or rank.
- The United Nations International Covenant on Civil and Political Rights of 1966, provides in Article 6 § 1 "*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*" The International Convention on Civil and Political Rights, does not expressly mention a duty to punish when these rights are violated, but through non obligatory documents and political activity international organizations and other countries, demand prosecution for the violated rights. This international treaty was ratified by Albania on the 4th of October 1991, so it was not obligatory for the country during the communist regime. After its entry into force the country should assume its obligation and find a way to prosecute communist crimes.
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, approved by Resolution of the General Assembly 1968, entered into force in 1970. Albania is part of this Convention, since the country ratified it in 1971. Article I of the Convention provides that no statutory limitation shall apply to the crimes included in this convention, irrespective of the date of their commission, even if such acts do not constitute a violation of the

[27] The criminal procedures that began in 1996 from the General Prosecutor against several former high ranking officials of the communist regime did not fulfil their mission, of investigating the crimes and giving justice to the victims. Due to the reduction of the sentence by the Appeal court, amnesties, age or the repeal of the sentence, all the defendants got out of the prison in a short time.

domestic law of the country in which they were committed. The crimes included are: the war crimes and crimes against humanity; of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

In addition to international acts, court decisions also have played an important role in this area. The most important international tribunal has been the Nuremberg International Military Tribunal, created with a special treaty. The universal validity of these principles has already been recognized by the European Court of Human Rights.[28]

The decision of the International Court of Justice in the Case Concerning the *Application of the Convention of the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)*, the court interpreted the legal meaning of genocide according to international law. The court affirmed that: "*Genocide comprises "acts" and an "intent." … The acts, … are by their very nature conscious, intentional or volitional acts.*"[29] This interpretation can help domestic court properly identify the relevant acts that constitute genocide.

Another milestone decision in this area has been the European Court of Human Rights Decision, *Streletz, Kessler and Krenz v. Germany (Applications nos.34044/96, 35532/97 and 44801/98).* During these proceedings the applicants alleged that the acts on account of which they had been prosecuted did not constitute offences, at the time when they were committed, under national or international law, and that their conviction by the German courts had therefore breached Article 7 § 1 of the Convention.[30] This argument, which has been one of the main lines of defence in the Nuremberg trials, was also used

[28] Decision *Kolk and Kislyiy v. Estonia, 17.01.2006*, No. 23052/04, No. 24018/04; Decision *Penart v. Estonia, 24.01.2006*, No. 14685/04, in which the court stated that: "*responsibility for crimes against humanity cannot be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War.*" For more see: D. Žalimas, *Crimes committed by the Communist Regimes from the Standpoint of International Legislation: The Lithuanian Case Study*, The Institute for the Study of Totalitarian Regimes Conference on the Crimes of Communist Regimes, February 24–26, Prague 2010.

[29] Case Concerning the *Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Jurisdiction and Admissibility, Judgment of 27 February 2007, (2007) ICJ Rep., para. 186.

[30] *Streletz, Kessler and Krenz v. Germany*, ECHR, 35532/97, 34044/96 and 44801/98, Judgment 22.3.2001 [GC], para. 3.

by the defendants and the court in the Albanian court cases[31]. The ECHR did not consider this argument acceptable:

> Because of the very senior positions they occupied in the State apparatus, they evidently could not have been ignorant of the countries' Constitution and legislation, or of its international obligation.[32]

The Court considered that it is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law.[33] At the time when they were committed the acts constituted offences defined with sufficient accessibility and foresee ability by the rules of international law on the protection of human rights.[34]

Apart from the above, several international organizations have approved non-binding political resolutions directly concerning the crimes committed by the communist regimes. Some of the most influential include:

- United Nations, Security Council, Report of the Secretary General, 2004, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies;[35]
- United Nations, General Assembly Resolution 60/147, dated 16.12.2005, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law";

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[31] Decision of the Tirana District Court, January 1993, against Nexhmije Hoxha; Decision of the Tirana District Court, June 1994, against Ramiz Alia, Rita Marko, etc.

[32] *Streletz, Kessler and Krenz v. Germany*, ECHR Judgment, 2001, op. cit., para. 78.

[33] Ibid., para. 81.

[34] Ibid., para. 107.

[35] UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, 23 August 2004, S/2004/616, available at: https://www.refworld.org/docid/45069c434.html [accessed: 17.11.2022].

- United Nations Report, Office of the UN High Commissioner for Human Rights, 2008, Rule of law tools for post-conflict states-Reparations Programmes;[36]
- UN Office of the High Commissioner for Human Rights (OHCHR), Rule of Law Tools for Post-Conflict States: Prosecution Initiatives;[37]
- The resolution of the European Parliament on European Conscience and Totalitarianism adopted on 2 April 2009;[38]
- The Parliamentary Assembly of the Council of Europe, Resolution 1096(1996) on Measures to Dismantle the Heritage of Former Communist Totalitarian Regimes;[39]
- The Parliamentary Assembly of the Council of Europe, Resolution No. 1481(2006) on Need for International Condemnation of Crimes of Totalitarian Communist Regimes;[40]
- Resolution of the OSCE Parliamentary Assembly on Divided Europe Reunited: Promoting Human Rights and Civil Liberties in the OSCE Region in the 21st Century.[41]

All these documents, which are not the only ones, aim to promote the remembrance of the past crimes, based on opening the archives and truth commissions, the conviction of perpetrators, the victims' reparation, as the only way to deal with their violent legacies and achieve reconciliation for these breached societies.

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[36] UN Office of the High Commissioner for Human Rights (OHCHR), *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, 2008, HR/PUB/08/1, available at: https://www.refworld.org/docid/47ea6ebf2.html [accessed: 17.11.2022].

[37] UN Office of the High Commissioner for Human Rights (OHCHR), *Rule of Law Tools for Post-Conflict States: Prosecution Initiatives*, 2006, HR/PUB/06/4, available at: https://www.refworld.org/docid/46cebb6c2.html [accessed: 17.11.2022].

[38] Resolution P6_TA (2009)0213, European Parliament, "European Conscience and Totalitarianism."

[39] Council of Europe Parliamentary Assembly, Resolution 1096 (1996), "*Measures to dismantle the heritage of former communist totalitarian systems*", available at: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507 [accessed: 17.11.2022].

[40] Council of Europe Parliamentary Assembly, Resolution 1481 (2006), "*Need for International Condemnation of Crimes of Totalitarian Communist Regimes.*"

[41] Vilnius Declaration of the OSCE Parliamentary Assembly and Resolutions Adopted at the 18th Annual Session AS (09) D1E, 29 June to 3 July 2009.

3. Domestic Criminal Prosecution of Communist Crimes in Albania

Domestic criminal trials, as part of the transitional justice, aim to punish perpetrators for the violations of human rights during the past in accordance with domestic criminal law of each transitional country. These trials can signal a strengthening in the rule of law, by demonstrating that: state actors do not benefit from impunity; domestic law is effectively enforced; and the judiciary is independent.[42] The domestic trials have to face many legal obstacles especially law's retroactivity and the legal framework at the time of the violations. It is necessary for international actors to take specific additional measures to strengthen local capacity.[43] In case the domestic trials are not done properly, then they will deliver the opposite message and undermine public trust in transitional justice.

At the begging of the Albania's transition, based on the steps undertaken by the country, there were big expectations regarding the measures included by the transitional justice framework. The first traces of the country were in the right direction. With the Law No 7514/1991, "*On Innocence, Amnesty and Rehabilitation of Former Political Convicted and Prosecuted*",[44] the Albanian parliament apologized to the Albanian people, recognizing the human rights infringements during the communist regime. It also provided two other tools of transitional justice, amnesty for the persons convicted on political charges from the communist regime and restoration for these victims, or their families. This law approved by the Albanian Parliament, was signed by the last communist President, Ramiz Aliaj, which would be after some years a defendant on the so called "genocide trials." The law acknowledged the fact that during 45 years, a large number of Albanian citizens have been, charged, tried, convicted and imprisoned, interned or prosecuted for political violations, while infringing their civil, social, moral and economic rights.

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[42] M. Lynch, B. Marchesi, *The Adoption and Impact of Transitional Justice, in Post-Communist Transitional Justice*, New York 2015.

[43] H. Haider, *Transitional justice, Governance Social Development Humanitarian Conflict,* Birmingham 2016.

[44] Gazette No 7, dated 14.01.1991, available at: https://qbz.gov.al/eli/ligj/1991/09/30/7514/1fbba9d3-d0ad-4c5d-8a00-2dae628e2faf [accessed: 17.11.2022].

The restoration arranged the provision of material and moral assistance to the victims of the communist regime, which included: monetary compensation; restitution and compensation of confiscated assets; restitution of honorary titles; education rights; etc. This is the only law, which recognizes although indirectly the criminal activities of the communist dictatorship. It was considered a proper step and the country a pioneer, compared to other former communist countries, but since it was not followed by concrete measures, its value was mainly symbolic.

The approval of the Criminal Code in the country,[45] which entered into force on 1 June 1995, by including genocide and crimes against humanity, created the necessary premise for the beginning of the domestic trials against the perpetrators during the communist regime. International law and practice helped in this. The Nuremberg trials have initiated a process which was later confirmed by the UN Genocide Convention, that managed to established as an international principle the non prescription of the crimes against humanity.[46] Crimes against humanity and genocide are considered binding on all states, so that regardless of local law during the conflict or authoritarian regime, the perpetrators can be tried for these crimes.[47] The domestic trials on these charges began only after the approval of law 8001/1995.[48] This law, called: "On Genocide and Crimes Against Humanity Committed in Albania during the Communist Regime for Political, Ideological and Religious Reasons", included in its name "genocide" and "crimes against humanity", and it is widely known as the "Genocide Law", but in reality the law was only based on the article of the Criminal Code that regulated the crime against humanity and the non prescription of these crimes, with no reference to the

[45] Law No. 7895, dated 27.01.1995, Criminal Code of the Republic of Albania, available at: https://qbz.gov.al/eli/ligj/1995/01/27/7895/49876337-8143-4c8e-bba8-a8620022f231 [accessed: 17.11.2022].

[46] International Military Tribunal, Nuremberg, Judgment of 1 October 1946, Part 22.

[47] E. Mobekk, *Transitional Justice in Post- Conflict Societies-Approaches to Reconciliation,* [in:] *After Intervention: Public Security Management in Post-Conflict Societies – From Intervention to Sustainable Local Ownership*, A.H. Ebnöther, P.H. Fluri (eds.), Vienna–Geneva 2005, p. 261–292.

[48] Law No 8001/1995, *"On Genocide and Crimes Against Humanity Committed in Albania during the Communist Regime for Political, Ideological and Religious Reasons"*, Official Gazette No 21, dated 10.10.1995, available at: https://qbz.gov.al/eli/ligj/1995/09/22/8001/47d8f329-ba05-4ad4-8fad-7f6d4f62827c [accessed: 17.11.2022].

genocide crimes. It is important to emphasise that both crimes were provided as criminal offences under the old Albanian penal code.

It is also important to indicate that there was no real legal necessity of the genocide law, since the Criminal Code had already entered into force. The reason seems to be the inclusion in this law, of the article that prohibited, until the 31st of December 2001, the election, or employment in the public administration, or the judiciary, of the former members of the leading elite, including all the employees of the State Security, their collaborators, the witnesses. Some months after the genocide law, the parliament would approve Law No. 8043, dated 30.11.1995; "*On the verification of the Moral Character of Officials and Other Persons Connected with the Defence of the Democratic State.*"[49] Both laws were passed just months before the 1996 parliamentary elections. Under the provisions of the genocide and lustration laws, the Government examined the files of political candidates in the May parliamentary elections. The 1995 Law on Genocide and Crimes against Humanity Committed during the Communist Regime prohibits any persons who were senior government officials, members of the secret police, or secret police collaborators before March 1991 from holding high-ranking state positions or being elected as Members of Parliament until the year 2002. The lustration law allows examination of the former secret police files to determine the rights of individuals under the genocide law.

As the course of events would show, the two laws were a political tool and their implementation resulted in the banning of seven of the Socialist Party's eleven-member presidency, including its leader Fatos Nano, as well as Skender Gjinushi, head of the Social Democratic Party, from participating in the forthcoming elections. [50] Austin and Ellison come to the conclusion that these laws were abused and misapplied, by the Democratic Party and then quickly dismantled and rendered meaningless upon the ascension of the Socialist Party in 1997.[51]

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[49] Official Gazette No 26, dated 28.12.1995, available at: https://qbz.gov.al/eli/ligj/1995/11/30/8043/b5c3d4b4-e4fc-42f5-80bf-594ec254f073 [accessed: 17.11.2022].

[50] Human Rights Watch, Human Rights in Post-Communist Albania, 1 March 1996, 1606, available at: https://www.refworld.org/docid/3ae6a7f30.html [accessed: 7.07.2022].

[51] R.C. Austin, J. Ellision, op. cit., p. 373–384.

The criminal procedures that were developed during 1995 and 1996, were initiated from the Prosecution against several former high ranking officials of the communist regime did not fulfil their mission, of investigating the crimes and giving justice to the victims. Some of the defendants were the same that had a few years ago faced the economical trials, and included some of the highest ranking officials of the former regime, including Nexhmije Hoxha, the wife of Enver Hoxha, the former dictator, who had died in 1995. Mrs. Hoxha hold several high positions in the communist hierarchy. As a defendant was also Ramiz Aliaj the last communist president, and other senior Labour Party members. Twenty-one former communist officials were arrested for crimes against humanity under article 74 of the current penal code.[52] The courts sessions were developed without the public or media presence,[53] based on article 12 of the Law that regulated at the time the functioning of the Constitutional Court,[54] which provided that the public and mass media may be barred from a courtroom if necessary for national security, public order, or for the best interest of minors, private parties and justice. Some of the crimes for which the defendants were accused were related with the cases of border killings that had taken place after May 8, 1990. Since that date, fleeing Albania was no longer regarded as high treason but as a crime with a maximum penalty of five years in prison. Nevertheless, border guards were allegedly ordered to continue with the shoot-to-kill policy.[55] On 20 October 1997 the Supreme Court acquitted several of the accused, ruling that they could not be held liable for actions that were not illegal at the time they were committed. This decision of the Supreme Court was not in conformity with International law, mandatory for Albania at the time.

These criminal proceedings and trails failed to pass the minimum professional, moral and legal standards.[56] Due to the reduction of the sentence by the Appeal court, amnesties, age or the repeal of the sentence, all the

[52] Human Rights Watch, 1996, op. cit., p. 25.

[53] A. Aliaj, *Transitional Criminal Justice in Albania: The use of trials and criminal proceedings as a Transitional Justice Instruments*, OSCE, Tirana 2019.

[54] Law No. 7561, dated 29.4.1992, "*On some changes and* additions to law No. 7491, dated 29.4.1991 "*On the main Constitutional Provisions*", Official Gazette No. 2, dated 20.06.1992.

[55] Human Rights Watch, 1996, op. cit., p. 25.

[56] A. Aliaj, op. cit., p. 28.

defendants got out of the prison in a short time. Despite the recommendations of the transitional justice international acts, the victims of communist regime were not part of these trials. The absence of the victims in the trials, dismissed the opportunity to balance competing moral imperatives, and reconciling legitimate claims for justice, or stability and social peace, like it had happened in other countries.[57]

During last years it is noted an increased interest in bringing to justice the former regime perpetrators. A major influence in this has been the Authority for the Information of the Documents of the Former State Security, and the Institute for the Study of the Communist Crimes. Both these entities have helped to make public communist crimes, not only to young generations of Albanians, but to the general public, which was kept in total dark by the communist regime.

One of the most symbolic initiatives undertaken was the petition in June 2019 from the Institute for the Study of the Communist Crimes, for crimes against humanity committed by the former director of the prison police of the political prison of Qafe Bari. On the 7th of January 2020, the Special Prosecution against Corruption and Organized Crime, in response to the request for information regarding the proceeding, informed the director of the Institute that this case was not on its competencies, but that they were still waiting for further information from the Policy Directorate. According to the Albanian Criminal Code, in case a petition is presented before the wrong prosecution office, they must not dismiss it, but should send it to the competent one. The delay in the proceedings shows the lack of will to deal with the communist crimes.

Conclusions

Albania is part of the main international treaties and organizations that deal with transitional justice. According to the country's Constitution international law is mandatory and has priority over domestic legislation (Article 116).

[57] P. Arthur, *How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice*, "Human Rights Quarterly" 2009, vol. 31(2), pp. 321–367.

In order to have a transitional justice efficient process this is not enough. It must be completed with the relevant domestic legislation, which should not be only formally in conformity with international law, but it must be effectively implemented. Legal framework in Albania, even if formally speaking is in conformity with international law, it does not manage to accomplish its main aims and objectives. After almost thirty years of transition, Albania has not closed its transitional justice chapter yet. The normative assessment of the Albanian legal framework proves that the country has faced a transitional justice process with a strong political approach that has not managed to conclude even one of its chapters.

The long distance from the occurrence is now a very big obstacle, in achieving this goal. Many victims and perpetrators are no longer alive, making it more difficult or impossible to initiate criminal proceedings. The indictment for the communist crimes in accordance with international law standards, the provisions of the Albanian Constitution and the domestic legislation, would raise the awareness of Albanian society towards the extent of the crimes committed during the communist regime. This would help the democratization of the society, would assist the victims' reparation and prevent similar scenarios from happening again in the future.

The data from the Institute for the Study of the Communist Crimes refer that more than 100 000 persons were victims of human rights violations during the communist regime. For a small country like Albania, this is a substantial part of the population, which is still waiting for its history to be told, its compensation process finished, its perpetrators put to justice, or at least made public. At the same time this means that there are also a large number of perpetrators, indicating that the conflict has been rooted into the relevant society for decades and is not an isolated event in history. In order to help the society surpass its distressing past, it is compelling to proceed with criminal prosecution of the communist perpetrators.

Albanian prosecutorial authorities should be more active in pursuing the communist crimes even on their own discretion. In doing this, they should massively rely on international law. The public would be more keenly to accept international law-based proceedings, since it is considered more authoritative and more neutral, helping the prosecution and judiciary to avoid the accusations for conducting political processes. On the other hand,

victims should use the active procedural position that they have gained due to the latest change to the Albanian Criminal Procedure Code. They should initiate the processes in the domestic courts, and if necessary, appeal them before the European Court of Human Rights, whose stance with relevant decisions on this matter is in favour of conducting the relevant proceedings by domestic courts.

TAMÁS HOFFMANN

The difficulties of prosecuting communist crimes – the Biszku trial in Hungary

Introduction

Unlike most post-communist countries, Hungary has not conducted many criminal proceedings concerning political crimes committed during the communism. Even though there have been repeated attempts, these have repeatedly failed due to legal difficulties and political resistance. The Fidesz-government taking helm in 2010 with a two-third, constitutional majority publicly vowed to change this state of affairs and introduced new legislation targeting a specific individual, Béla Biszku, the sole surviving high-ranking communist official from the 1950's, one of the architects of the political trials and repression following the quashing of the 1956 Hungarian revolution. Yet, the Biszku trial became an emblematic example of the inability of the Hungarian court system to prosecute communist crimes in an adequate manner.

In this chapter, I will first introduce the Hungarian attempts to prosecute communist crimes between 1990 and 2010, then I will critically analyse the legislative efforts of the Fidesz-era and demonstrate the shortcomings of the Biszku trial.

1. Entering uncharted territory – Attempts to prosecute communist crimes after 1990

In 1990, the first free election after the fall of communism brought about the victory of a right-wing coalition, which attempted to redress the injustices of the communist era. Even though the limited restitution of nationalised

property[1] and the adoption of a lustration law[2] was generally supported by the Hungarian population, legislative efforts to create the legal conditions for prosecuting perpetrators responsible for political crimes committed during the communist era created a huge political controversy.[3] Crimes connected to the communist state apparatus were never prosecuted for obvious reasons and thus had lapsed by the 1990s, however, there was a fear that reopening the statute of limitations for communist crimes could be used to single out persons holding influential positions in the previous regime,[4] i.e. effectively eliminating some part of the opposition.

The government first attempted to abolish the statute of limitations for treason, voluntary manslaughter and infliction of bodily harm resulting in death committed between December 1944 and May 1990, 'provided that the state's failure to prosecute said offences were due to political reasons.'[5], but the Hungarian Constitutional Court decided that reopening already lapsed crimes violates the principle of legality.[6] A further attempt aimed at criminalizing only offences committed during and in conjunction with the 1956 Hungarian Revolution.[7] This time, even though the Constitutional Court found the draft act unconstitutional, it held that the authorities can still prosecute international crimes, i.e. war crimes and crimes against humanity committed during the communist era as they were not subject to statutory limitations since the Hungarian legal system also incorporated customary international law.[8] This decision effectively meant that the prosecution of communist crimes had to

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[1] See C. Kuti, *Post-Communist Restitution and the Rule of Law*, Budapest 2009.

[2] M.S. Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc*, "Law and Contemporary Problems" 1996, vol. 59, iss. 4, p. 183–185.

[3] Other post-communist countries faced similar dilemmas. See e.g. A.M. Quill, *To Prosecute or Not to Prosecute: Problems Encountered in the Prosecution of Former Communist Officials in Germany, Czechoslovakia and the Czech Republic*, "Indiana International and Comparative Law Review" 1996, vol. 7, iss. 1, p. 165.

[4] K. Morvai, *Retroactive Justice based on International Law: A Recent Decision by the Hungarian Constitutional Court*, „East European Constitutional Review" 1994, vol. 3, p. 32.

[5] Hungary, *Draft Act on the Prosecution of Grave Crimes Committed between 21 December 1944 and 2 May 1990 that were Not Prosecuted Due to Political Reasons*, 4 November 1991.

[6] Hungarian Constitutional Court, Decision No 11/1992, 5 March 1992.

[7] Hungary, *Draft Act on the Procedure to Follow in Case of Certain Crimes Committed During the 1956 War of Independence and Revolution*, 16 February 1993.

[8] Hungarian Constitutional Court, Decision No 53/1993, 13 October 1993, Section V. For a more thorough overview of the events see T. Hoffmann, *Trying Communism Through*

focus on offences committed in association with the 1956 Hungarian Revolution as no other situations could be deemed to have constituted an attack against the civilian population or a violation of international humanitarian law. Ultimately, the prosecution investigated forty potential incidents and charged nine persons with war crimes and crimes against humanity but only three persons were convicted.[9]

All the incidents were acts of violence committed against civilians during or after the 1956 Hungarian Revolution. These so-called "volley trials" had to overcome significant hurdles as Hungarian domestic law did not define the concept of an armed conflict and the category of crimes against humanity was completely missing from the Hungarian Criminal Code. Confusingly enough, Chapter XI. of the Criminal Code bore the title "Crimes against Humanity" or "Crimes against Mankind" – the two terms being virtually indistinguishable in Hungarian –, but it only contained war crimes and crimes against peace.

The first prosecutorial attempts failed as the Hungarian courts did not find that the intensity of violence of the first period of the Revolution between 23 October and 4 November 1956, preceding the intervention of the Soviet army, reached the threshold of a non-international armed conflict. The Supreme Court, however, authoritatively ruled that in 1998 that the use of armed force against the civilian population qualified as a non-international armed conflict and thus the violations of international humanitarian law committed during this period also constitute war crimes.[10] These offences were simultaneously also deemed as crimes against humanity.[11] Even though the European Court of Human Rights held that such confusion of war crimes and crimes against humanity violated the principle of non-retroactivity under Art. 7 of the European Convention of Human Rights,[12] the Hungar-

International Criminal Law? – The Experiences of the Hungarian Historical Justice Trials, [in:] K.J. Heller, G. Simpson (eds.), *Hidden Histories of War Crimes Trials*, Oxford 2013, p. 231–234.

[9] See T. Hoffmann, *Individual Criminal Responsibility for Crimes Committed in Non-International Armed Conflicts – The Hungarian Jurisprudence on the 1956 Volley Cases*, [in:] S. Manacorda, A. Nieto (eds.), *Criminal Law Between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions*, Cuenca 2009, p. 735–753.

[10] Hungarian Supreme Court, Judgment No X. 713/1999/3, 28 June 1999.

[11] For a critique of this approach see T. Hoffmann, *Trying Communism…*, p. 239–244.

[12] *Korbély Decision* (European Court of Human Rights, Grand Chamber, Application No 9174/02, 19 September 2008) para. 95.

ian Supreme Court declared that the concept of armed conflict logically incorporates widespread and systematic attack and thus professional soldiers fighting during the revolution were inevitably involved in the commission of crimes against humanity.[13]

2. Justice long last? – Post-2010 attempts to punish communist crimes

At the 2010 Hungarian parliamentary elections, the right-wing Fidesz party won a sweeping victory at the polls, gaining a two-thirds majority in the national assembly, which enabled it to completely overhaul the Hungarian legal system and reinforce its publicly expressed commitment to prosecute communist-era crimes. Symbolically, one of the first acts of the new legislation was to adopt a bill criminalizing "The Public Denial of the Crimes of National Socialist and Communist Regimes."[14] However, the new government went much further. In 2011, the preamble of the newly adopted Fundamental Law of Hungary, the so-called "National Avowal", raised the prospect of reopening the prosecution of communist crimes by denying legal continuity with the previous regime. The preamble pronounced that: "We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and the communist dictatorship." Moreover, Article U declared that "The Hungarian Socialist Workers' Party and its legal predecessors and the other political organisations established to serve them in the spirit of communist ideology were criminal organisations, and their leaders shall have responsibility without statute of limitations."[15]

However, by this time to only surviving former communist leader, who could potentially had been involved in international crimes was Béla Biszku.

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[13] Hungarian Supreme Court, Case No X. 1.055/2008/5, 9 February 2009.

[14] Article 7 of Act LVI. of 2010. For an overview of the Hungarian regulation of public denial of authoritarian crimes see T. Hoffmann, *The Punishment of Negationism in Hungarian Criminal Law – Theory and Practice*, [in:] P. Grzebyk (ed.), *Responsibility for Negation of International Crimes. Memory Law – International Crimes – Denial*, Warszawa 2022.

[15] The Fundamental Law came into effect from 1 January 2012. It is unnumbered to emphasize its significance within the Hungarian legal order.

Biszku was the Minister of Interior between 1957 and 1961, during the period of (show) trials and the subsequent executions of numerous participants of the 1956 Revolution, including the former Prime Minister Imre Nagy and was also a member of the Political Committee of the Hungarian Socialist Working Party between 1957 and 1980. Biszku gained notoriety in 2010, when he brazenly stated in a documentary that he had not repented anything and that Imre Nagy had deserved his fate. Shortly afterwards, on a show at the Hungarian state-owned television channel Duna TV, he claimed that the 1956 events had been a "national tragedy" and that the trials of the revolutionaries had been justified since "they had committed something." In the immediate aftermath of the scandal, a report was filed against the former communist leader that accused him of involvement in the persecution of Hungarian revolutionaries. The Office of the Prosecutor General rejected to initiate criminal proceedings against Biszku, explaining – obviously erroneously – that only grave breaches of the 1949 Geneva Conventions constituted crimes against humanity and there was no clear evidence linking Biszku to murder or deprivation of fair trial rights as defined in Art. 147 of Geneva Convention IV.[16]

Unsurprisingly, this failed prosecution attempt did not put an end to further efforts to put the former politician to trial. In 2011, the Hungarian Parliament adopted an act – informally known as Lex Biszku – to facilitate his prosecution.[17] Act CCX of 2011 sought to solve the confusion surrounding the application of crimes against humanity in Hungarian criminal law and punish common crimes committed during the communist era at the same time. In Arts. 2 and 3 the Act reaffirmed the non-applicability of statute of limitations to international crimes and translated the definition of crimes against humanity enshrined in Art. 6 of the Charter of the International Military Tribunal[18] into Hungarian to educate Hungarian lawyers. However, that attempt was hardly successful as domestic lawyers still would have needed a background in international criminal law to interpret the contextual

[16] Hungary, Office of the Prosecutor General, NF.10718/2010/5-I., 17 December 2010.

[17] Hungary, *Act CCX of 2011 on the Criminalization of Crimes against Humanity and Exclusion of Statute of Limitations, along with the Prosecution of Certain Crimes Committed During the Communist Dictatorship*.

[18] *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis*. Signed at London, on 8 August 1945.

elements and individual acts of crimes against humanity developed in the case-law of international criminal fora. Besides, the Charter linked crimes against humanity to the existence of a war, i.e. an international armed conflict, which would have prevented its application in non-international armed conflicts and peacetime.[19]

Even more crucially, Art. 3 introduced the new concept of 'communist crimes', i.e. voluntary manslaughter, aggravated bodily assault, torture, illegal confinement, and treason committed for, in the interest, or in agreement with the party state, which were not prosecuted during the communist dictatorship due to political reasons. Even though the category of communist crimes has no basis in international law as it is not a *sui generis* category of international crimes, the act equated them with international crimes and prescribed their application with retroactive effect, abolishing the applicable statute of limitations.

The adoption of the law opened the way to new prosecutorial attempts. In February 2012, two members of the far-right party Jobbik pressed new charges against Biszku for his role in the judicial proceedings against the Hungarian revolutionaries. Similarly to the previous report, they also alleged that Biszku, as minister of interior, member of the Political Committee of the Hungarian Socialist Working Party and the so-called Coordination Committee had the authority and opportunity to influence the judicial proceedings. On 26 September 2014, however, the Prosecution refused to initiate proceedings as yet again it concluded that it could not find sufficient incriminating evidence. Yet, in a surprising turn of events in November 2013, the Budapest Office of the Prosecution charged Biszku for complicity to commit war crimes in the period following the 1956 Revolution due to his leadership position and on 13 May 2014, the Budapest-Capital Regional Court found him guilty for war crimes committed by several instances of volleys fired at the civilian population during 1956 and 1957. Still, that was hardly the end of the proceedings. In the same year the Metropolitan Regional Court quashed the verdict, ruling

[19] This problem, however, has largely been solved by the adoption of Act C of 2012, the new Hungarian Criminal Code, which in Art. 143 defined crimes against humanity by essentially translating Art. 7 of the Rome Statute of the International Criminal Court. See T. Hoffmann, *Az emberiesség elleni bűncselekmények nemzetközi és magyar jogi szabályozása*, "Állam- és Jogtudomány" 2017, vol. 58, p. 29–55.

that the Budapest-Capital Regional Court did not adequately establish the facts on which it based its judgments and remitted the case.

Following the repeated judicial proceedings, the Budapest-Capital Regional Court rendered its decision on 17 December 2015., and found Béla Biszku guilty of a somewhat confusing array of charges, including complicity to commit war crimes, misuse of explosives (by illegally possessing 11 hunting cartridges), and public denial of the crimes of the communist regime.[20] The only international crimes the Regional Court could prove to have occurred were war crimes committed in the towns of Salgótarján and Martonvásár. According to the ruling, which reproduced an earlier Supreme Court decision concerning the Salgótarján case,[21] following the armed intervention of the Soviet troops on 4 November 1956, there was international armed conflict between Hungary and the Soviet Union, and Hungary remained occupied territory until 17 November 1957, i.e. one year after the general close of Soviet military operations, as set out in Art. 6 of Geneva Convention IV. Consequently, grave breaches of the Geneva Conventions committed during this period of time qualified as war crimes. According to the judgment, Biszku had knowledge of the volley fired at unarmed civilians on 8 December 1956 in Salgótarján, and the severe beating of scientific researchers on 9 March 1957 in Martonvásár, which constituted grave breaches of Art. 147 of Geneva Convention IV. Since he failed to initiate criminal proceedings against the direct perpetrators, he became an accomplice and thus guilty of war crimes.

The legal proceedings continued after the Budapest-Capital Regional Court decision. However, before the Supreme Court had an opportunity to revisit the case, Béla Biszku died on 31 March 2016, at the age of 94. While the Hungarian legal system failed to conclusively establish the guilt of the last living communist leader involved in the 1956 Revolution, this case can still serve as a useful reminder of the various problems inherent in the domestic prosecution of international crimes.

[20] Budapest-Capital Regional Court, 25.B.766/2015./117., 17 December 2015.
[21] Hungarian Supreme Court, Bf.IV.1847/1996/10., 16 January 1997.

Conclusion – The perils of the myth of judicial omniscience

International criminal law has become a highly technical and complex field of international law that combines general public international law, international human rights law, international humanitarian law and criminal law and is constantly developed and debated in international jurisprudence and scholarly discourse. In Continental Europe, domestic lawyers are supposed to expertly apply this extremely heterogeneous body of norms without the support of legal experts, as the principle of *jura novit curia* posits that judges are cognizant of all legal issues, including foreign and international legal questions, which precludes the possibility to consult with international law scholars on some particularly thorny questions. This is compounded by the fact that even if international law is an obligatory subject at law schools, it has no real practical significance as very few cases would actually require its application. Consequently, legal professionals either try to avoid invoking international legal norms or have to solve the emerging problems to the best of their abilities, maybe consulting the available legal literature – usually in their national language as they are seldom fluent in English or French – or attempting to interpret international legal norms without the support of international legal literature. Once the local apex court reaches a decision, judges will be happy to rely on the established precedent even if it deviates from the consensus of international law scholars. Moreover, if the case at hand pertains to politically sensitive issues, such as historical justice debates, judges might be even more tempted to either avoid dealing with the question or interpret international law in a way that better suits the prevailing political expectations.

These issues are observable in all the Hungarian historical justice cases, including the Biszku case. The legal background of Hungarian lawyers lacked a comprehensive education in international criminal law and after a series of contradictory judgments the Hungarian Supreme Court eventually decided that crimes committed during the 1956 Hungarian Revolution could be prosecuted as war crimes no matter whether they were committed during a non-international armed conflict (between 23 October and 4 November 1956) or during an international armed conflict (4 November 1956 and

17 November 1957). In two subsequent judgments,[22] the Supreme Court erroneously established the threshold of a non-international armed conflict, failed to prove that the concept of war crimes committed in non-international armed conflict existed in 1956, and misread the Geneva Convention IV. to mistakenly claim that occupation automatically ends one year after the general close of military operations, while neglecting to prove whether Hungary was actually under Soviet occupation during that period.[23] This situation was aggravated by an earlier decision of the Hungarian Supreme Court that mistakenly claimed that violations of Common Article 3 automatically constitute crimes against humanity.[24] Moreover, Hungarian courts were also under enormous pressure to finally deliver historical justice and that could have influenced their deliberations.

Focusing specifically on the Biszku judgment, it is quite revealing that neither the prosecution, nor the Court considered to apply the category of crimes against humanity, even though the Parliament adopted an act for this specific purpose. It seems that although it is one of the so-called "core crimes" in international criminal law, the concept of crimes against humanity was still too novel for the Hungarian judiciary to utilize. Interestingly, Biszku was not charged with communist crimes, either, even though that category was tailor-made to convict him. On the other hand, the Court had no such misgivings about establishing the commission of war crimes as it could rely on established precedent, even if that interpretation was arguably based on an incorrect and superficial interpretation of international humanitarian law. Foregoing the prosecution of Biszku for crimes against humanity, however, ultimately resulted in the Court directing its attention only to one major (the volley in Salgótarján) and one minor incident (the beating of scientific

[22] Hungarian Supreme Court, Bf.IV.1847/1996/10., 16 January 1997; Hungarian Supreme Court, Bfv.X.713/1999/3., 28 June 1999.

[23] Art. 6 of Geneva Convention IV. does not state that occupation ends after one year but prescribes that certain provisions of the Convention are no longer applicable. The International Court of Justice, for instance, held that "since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in the occupied territory." International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion of 9 July 2004, para. 125.

[24] Hungarian Constitutional Court, Decision No 53/1993, 13 October 1993, Section V.

researchers in Martonvásár), that obscured the leading role of Biszku in the retaliations following the 1956 Revolution. This arguably also led to the inclusion of trivial (misuse of cartridge) and highly politicized charges (public denial of communist crimes) that made the entire judicial proceeding seem frivolous.

Ultimately, the Biszku trial proved that complex international criminal law cases, especially in an overtly politicized environment, require specialized expertise, whose absence could lead to an inconsistent and contestable judgment. Prolonging the myth of the omniscient judge will only weaken judicial authority in the long term.

ALEKSANDER GUBRYNOWICZ

Between Western tradition and Soviet doctrine: Some remarks on international law's application by the Hungarian People's Courts

Introduction

Hungary's legal proceedings against war criminals after WWII have been discussed many times.[1] This contribution offers some general remarks on the application of international law by the People's Courts in their judgments handed down in cases of some most notable major Hungarian WWII criminals (hun. *háborús főbünösök).*[2] The analysis is structured in Four Parts. Part I summarizes the most critical extralegal factors leading to the establishment of the People's Courts and outlines the international legal backdrop they were operating within. Part II discusses the most crucial principles and mechanisms laid down in Decree 81/1945, which served as the principal tool of the retributive legislation. Part III analyses the interpretation of the international

[1] T. Hoffmann, *Post-Second World War Hungarian Criminal Justice, and International Law – The Legacy of the People's Tribunals* (August 17, 2014), [in:] M. Bergsmo, Ch.W. Ling, Y. Ping (eds.), *The Historical Origins of International Criminal Law – Vol. II*. Torkel Opsahl 2014, p. 735–763, at SSRN: https://ssrn.com/abstract=2551293 [accessed: 17.11.2022], p. 30. L. Karsai, *The People's Courts and Revolutionary Justice in Hungary, 1945–46*, [in:] I. Deák, J.T. Gross, T. Judt, *The Politics of Retribution in Europe: World War II and Its Aftermath,* Princeton 2000, p. 233–251; L. Karsai, *Crime, and Punishment: People's Courts, Revolutionary Legality, and the Hungarian Holocaust,* [online:] https://ciaotest.cc.columbia.edu/olj/int/int_0401c.pdf [accessed: 30.07.2020]; I. Barna, A. Pető, *Political Justice in Budapest after the WWII*, Budapest–New York 2015; I. Rév, *Retroactive Justice (Prehistory of Communism),* Stanford 2005, p. 203–239. See also A. Papp, *Népbiráskodás – forradalmi törvénység*, [online:] http://www.kanizsaujsag.hu/hirek/16647/dr-papp-attila-nepbiraskodas- [accessed: 30.07.2020]; A. Papp, *Volt egyszer egy népbíróság* (Once upon the time was a people court), Nagykanizsa 2017.

[2] In this contribution, I analyze the following judgments: a) László Bárdossy, b) Béla Imrédy c) Ferenc Szállasi, and – accidentally – Sztójay et all, and Endre-Baky-Jaross.

norms in judgments handed down in the abovementioned cases, with particular emphasis on László Bárdossy's case[3]. Part IV considers mistakes and abuses committed in the People's Courts' interpretation of international rules. It examines some hypotheses on the true causes of many irregularities found in so few landmark cases mentioned in part III.

In conclusion, it is submitted that the role of international law in jurisprudence analyzed here was somewhat limited. Nonetheless, although the line of reasoning and conclusions Hungarian People's Judges drew from international rules were sometimes controversial, the overall assessment of their work in the area of our interest here is everything but straightforward. Concerning the surprisingly substantial mistakes or presumed abuses – their actual causes were twofold. On the one hand, some of them resulted from certain objective factors over which these organs had little influence or could not prevent them. On the other hand, the political nature of these processes, determined by the structure of Decree 81/1945 and its later interpretation, was often subordinated to pragmatic and short-term goals – not necessarily the simple justice administration. This contribution also substantiates the hypothesis that the limited role that international law could play in the proceedings and the lack of international organs reviewing its day-to-day application had some more far-reaching consequences. Notably, the jurisprudence examined suggests – albeit *mutatis mutandis* – some similarities to the judgments given in the infamous Leipzig trials of 1921, although – due to different realities prevailing in the Weimar Republic in the 1920s and in Hungary in the mid-40ties – these features could have been revealed to a limited extent.

Finally, it is posited that even though none of the cases analyzed in this contribution fully mirrored the Soviet "show trials," some of them were undoubtedly the harbinger of the upcoming Stalinist era in the Hungarian judiciary.

[3] See *supra note* 2.

Part I

The events preceding the establishment of People's Courts are well known. As Hungary entered WWII as the Nazi-Reich ally, it had to bear the responsibility for internationally wrongful acts by Hungarian organs after Germany's defeat. An essential part of the retributive policy initiated by the Provisional National Government (PNG) (hung. *Ideiglenes Nemzeti Kormány*) established at the inspiration of the Soviets on December 22, 1944, was criminal trials against people holding the highest positions in the prewar structures of power and direct perpetrators of crimes committed under the color of Hungarian authority, both in 1939–1945 and in the interwar period.

The Armistice Agreement[4] concluded on January 20, 1945, between the Allies and Hungary imposed numerous duties on the Hungarian State. The Allied Control Commission[5] was established to control the execution of AA's provisions by Hungarian authorities. It should be noted that, as of May 8, 1945, all Hungarian territory was under Soviet occupation. Moreover, the AA (as well as statutes of the ACC) granted a greater say to the ACC Soviet Chairman. In practice the role of Western Allies in Hungary was effectively limited, for even though the AA gave some rights to UK and US representatives, the Soviets did not honor them in practice. Therefore, in the matters of war criminals' prosecution and punishment, the ACC was not efficient even though it existed until the Paris Peace Treaty's signature in 1947.[6]

AA's Art. 14 stated as follows: *Hungary will cooperate in the apprehension and trial, as well as the surrender to the governments concerned, of persons accused of war crimes.* The origins of this provision, its *ratio*, and its later interpretations remain out of the scope of this contribution. What counts is that since February 1945 at the latest, the Soviets understood art. 14 (probably against the original view of the AA's Parties) – as imposing the unilateral duty

[4] From now on as «the AA.»

[5] From now on as «the ACC.»

[6] C.G. Bendegúz *Documents of the meetings of the Allied Control Commission for Hungary 1945–1947*, Cold War History Research Center, Online Publication November 2010, p. 24, who opines the issue of war criminals *was not too often raised* during Meeting of the Commission p. 24. On the Russian tendencies to regulate the matters in flagrant contradicting of the ACC statutes – cf. ibid., p. 24 et seq.

to prosecute war criminals on Hungary. Although the issue beg for further research, it seems that this reading was silently accepted by the PNG, in the wake of which it issued the Decree 81/1945,[7] which – with some modifications introduced later – was incorporated into Law VII and approved by the Provisional Assembly in September 1945.[8] In this way, Hungarian authorities set up legal foundations for the People's Courts (hun. *népbiráskodás*) considered the Hungarian retribution policy's primary tool. To clarify the following parts, some essential elements of this Decree must also be recapitulated.[9]

Part II

To prevent the *ancien régime* political forces from distorting the course of proceedings against war criminals, the people's courts were operating from the outset outside the pre-war Hungarian criminal judiciary. Their tasks (set out in the preamble of the Decree) were to *punish as soon as possible all of those who caused the historical catastrophe undergone by the Hungarian People and their accomplices.* In essence, all criminals falling within the scope of the Decree were divided into two groups:

a) war criminals (hun. *háborús bűnös*) regulated in §§ 11 and 13. It should be emphasized that – unlike modern standards, which differentiate *crime of aggression*'s concept from a *war crime* – (cf. Article 5 (1) (c) and (d) read in conjunction with Articles 8 and 8 bis of the ICC Statute), the paragraphs mentioned above dealt with both of these categories in an indistinguishable manner. Consequently, the Hungarian legislator considered as a "war crime" both the acts, which – in line with the terminology of the *Nüremberg Charter* adopted six months later – were treated as *crimes against peace*, and *war crimes*, as the latter term was understood by the classic IHL (cf. § 11 para. 5 of the Decree); Moreover the same paragraphs also targeted participants in the Szálasi *coup*

[7] 81/1945. ME. számú rendelet a népbíróságokról (jan. 25.) [published in:] Magyar Közlöny 1945/3. szám, 1945. február 5, hétfő. (hereinafter – the decree).

[8] 1945. évi VII. Törvény *a népbiráskodás tárgyában kibocsátott kormányrendeletek törvényerőre emeléséről*, [in:] Megjelent az 1945. évi Országos Törvénytár 1945. évi szeptember hó 16-án kiadott 2. számában. (Hereinafter Law VII).

[9] The examination of the modalities of this decree: see: *supra note* 1.

d'État, war propagandists, and some different kinds of criminals, we can omit in this analysis;

b) persons who committed "*crimes against people*" (hun. *népellenes),* regulated in §§ 15 and 17 of the Decree. As recently established, these crimes overlapped– but to a degree only – with the term *crimes against humanity.*[10] Still, contrary to the anti-discrimination tenet laying behind art. 6 (c) of the Nüremberg Charter, Hungarian construction criminalized some activities of officers or other persons acting in an official capacity that was harmful to the "interest of the people" as a whole. At first glance, such construction warranted an investigation exclusively against those who inflicted damage or suffering to all Hungarians (understood as the whole nation) or/and the Hungarian State. However, this understanding of the term "people" is partially incorrect. Both paragraphs also served as legal bases for legal proceedings against perpetrators who persecuted specific social or ethnic groups during the interwar period and World War II. Still, by mingling these two dimensions, the legal construction of "crimes against people" made the task of establishing who could fall within the scope of the *people's enemy* category quite tricky. E.g., § 15 (2) targeted persons *who* (after September 1, 1939-added A.G.) *engaged in implementing laws and regulations directed against certain sections of the people, which endangered or violated personal liberty or physical integrity or contributed to the deterioration of the property of certain persons*. Undoubtedly, by adopting this provision, Hungarian legislators wanted to prosecute and punish Holocaust perpetrators, although they did not state this goal in a nonambiguous manner. Other points of §§ 15 and 17 aimed at prosecuting and punishing members of the pre-war ruling Hungarian elite.[11] Nonetheless, it should be underlined

[10] Cf. art. 6 (c) of the IMT Charter: *murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.*

[11] As Tamás Hoffmann recently noted, *The invention of the concept of crimes against the people was an idiosyncratic solution to the problem of addressing crimes committed against parts of the civilian populations and also holding accountable the political elite of the Horthy regime*.

that § 17(2) was also applied in cases of "active participation" in the Arrow Cross or other fascist parties, no matter the actual position of an accused person within the society.

The mechanism of appointment of People's Courts judges (laid down in § 39) was also striking. These were the political parties' appointees, and even if the proceedings were chaired by professional lawyers (§ 42), their role was relatively close to the specific legal advisor whose proposals could have been taken into account, but it was not mandatory. Moreover, they could vote only in exceptional cases (§ 49).[12] Thus, the punishment's question was totally in the hand of the party delegates, considered an emanation of the «Hungarian People.» For obvious reasons, the mechanism of People's judges' appointment was in a flagrant breach of judicial independence. This conclusion is further exacerbated by some instruments the Minister of Justice disposed to bring the «disloyal judges» to the line.[13] However, perhaps the weakest point of this system was the procedural guarantees: even if the right to defense was more or less clearly stated, the right to appeal to the National Council of People's Tribunals (hun. *Népbíróságok Országos Tanácsa* – NOT),[14] which in the system established by the Decree, played the role of the last instance and the appellation body cumulatively, was reserved for only some carefully drafted cases (§ 53).[15] As the last resort measure, the sentenced person could beg for pardon from the State Council (§ 7). It is worth noting that this possibility remained very close to «the dead letter of the law» in all cases analyzed here.[16]

See T. Hoffmann, *Crimes Against The People – A Sui Generis Socialist International Crime?*, "Journal of the History of International Law" 2019, vol. 21. Available at SSRN: https://ssrn.com/abstract=3339275 [accessed: 17.11.2022], p. 10.

[12] As pointed out by L. Karsai, in practice Minister of Justice could fire these judges from office who were not firm enough in their activities. L. Karsai, *The People's Courts and Revolutionary Justice in Hungary, 1945–46*, [in:] I. Deak, J.T. Gross, T. Judt, *The Politics of Retribution in Europe: World War II and Its Aftermath*, Princeton 2000, p. 238.

[13] Justice Minister István Ries, did not hesitate to suspend or even relieve people judges (see L. Karsai, *The People's Courts and the Revolutionary Justice in Hungary 1945–1946*, [in:] I. Deák, J.T. Gross, T. Judt, op. cit., p. 237.

[14] Hereinafter – NOT.

[15] This concerns, especially such elements like the right to appellate the First Instance People Courts (more on this L. Karsai, *Crime, and Punishment: People's Courts, Revolutionary Legality, and the Hungarian Holocaust*, "Intermarium" 2000–2001, vol. 4, No. 1, p. 3).

[16] In Bárdossy's case, the Council decided to change the form of the execution from hanging to the firing squad. See P. Pritz, *The war crimes trial of Hungarian Prime Minister László Bárdossy*, New York 2004, p. 72.

There is an ongoing discussion to what extent the Decree was compatible with the provisions of the Nüremberg Charter or – on the contrary – it merely reflected the Soviet doctrine. However, it seems that we should never forget its domestic Hungarian origins due to all the specific circumstances in which the final draft of this act was created. Decree 81/1945 was based on the particular extract of some provisions of pre-war criminal legislation.[17] To be sure, this extract was made by the Communist or the Communist-like-minded bureaucrats of the Ministry of Justice. It follows that it cannot claim continuity with the previous Hungarian legal tradition,[18] as it was from the outset planned as a tool of «revolutionary justice.»[19] Still, the «legal material» upon which the decree fundamentals were built up was undoubtedly Hungarian.[20]

Regardless of this native provenance, it is also true that the "Soviet doctrine" undeniably influenced the final shape of the Decree in question. Setting aside the "ideological lineage" that was openly signalled in the preamble, especially the concept of "crimes against the people" (§ 15) to some extent reflected the Stalinist category of "vrag Naroda"[21], a different problem constitutes the issue of the Soviet doctrine's influence on the final draft of §§ 11 and 13. One should not overlook that the negotiations on the Nuremberg Charter had not yet begun when Decree 81/45' entered into force.[22] Consequently, the definition of the *crime against peace* in Art. 6 (a) of the Charter could not play the role even in terms of a potential reference point for the Hungarian regulations discussed here. Theoretically, the only source of foreign inspiration for the provisions

[17] I. Barna, A. Pető, *Political*…, p. 15 et seq.

[18] If Decree 81/1945 (as modified later) should be placed within the Communists policy seeking to outlaw the Horthy regime and re-establish legal ties with the 1919 Hungarian Soviet Republic – it is out of the scope of this analysis.

[19] Cf., however, G. Berend, *A Népbíráskodás*, "Acta Universitatis Segediensis, Sectio Iuridico-Politica", Redigunt J. Móra et J. Szabó Series Nova, vol. III, Szeged 1948, pp. 10–11, who argued, (unpersuasively) that – without denying revolutionary goals of the Decree – such a continuity might have been presumed or deduced from the past revolutionary experiences.

[20] See also T. Hoffmann, who argues that at the moment of preparatory works, the drafters had no access neither to the Soviet legal sources, nor to the documents of the UNWCC. (T. Hofmann, *Crimes*…, p. 11).

[21] T. Hoffmann, *Crimes*…, p. 12. See also, K. Szerencsés, *"Az ítélet: halál" magyar miniszterelnökök a bíróság előtt,* Budapest Kairos Kiadó 2009, p. 35–36.

[22] K. Sellars, *Crimes against Peace and International Law*, Cambridge 2013. As it is generally acknowledged, in the end, Stalin managed to persuade Roosevelt and Churchill to his idea to settle this problem through international legal proceedings, but the Soviet proposal was accepted by the US and UK not earlier than in June 1945 (ibid., pp. 48 and 110).

mentioned above could be the book of A.N. Trainin devoted to the criminal liability of the Nazis.[23] Against this backdrop, it is legitimate to ask to what extent the Soviets inspired the redaction of § 11? Did they directly instruct their "comrades," or is this paragraph the outcome of Hungarian communist legal theory? So far, this question remains unanswered, as it is still unknown to what extent the Chairman of the ACC, Marshall Voroshilov, modified the final draft of the Decree sent to him for approval.[24] We do not even know what parts of the Decree the Soviet hand adjusted or amended: did Moscow interfere with the accused's rights? Alternatively, the position of the people prosecutor?[25] These and other questions concerning the Soviets' role in creating the Decree still wait for an additional research.

Summing up, it can be concluded that the legal act discussed here was in-between the provisions of Hungarian criminal law (which, however, were drastically distorted in such a way as to serve the PNG's revolutionary goals) and certain elements taken from the Soviet doctrine. As a result of this mix of doctrinal influences, Decree 81/1945 escapes easy classifications. It is pretty tricky to be unambiguously assessed. In the discussion on this subject, there is another problem, i.e., the issue of convergence of its provisions with the IMT Statute adopted six months later. Against this backdrop, the question arises to what extent Hungarian regulations were compatible with the norms of international law as it stood in the mid-40ties.

Regarding the latter point, it can be safely stated that the Decree under discussion was certainly neither contrary to international criminal law nor international nor humanitarian law. The reason is that in the realities of the time, these branches of international law and the protection of human rights were at a relatively early stage of development. Therefore, the explicit norms' limited quantity in the field of international obligations, *ipso facto*, left states a vast discretion in creating national regulations and narrowed the

[23] A.N. Trainin, *The criminal responsibility of Hitlerites*, Moscow 1944.

[24] The Soviets' interference in Decree's final draft was known to Americans before the end of March 1945 at the latest. 740.00119 Control (Hungary)/ 3–2745 Telegram, *Mr. Alexander C. Kirk to the Supreme Allied Commander, Mediterranean Theater to the Secretary of State. Caserta, March 27, 1945*, [in:] United States Department of State /Foreign relations of the United States, diplomatic papers, 1945. Europe (1945, vol. IV, p. 811 and seq).

[25] Cf. T. Hoffmann, *Post-Second*…, p. 5 et seq.

field to possible conflicts of norms derived from both orders. Moreover, as demonstrated by Tamás Hoffmann – as a result of negotiations, representatives of the USSR managed – at least partially – to include in the content of the Nüremberg Charter ideas that they considered their own. It seems that this is why later, Hungarian lawyers argued that there were no significant discrepancies between the provisions of the Decree and Charter.[26]

On the other hand, notwithstanding to what extent the Nüremberg Charter is considered a parameter of the compliance assessment of Decree 81/1945 with international law, it must not be forgotten that Hungary has never been the Party to the London Agreement.[27] Moreover, as Hoffmann points out, there were not only similarities but also some marked differences between Hungarian legislation and the Charter's text.[28] They were not limited only to the scope of the crimes referred to in both legal acts.[29] Moreover, the practice of Hungarian people's courts – at least in specific periods – diverged from the IMT judgment's content and the procedural standards in force during the Nuremberg trial.[30] Still, although significant from a historical point of view, the above discrepancies are insufficient for challenging the compliance of Decree 81/1945 with public international law – as it stood in 1945. The issue of compatibility of Hungarian retributive legislation with international standards must be distinguished, however, from the problem of people's courts practice

[26] T. Hoffmann, *Post-Second…*, pp. 12 et seq., pp. 19–23.

[27] There are some other reasons advocating a due caution against applying this Charter as a comparand for a Decree without any reservations. Setting aside the temporal aspects (the Decree had been adopted c.a. half a year before the London Agreements' date of signature), it's worth noting that Prof. Manfred Lachs, in his magisterial work on war crimes, published in April 1945, reduced the "crimes of quislingism" to the exclusive scope of domestic law without any direct references to the international legal order. Therefore, the extent and pace of internationalization of crimes committed during WWII by Fascist regimes against their citizens (classified under the Nüremberg Charter as *crimes against peace*) also beg additional research to establish as precisely as possible the moment these sorts of crimes became international ones indeed. (See M. Lachs, *The War Crimes; an Attempt to Define the Issues,* Quotation after *Manfred Lachs, War Crimes in the 60th Anniversary of Publication. Remarks, Sources,* Warsaw 2017, p. 243.

[28] Cf. Hoffmann's remarks on the term "crimes against people" T. Hofman, *Crimes…*, p. 13.

[29] Cf. Art. Sixteen of the Charter enumerates the Defendant's rights and the lack of analogous provision in the Decree.

[30] See T. Hoffmann, *Post-Second…*

of international law application, which – as we will see in the next Part – often left a lot to be desired.

Part III

Before WWII, Hungarian courts followed the dualist approach.[31] Therefore; one could expect that during the first public trial proceeded against the former PM – László Bárdossy,[32] the Budapest People's Court,[33] would limit its analysis to the provisions of Law VII. Still, it turned out otherwise. As Bárdossy was accused of crimes specified in § 11 points 2–4 (concerning i.a. the initiation of war – § 11(2)),[34] taking into account the circumstances of his case, some references to the international norms were probably unavoidable. The process took place in the specific atmosphere, which was influenced by a number of non-legal factors[35]. In addition, the President of the Court was acting under intense pressure exerted by the domestic politicians and foreign powers.[36] These extraordinary circumstances are reflected in the judges' reasoning and conclusions, also in this part of their judgment, in which the arguments derived from international law played a significant role.

Most notably, Defendant questioned the people's courts' cognition in his case. He argued that, under the principles derived from statutes, which the pre-war theory and practice gave the rank of provisions of Hungary's

[31] N. Chronowski, T. Drinóczi, I. Ernst, *Hungary*, [in:] D. Shelton, *International Law and Domestic Legal Systems: incorporation, transformation, and persuasion,* Oxford 2012, p. 260.

[32] Unless otherwise specified, all documents from this trial are quoted after L. Jaszovsky (ed.), *Bűnös volt-e Bárdossy László?*, Budapest 1996.

[33] Hereinafter – the BPC.

[34] For the full lists of charges in the indictement against László Bárdossy's, see P. Pritz, op. cit., pp. 75–83.

[35] These were 1) upcoming general elections, which were held on November 4, just the day after the BPC had issued its judgment sentencing Bárdossy to death, and 2) the ongoing negotiation with Allied Powers and the Hungarian to retain some territories acquired between 1938–45 3) the strict monitoring of the proceedings by the UK and USA, that were anxious about some possible consequences of the death sentences passed by the People's Courts for the future proceedings before the IMT.

[36] This information is quoted after the memoirs of the President of the BPC see Á. Major, *Népbíráskodás, forradalmi törvényesség: egy népbíró visszaemlékezései*, Minerva 1988, pp. 147, 213–215, 223.

unwritten constitution, the proceedings against him should have been brought before the Parliamentary Court. Bárdossy based this claim on the allegedly political nature of the offenses he was charged with in the indictment, making them not prosecutable before any other judicial organ but the Parliamentary Court. However, the BPC, adjudicating in the first instance, rejected this argument *in toto*. In their justification, the people's judges distinguished between *political crimes* and *war crimes*, where the division criterion was the international nature of the war crimes and crimes against the people of which László Bárdossy was also accused. At the same time, the Court expressed the view that the war crimes committed during World War II shook the order of the peaceful coexistence of humanity. Therefore, Defendant's conviction that war in itself had no signs of an international crime might not have been accepted. Thus, due to the unique nature of these crimes, the people's Court rejected the equation of war crimes with political crimes, where the latter in the Hungarian theory and practice so far fell within the exclusive jurisdiction of the Parliamentary Court. However, seeing that the accused had invoked the provisions of constitutional rank, the People's Court in Budapest decided to "raise the stakes" and – evidently seeking additional legitimacy for its jurisdiction – stated, among other things, that:

The Crimea and Potsdam Conferences and the resulting ceasefire agreements had become a reality, the idea of collective criminal competence of states. Based on these assumptions, the People's Judges argued that *although the people's Court remains an organ of the Hungarian judiciary, it also performs its tasks as an organ of delegated inter-state criminal competence in fulfilling our (*i.e., Hungarian – add. AG*) international obligations*.[37] Thus, by deriving its jurisdiction directly from international law, the Court refused to honor the priority rule in applying constitutional rank provisions. Moreover, and by the same token People's Court in Budapest excluded cases arising under Decree 81/1945 from the jurisdiction of Hungarian criminal courts and made them cognizable exclusively by *népbíráskodás*.[38]

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[37] *A Budapesti Népbíróság ítélete 1945. XI 2-án*. Nb. I 3557/1945 szám, [in:] L. Jászovsky, op. cit., p. 298. (Translation – AG) (From now on: as Bárdossy I).

[38] It is interesting to note that in the case of another former prime minister Béla Imrédy decided a few days later, the BPC (but acting in a different composition) reiterated the arguments developed in Bárdossy's case – but in parts only. While the Court repeated that "political

Elsewhere in the same judgment, the Court considered the legality of war under international law. The fragment in question is mainly well known and highly valued in the literature[39] because the People's Court in Budapest, without hesitation, rejected Defendant's arguments, who argued that by the end of World War II, war was not entirely prohibited by international law. Interestingly, in their analysis, the people's judges directly referred to the views of the American lawyer Robert H. Jackson, whose "Report" significantly influenced the People's Court's reasoning and conclusions. In particular, the judges emphasized that the war was illegal even before World War II. They also suggested that an attack against another nation was always an attack on the international community's well-protected interests.[40]

Another argument of Defendant, derived from international law, referred to the doctrine of *rebus sic stantibus*. Namely, seeking to exonerate his responsibility for the armed attack on Yugoslavia Hungary launched on April 11, 1941, i.e., when Bárdossy was Prime Minister, he tried to convince the judges that he acted along the same lines as the Soviets on September 17, 1939. On this day, the Soviet Union had groundlessly assumed that the Polish State had ceased to exist, in the wake of which the Red Army illegally entered and occupied the territories of the eastern voivodships of the Second Polish Republic. Against this backdrop, Defendant argued that the decision he took on April 11, 1941, to order the Hungarian army to enter and occupy the Vojvodina region was based on comparable premises, factual and legal, as had been the Soviet authorities' decision adopted two years earlier. Apparently, Bárdossy overlooked (or did not want to notice) that, similarly to the situation of Poland on September 17, 1939, at the stage of the conflict, when Defendant ordered the Hungarian Army to attack Yugoslavia, the latter's army was still struggling with the German aggressor. Nonetheless, Defendant insisted that neither the Soviet's decision adopted on September 17, 1939, nor his own decision to begin

crimes" and "war crimes" differ in the international dimension of the latter, at the same time, it remained silent on the "delegated forum" doctrine *A Budapesti Népbíróság ítélete* Nbr. 3953/1945–11. szám, [in:] L. Varga (ed), *Imrédy Béla, a vádlottak padján*, Budapest 1999, p. 373.

[39] See T. Hoffmann, *Post-War*…, pp. 14–16.

[40] Bárdossy I, p. 348–349.

the invasion against the neighboring southern country constituted a breach of international law due to the *rebus sic stantibus* doctrine.[41]

Given the Red Army troops stationed in Hungary, the People's Court in Budapest was not inclined to enter into any deliberations on the 1939 USSR's aggression against Poland. Nevertheless, the People's Judges rightly rejected Defendant's arguments as unfounded. They emphasized that – contrary to his claims – when the Hungarian army entered Vojvodina, the existence of Yugoslavia as a sovereign entity did not raise any doubts. Therefore, neither the secession attempts by the Croatian minority nor the coup d'Etat engineered just a few days before the invasion by Germany were sufficient grounds to exonerate Bárdossy's responsibility by invoking the *rebus sic stantibus* doctrine understood in his way.[42]

Nonetheless, the people's courts' practice's openness to applying international rules depended on the political conjuncture. The latter was very short-living. Just a few days after the general elections (November 4, 1945), Justice Minister István Ries stated that the People's Court's role is not limited to the administration of justice as their jurisprudence must attain specific political goals.[43] The effects of this statement were felt in People's Courts' jurisprudence quite quickly. During the next two months, the political considerations stimulating the greater openness for the international norms also faded away.

In November 1945, BPC handed down its judgment in Bárdossy's case and proceeded separately – with another pre-war prime minister, Béla Imrédy (both politicians were sentenced to death).[44] Bárdossy and Imrédy lodged their appeals to the NOT for the review of their sentences. However, while rejecting Bárdossy's motion, the NOT took a distinctly different path than the one adopted by BPC. Notably, as the appellate body shared the view

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[41] Cf. *The speech of László Bárdossy before the People's Court by his right as Defendant Defendant to the last word*, [in:] P. Pritz (ed.), *The War Crimes Trial of Hungarian Prime Minister*, Chichester, p. 137.

[42] Bardossy I, p. 359 et seq.

[43] I. Ries, *A népbíróság védelmében*, Népbírósági Közlöny, 8 November 1945.

[44] For the list of charges against Béla Imrédy (who – similarily to Bárdossy – was also accused of the breach of § 11 (2)) cf. *Imrédy Béla a vádlottak padján,* Budapest Főváros Levéltára, Párhuzamos Archívum, Osiris, Kiadó, Budapest 1999, p. 63.

that people's courts have exclusive jurisdiction over the crimes under Decree 81/1945,[45] it indicated different grounds for this exclusivity, as they underlined that *changes in society also bring about changes in the laws governing social life.*[46] Similarly, in the case of Imrédy, the NOT, although it approved the judgment of the BPC,[47] strongly emphasized the revolutionary transformation's role as a critical factor determining the jurisdiction of People's Courts.[48] Concerning the "delegated forum doctrine" adopted in the first instance's Bárdossy's ruling, the NOT kept total silence on the issue. Neither the doctrine was approved nor rejected.

Thus NOT's judges, while analyzing the jurisdictional questions, they paid lip service to international law. At the same time, they strongly underlined the role of extralegal, sociological factors deemed justifying the special regime established by the Decree, as if they had wanted to highlight that these factors were sufficient to explain the people's courts' exclusive jurisdiction. Moreover – contrary to the more unequivocal stance of the BPC in Bárdossy's case – the NOT's attitude on such issues as the aggressive war or *rebus sic stantibus* and its effects – for the reasons that will be discussed further – was much more ambiguous.[49] To be sure, this visible shift in the NOT's case – line did not mean the total end of the application of international law by the People's Courts. As demonstrated by T. Hoffmann, the *népbiráskodás* could, on many occasions, support their reasoning with arguments derived from the international order. However, they did it more subtly, e.g., by hints that a particularly cruel, barbarous, or inhuman behavior of a defendant(s) run against the fundamentals of the European culture or minimum standards of morality.[50] Nonetheless, from January 1946 onward, international law did not play a role similar to this in Bárdossy's case. It means People's Judges used

[45] *A hatáskör kérdésében az Országos Tanácsa teljesen osztja az elsőfokú bíróság álláspontját.* Quotation after: *Népbíróságok Országos Tanácsa ítélete 1945 XII 28-án*, [in:] L. Jaszovsky, op. cit., p. 419 (Hereinafter: Bárdossy II).

[46] Bárdossy II, p. 419.

[47] See supra note 38.

[48] *Fellebbviteli főtárgyalás a Népbíróságok Országos Tanácsa előtt* Not. I. 304/1946/18. 28 I 1946, [in:] L. Varga (ed.), op. cit., p. 427.

[49] Cf. next part of this chapter. On other attempts by people's courts, which aimed at delegitimizing the entire interwar period, cf. I. Rév, op. cit., pp. 206 et seq. and 209.

[50] Cf. T. Hofmán, *Crimes Against…*, p. 17 quoting the NOT's decision in István Antal 3678/1946/11, Judgment of August 31, 1946. In the famous Endre-Baky-Jaross case, the BPC

Law VII as an almost monopolistic legal basis, which was only occasionally enriched with the guidelines driven from sources having extra-domestic character.

Furthermore, as Law VII was adopted to serve political goals, its text was written under the Soviets' supervision, and the People's judges were mostly Communist or Moscow sympathizers, the increasing role of the Soviet doctrine and the Soviet practices became a matter of time. As early as February 1946, during the trial against the former leader of the fascist Arrow Cross Party, Ferenc Szálasi, the courtroom's atmosphere became much more Stalinist-like. The infamous judge Péter Jankó openly mocked the accused (occasionally – even publicly intimidated him).[51] Furthermore, the pressure was exerted on the lawyers defending the accused. Finally, one should not forget the brutal interruption by Jankó Szálasi's last word[52] and scandalous breach of the rules of procedures. Specifically, Szálasi – sentenced to death – had been publicly hung before the State Council officially rejected his petition for pardon. These facts make this case significantly different if compared to the standards of Bárdossy or Imrédy's trials.

This shift does not seem to be a pure coincidence. As early as in its decision in Bárdossy's case, by silently dismissing the "theory of international delegation" while simultaneously emphasizing the revolutionary nature of the changes in Hungary, the NOT signaled that excessive delving into norms other than Decree 81/1945 is unnecessary. Moreover, (although this hypothesis should be confirmed with more substantial evidence), the first months of 1946 were also characterized by the increasing ideologization of the people's courts' jurisprudence. This trend was even strengthened in their later jurisprudence, E.g., in its decision in the case *Sztójay et al.*, NOT strongly suggested the causal link between the collapse of the Hungarian Soviet Republic in 1919 and the events taking place in 1944, when the defendants committed their crimes.[53]

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expressed his condemnation in a similar vein. (The judgment quoted after L. Karsai, J. Molnár, *Az Endre-Baky-Jaross per*, Budapest 1994, p. 465).

[51] See e. g. the Protocol of the Szálasi's hearing, 6 February, 1946, [in:] E. Karsai, L. Karsai, *A Szálasi per*, Budapest 1988, pp. 74 and 75.

[52] The last word quoted after K. Szerencsés, op. cit., Dokumentum 16, pp. 357–390.

[53] L. Karsai, J. Molnár (ed.), *A Magyar Quisling-Kormány, Sztójay Döme és társai a népbíróság előtt Párhuzamos Archívum*, Budapest 2004, p. 694.

In more practical terms, NOT insinuated, they were a part of «the fascist plot» who secretly had been ruling Hungary over 25 years before WWII. Given the explicitly political goals that the people's courts were to pursue, according to Ries' statement, this does not seem to be merely a coincidence.[54] What is more interesting here, ideologizing people's courts' judgments' content went hand in hand with the gradual disappearance of international law threads in their subsequent jurisprudence. Undoubtedly, the above trend in the jurisprudence of people's courts was caused by several reasons, the most important of which seem to be the following.

By 1945 international law in the area of interest to us was at a relatively early stage of development. Therefore, it might not have been too hastily assumed it imposed on all States a general obligation to prosecute and punish all "war criminals," as the concept was quite vague and ambiguous at that time.[55] But assuming that the *népbíráskodás* shared the Soviet view, such as this duty can be derived from the AA's art. 14, and they had a genuine will to fulfill this obligation, then they would have to prosecute and punish every perpetrator of these crimes. However, this was not the logic of the PNG, and in particular – it was not the logic of Hungarian communists.

In 1945 they were at the beginning of their road to totalitarian power. Moreover, Secretary-General Rakósi and his comrades knew that, on the one hand, some members of the pre-war elite would still be "politically valuable" to rule the country conquered by the Red Army effectively. On the other hand, being aware that the general public did not like PNG and their political position was weak, the communists had to compromise with the population of Hungary to ensure the minimum social cohesion necessary for exercising power and effectively implementing the new system. As it is easy to guess, the price for this compromise was People's Courts' jurisprudence's ethical and internal coherence. Against this backdrop, it seems reasonable to assume that the gradual but swift displacement of international law from the judgments of people's courts and its replacement with revolutionary teleology was closely related to the fundamental intention of the rulers, which was to strengthen their power in Hungary. It also explains why in hindsight, it seems

[54] See supra note 43.

[55] M. Lachs, *The War Crimes…*, p. 54.

evident that judgment in *Sztojay et al.* quoted above was just one the first of the case-line developed later, through which the Communists sought to attain two goals. Firstly – to prove that Admiral Horthy's regime was illegal from the outset and highly immoral, as it reflected the "dark forces" of the "bloody counterrevolution" which, having taken over the power in 1920 via military coup, over the next 25 years 24/7 oppressed "innocent masses" allegedly against their presumed will.[56] Secondly: in this way, the Communists wanted to send a sort of *communiqué* to society. According to this line of reasoning – solely persons qualified as "fascist conspirators" would be held responsible for WWII's catastrophic effects – not the Hungarian nation. The latter's role was reduced in this reading exclusively to the one of a victim – not a perpetrator.[57]

This political logic, on many occasions, grossly violated both the obligation to prosecute and punish war criminals and the standards of a democratic criminal trial. Nonetheless, these biased judgments or prosecutors' decisions could only be justified by referencing the "revolutionary goals" that the Hungarian legislator set before the people's judiciary by decree 81/1945. Thus, by deviating from the pre-war standards, the new authorities could divide all Hungarian residents into four categories:

1. Those who, being fascist criminals, were somehow politically valuable to them;
2. Those who, being fascist criminals, could and should be adequately punished;
3. Those who were politically inconvenient for the authorities and therefore should be subsumed into the category under 2), and;
4. Those (the vast majority) who could be left in peace as non-threatening the Provisional Government, the USSR, or the Hungarian communists.

Thus, if the communists considered someone valuable to them, then – as the famous case of Gendarmerie General Gabor Faragho shows – even direct participation in a leadership position in the implementation of the Holocaust was not an argument strong enough to prosecute and punish him for his deeds. However, if the communists considered someone a threat to their power, then – as the case of Zoltán Tarpataki clearly shows – active participation

[56] I. Rév, op. cit., pp. 202–240 (see notably this author's remarks on 203 et seq.).
[57] Ibid.

in saving Jews during the Holocaust did not prevent the prosecution of such a person as an alleged "fascist."[58]

In this context, retributive policy could only be (and was) a means to an end – never an end. And even though by the mid-1940ties, international law entered a phase of dramatic change, it's doubtful if it could have caught up with such a dialectical logic and revolutionary dynamic as imposed and steered by the PNG and the communists. The problem was that because of its inherent reason and axiology, international humanitarian law could not serve as a convenient instrument of political expediency. Therefore, it was gradually superseded in People's Court Jurisprudence by domestic legislation reflecting a "revolutionary spirit" and could be changed whenever Hungarian rulers deemed it necessary.

Part IV

Undoubtedly, the interpretation of international law carried out by the people's courts has often been simply incorrect or incomplete. This view relates to some extent to the first instance judgment in the Bárdossy case. Its results have always been controversial, even though there is no reason to doubt that the BPC put much work into making its first decision that was ever doctrinally correct. Against this background, a question arises regarding the reasons for these irregularities. Were they solely the result of a shortage in the legal education of people's judges or political pressure? Or maybe they should be treated in terms of conscious instrumentalization of the law to achieve specific political goals (and if so – which ones)?

The first of these hypotheses seems not entirely to exclude the second. Although the scale of intimidation or pressure on people's judges would call for separate studies, it can be safely stated that at least sometimes, they were undoubtedly exerted (both by communists and representatives of Western countries). Consequently, some issues (e.g., the problem of Hungary's state

[58] Both Faragho and Tarpataky's cases quoted after L. Karsai, *Crime and Punishment*, p. 7. The short biography of Tarpataky is accessible on the homepage of the Hungarian Holocaust Centre http://hdke.hu/tudastar/enciklopedia/tarpataky-zoltan [accessed: 1.09.2020].

borders) remained outside the scope of the above-cited judgment.[59] The main problem, however, is that, after many years, it is sometimes difficult to explain which of the abovementioned reasons was a direct cause that made the Court commit an error in a given case.

By way of example, let us point out that in the sentence pronounced in Bárdossy's case, the BPC stated that the Crimea and Potsdam Conferences and the resulting ceasefire treaties and agreements could become *a source of collective criminal competence of states*. This striking view must have aroused considerable controversy already in the 1940s. In 1945, none of the treaties concluded in the wake of the Yalta and Potsdam Conferences were legally binding on Hungary. The AA preceded both Conferences, and the Allied Powers certainly did not provide for any international criminal organ to which the Hungarian judiciary would have been subjected. Against this backdrop, it is more than striking that the people's Court did not mention Art. 14 and the role of the ACC but once.[60] Although, in theory, this provision could be considered a little easier as the presumed basis for an alleged international obligation to prosecute and punish war criminals that allegedly was imposed on Hungary under international law, for the reasons unknown – People's Judges omitted it. Therefore, it seems probable that this controversial view resulted from two coincidental factors. On the one hand, the ignorance of adjudicating judges, and on the other one, a tendency to instrumentalize the law, the purpose of which was to prevent the parliamentary Court from considering any cases prosecuted under Decree 81/1945. As mentioned above – in the same proceedings – the people's judges did not attempt to clarify whether the *rebus sic stantibus* doctrine was in force under international law. This reluctance also seemed to result primarily from a lack of knowledge. Still, given the context invoked by Defendant, it cannot be wholly excluded that the people's Court

[59] See supra note 36. It is another issue to what extent the analysis of international legal aspects in Bárdossy's case was influenced by the personal views of the President of the Budapest People's Court. The latter openly admitted that he did not want to dwell in the territorial policies of Defendant because he thought his political choices were – at least partially – right). Cf. L. Karsai, *The People's Courts and the Revolutionary Justice in Hungary 1945–1946*, [in:] I. Deák, J.T. Gross, T. Judt, *The Politics of Retribution in Europe: World War II and Its Aftermath*, Princeton–New Jersey 2000, p. 237.

[60] It's possible the «delegated forum» doctrine was unpersuasive even for the BPC president, cf. Á. Major, *Népbíráskodás…*, p. 140.

did not analyze this issue in greater depth for fear that its results might turn out to be unacceptable to the PNG or the USSR.[61]

Nevertheless, apart from cases of ignorance or political pressure, the judgments under discussion also include examples of evident misinterpretation of international law, which almost certainly hid quite an explicit political calculation of Hungarian authorities. Returning to Bárdossy's case, it is worth noting that the Court of the first instance admitted without hesitation that the actions taken against Yugoslavia on its order constituted a breach of international law. However, having considered the appeal in the same case, NOT adopted a much more nuanced stance: that by ordering the armed attack against this State, *Defendant took a fatal step that seriously undermined the honor and national interest of the Hungarian people*. What is even more striking, the issue of war declaration launched against the US on December 7, 1941, remained unsettled, as the NOT simply refrained from whatsoever assessment of this act in the light of international law. Thus, only in the case of the decision on the war declaration against the USSR NOT qualified the former prime minister's conduct as an international crime, even though the circumstances in which Bárdossy and his government took this step were relatively less straightforward. In turn, in the case of Béla Imrédy, who in 1944 served as the Minister of Economic Coordination in the Döme Sztójay cabinet, the Court ruled that:

> It is well known that the German armed forces had occupied the country from March 19, 1944, forcing the more favorable to the Reich. From that day on, throughout the German occupation, Hungary lost its sovereignty (sic!).[62]

Of course, the BPC erred in law by equating the legal effects of (unlawful) occupation with the loss of sovereignty. In this context, however, the question arises again: was it a mistake resulting from ignorance, or was it instrumentalized? There are many indications that when accepting the above nonsense, the judges were well aware of what they were doing. If one restates this fragment with István Ries's opinion on Imrédy's petition for pardon, in which he indirectly suggested that Sztójay's government was German, not

[61] Cf. Bárdossy, I p. 359.

[62] A Budapesti Népbíróság. Nbr. 3953/1945–11. szám, [in:] L. Varga (ed.), op. cit., p. 392.

Hungarian organ,[63] the suspicions concerning the true intents behind such a sort of mingling got even more vital.

The above findings constitute substantial evidence to support the hypothesis that at least a part of the abovementioned errors (undoubtedly: some of them flagrant once) – made in the course of interpretation of international law were not the result of a pure coincidence or hazard. They suggest that at least some of the People's Judges, as well as the Ministry of Justice, had sufficient knowledge about the potential consequences that, in terms of the international responsibility of states, the findings and decisions of people's courts could have had for Hungary. Specifically, it is hard to escape the impression that by accepting these inept interpretations, NOT deliberately aimed to shift the lion's share of responsibility on the Nazi Reich. That is, to make Germany the sole State held accountable for all crimes committed after March 19, 1944 (the date of the Wehrmacht's entry into Hungary) – including those committed by representatives of the Hungarian organs. Similarly, by pronouncing Bárdossy guilty of the international crime because of declaring war against the USSR, and refusing to do the same in the cases of Yugoslavia and the USA, NOT could have had in mind not to make it easier to claim reparations by both States. Thus, it seems very probable that people's courts operating under the Ministry of Justice's careful supervision were not so blind to the potential effects of their judgments in international law. Considering the lack of appropriate training of people courts' staff who were usually unfamiliar with international law, such a hypothesis is a surprise. Therefore, its final confirmation begs for further research.

Conclusions

For the reasons explained in this contribution, international law's role in the Hungarian People's Courts' jurisprudence could not have been preeminent – and indeed – it was limited. Nonetheless, despite unfavorable external conditions and domestic legal and political obstacles, Hungarian People's Courts

[63] I. Ries, *Igazságügyminiszter előterjesztése Tildy Zoltán Kosztárszoszági Elnökne Imrédi Béla kegyelmi kérelme tárgyában, 12 Februar 1946*, [in:] L. Varga (ed.), op. cit., p. 441.

sometimes invoked international rules in their jurisprudence. Although much more advanced research must be done to establish the actual influence of international law upon the People's Courts' jurisprudence, even this limited analysis supports the claim that *népbiráskodás's* legacy in international law application cannot be assessed univocally.

Undoubtedly, some parts of the BPC judgment handed down in Bárdossy's case (notably the analysis of the legality of aggressive war in international law) only slightly differ from the opinion handed down by the IMT half a year later in Nüremberg. Moreover, considering the issue of the *rebus sic stantibus* doctrine, People's judges also drew correct conclusions.[64] However, apart from the examples of the uncontestable application of international law, in the jurisprudence of people's courts, many errors can be identified, which – in the light of the above findings – cannot always be attributed to simple adjudication ignorance or mere omission. As indicated above, there are solid grounds for supposing that sometimes these irregularities could be the result of deliberate instrumentalization, as a result of which it was expected (less so – how rightly) to achieve specific political and legal effects. If the above hypothesis turned out to be accurate, the above finding would not be surprising. In retrospect, it looks pretty likely that had people's courts remained more faithful to international law and pronounced their judgments in line with its rules, the amount of the reparations Hungary would have had to pay could have increased. It is doubtful if Hungary, ruined by the war and the Soviet occupation, could have satisfied these claims.

[64] In retrospect, it also seems evident that although the People's Judges almost certainly did not intend to do so, their conclusions and reasoning were partially unfavorable to the USSR. The fact remains that their view fundamentally differed from the findings and reasons laid down in the infamous Potemkin's diplomatic note delivered to Poland on the eve of September 17, 1939. Therefore by rejecting the Defendant's arguments, the People's Court -albeit indirectly – contributed to the delegitimization of the Soviet lies seeking to justify their aggression against Poland by invoking a similar line of reasoning and conclusions. Besides, rejecting Bárdossy's submissions based on the rebus sic stantibus doctrine placed itself within the modern current of progressive international law development. To a degree, it pioneered the contemporary understanding of the fundamental change of circumstances, as this institution is reflected in VLCT's Art. 62 (2)(a). It should be underlined, however, that it remains unknown if the ILC had been aware of the mere existence of the judgment handed down in Bárdossy's case. At the current research stage, such a possibility seems unlikely.

It should also be remembered that international law was cited relatively rarely in the jurisprudence of people's courts. Moreover, the political situation enabling *népbiráskodás* to apply these norms without substantial hindrance lasted shortly in Hungary. Seeking the reasons for these decision-makers' reluctance to allow the judiciary a greater degree of flexibility, one can point to several objective factors over which the popular courts had little influence. These included, among others, the dualistic legacy of the pre-war period and the shortcomings in the education of people's judges, for whom issues in the field of international law were usually *terra incognita*. Some other problems further exacerbated the last challenge. At the threshold of 1945, international law's current and future shape raised many doubts even among eminent specialists in this field. In effect, the lack of clarity must have discouraged judges whose task was to resolve specific criminal cases from wasting time searching for answers to questions they could find in national legislation. To add bad to the worse, Hungary was not a party to any of the agreements that could be considered as the base of adjudication or a source of information about the emerging new norms of international criminal and humanitarian law, as well as rapid changes in its fundamental principles. Further, contrary to the Bárdossy case's thesis, the People's Courts were never a "delegated forum of the international community." Thus, their jurisdiction to prosecute and punish war criminals was never derived from any international authority. After all, *népbíráskodás* were Hungarian judicial organs. The legal acts constituting the legal basis for their organization and adjudication were also Hungarian. Therefore, the role of international law in the jurisprudence of people's courts could not go beyond the strictly defined limits. The structure of people's courts and the tasks imposed on them by the Hungarian legislator almost automatically determined the scope of analyses carried out in the framework of criminal proceedings. Moreover, the analyzes were carried out in light of the primary goals of these trials. I.e., the pronouncement on guilt or innocence of an accused in the context of achieving revolutionary goals. Therefore, it should be assumed that, on the one hand, in a way, the people's judiciary system created a particular barrier that effectively prevented the application of international law on a broader scale in judicial practice. On the other hand, the lack of clarity on what international rules were in force and what not even complicated the direct application of these norms in judicial practice.

However, apart from these objective limitations, it is also worth noting some political conditions, which could have been an additional brake against excessive delving into considerations of an international nature. For reasons explained in Part III, the gradual elimination of international law from the jurisprudence of people's courts went hand in hand with the growing importance of revolutionary teleology. In retrospect, it seems evident that the trend superseding international law from people's courts' judgments with the historiosophic revolutionary content resulted from the collision of two convergent but not identical axiologies. The one international humanitarian and criminal law and the Decree 81/1945. The fundamental doctrinal assumption of the former has always been the administration of justice. The latter was understood primarily as a tool of social revolution in the hands of the rulers. Against this backdrop, it is hardly surprising that international law must have been perceived by the PNG and the Communists as an instrument of little use or even a sort of obstacle in the „flexible" personnel selection for the emerging political regime. Finally, in Hungary's case, international law played the role of an instrument imposing heavy burdens on the defeated country. The hypothesis related to presumed concerns on the results of the ongoing negotiations on reparations is mentioned above. This factor probably played a role in stimulating the adoption by the courts of interpretations that were both favorable to Hungary and highly controversial doctrinally (or even logically inconsistent). Still, presumably, it also produced another effect, as it generally discouraged the application of international rules, except where it was unavoidable. For all these reasons, it seems reasonable to assume that in Hungary, the zeal to apply international rules had to be somewhat even more limited than in other countries.

Given the above, it is not surprising that – generally speaking – the political situation allowing, and sometimes even forcing, people's courts to apply international law had to be short-lived and largely dependent on the will of the great powers. Against this background, another question arises whether certain parallels with the 1921 Leipzig trials can be found in the jurisprudence of people's courts? The answer seems to be in the affirmative in part. Contrary to the German experiences in the 1920s –, the mere presence of the Red Army on Hungarian territory sufficed to secure at least some members of the prewar elite would be severely punished. It is also true that, as a result of the

revolutionary transformation, the judiciary deciding the cases of Hungarian war criminals was deprived of institutional continuity, while the courts of the Weimar republic settling in Leipziger Prozesse were composed of judges, as a rule, nominated before 1918. Thus, identifying the Leipzig trials with the activities of the People's Courts would be a too far-fetched simplification. Still, some parallels between them genuinely existed. The communists taking power in Hungary were also subject to specific general political processes that inhibited the impetus for an overly scrupulous account of the Hungarian past due to similar dilemmas that emerged before the Weimar Republic, which faced the crimes committed during WWI. Specifically, in both cases – the necessity to maintain a minimum of social cohesion determined the scope and pace of trials against the perpetrators. In both cases, the central keystone is an evident reluctance to correctly interpret the provisions of international law and authentic accounts, which is revealed in judgments acquitting people who could be easily proven guilty. In the case of Hungary, however, there were also manipulations of international law aimed at limiting the scope of future reparation claims, which is missing in the jurisprudence of German courts, as these issues were previously regulated in the Versailles Treaty.

The answer to the question of how the *népbíráskodás* made so many mistakes and sometimes mere abuses is relatively simple: mainly because the people's courts were «allowed» to do so. The judgments in the trials of war criminals in Hungary, like the judgments of the Leipzig courts, have never been subject to any control of international bodies. In turn, the Soviets were also not interested in controlling the work of People's Judges, the position of the Americans and the British in the ACC was weak, and in addition, the interest of these countries in Hungarian affairs, in general, was minimal. The ACC itself, as an international body, even had it wanted to, could not play the role of an effective reviewer of Hungarian courts due to the stagnation in which this body was plunged due to the Soviet obstruction. It follows that in all cases where People's Courts decided to apply international law with direct effect, they did so without fear of overturning the judgment by international bodies. In practice, this allowed them to "switch on" and "switch off" international rules to the extent that the panel of judges handling a given case (and possibly the Minister of Justice politically supervising the People's Court system) considered it suitable or valuable. Considering the political and geopolitical realities

of the post-war period, the features mentioned above of the 81/1945 decree, and the system based upon this legal act, one can safely state that this system almost encouraged such errors and abuses as those under discussion here.

In conclusion, it is worth pointing out that none of the cases discussed above can be fully equated with the typical Soviet-style "show trial" of the 1930s: In particular, it should be emphasized that none of the criminals mentioned here was tortured, and none of them were forced to publicly "confess" to their alleged guilt, and none of them had to "beg for execution." However, the "irregularities" that occurred during the Szálasi trial undoubtedly prepared the social ground and the institutional infrastructure for the "mature" Stalinist process and, at the same time, heralded an era that was yet to come. In this context, it is worth recalling the communist László Rajk, murdered in 1949 after a show trial later referred to as the classic example of a misuse of judiciary proceedings of this kind. The problem is that he, too, was accused of participating in a "fascist conspiracy." He, too, was prosecuted under Decree 81/1945. In his case, the chief judge was none other than Judge Péter Jankó, who had sentenced the leader of the Arrow Cross Party to death three years earlier. The above coincidence was not purely accidental.[65]

[65] Some critical documents of Rájk's process were published in 1949 See *László Rájk and His Accomplices before People's Court*, Budapest 1949 (accessible at https://mek.oszk.hu/10900/10919/10919.pdf [accessed: 1.09.2020]).

MICHAŁ GÓRSKI

Reactivation of a communist party responsible for introducing the totalitarian regime not that obviously unfounded? Comments on the judgment of the ECHR in the case *Ignatencu and Romanian Communist Party* (*RCP*) *v. Romania*

1. Judgment

On 24 March 2020, the European Court of Human Rights (hereinafter: ECHR) issued a judgment in the case *Ignatencu and the Romanian Communist Party v. Romania*[1] (hereinafter: the judgment). It dealt with the refusal to register the Romanian Communist Party (hereinafter: the RCP) by the Romanian courts.

According to the justification, the application for registration of this party (or rather, its reactivation – see below) was submitted in 2010 by a Romanian citizen Petre Ignatencu, who had previously been elected chairman of its organizing committee (§ 10 of the judgment). According to the then adopted statute of the party, its ultimate goal was *to create a communist society based on high social awareness, brotherhood, individual freedom and equality* (§ 11 of the judgment).[2] The doctrine of the RCP was to be Marxism and other contemporary ideas on the building of socialism. The party undertook to respect the constitution and legislation of the state, as well as its democratic principles and system, and positioned itself in opposition to totalitarianism and discrimination (ibid).

[1] Judgment of the ECHR of 5 May 2020 in the case *Ignatencu and the Romanian Communist Party v. Romania*, No. 78635/13. Unless otherwise indicated, this and any other judgments of the European Commission of Human Rights and the European Court of Human Rights are available in the HUDOC database of judgments of the European Court of Human Rights, https://hudoc.echr.coe.int [accessed: 18.11.2022].

[2] The judgment was published only in French. Here and below, translation mine.

Importantly, under Article 9 of the statute, the party declared a continuation of *the theoretical and practical experience of the socialist and communist workers' movement in Romania, its goals and ideals, being a continuation of the Romanian Communist Party established on 8 May 1921*. In the case of former RCP members (before 1989), to apply to join the party, it was enough to confirm the former membership, without having to sign up again.

The party's political program was drawn up in a similar vein, emphasizing the efforts to introduce a socialist economy based on collective property (*propriété collective*). The state was to respect the right to private property, but on the condition that it would be *legally constituted, just and moral, and that it is not contrary to the present and future interests of the Romanian people* (§ 13 of the judgment). Particularly noteworthy is the concept of the postulated "socialist state of law" (*L'État socialiste de droit*), whereby legal norms regulating social relations would be subordinated to the construction of a socialist society (*L'État socialiste de droit est l'État où les normes de droit qui régissent les relations dans la société sont subordonnées à l'impératif d'édifier la société socialiste* – ibid).

Courts of both first and second instance dismissed the application for registration. Both decisions emphasized that the party not only referred directly to the doctrines and ideas that lay at the basis of the totalitarian regime that ruled the country for almost half a century, but also explicitly recognized itself as a continuator of the Romanian Communist Party that was in power before 1989, and the activities of which were entirely contrary to democratic values (§ 19 et seq. of the judgment). The Court of Appeal also pointed out that during the communist period, the method of socializing the means of production was the compulsory collectivization of agriculture and the nationalization of industry. Therefore, it found that the references in the statute and program to political pluralism and respect for the principles of constitutional democracy should only be considered formal (§ 30 of the judgment). Other reasons for the refusal pointed to procedural issues, including those related to collecting signatures.

In view of the refusal, the chairman of the organizing committee, on behalf of himself and the party, filed a complaint with the European Court of Human Rights. He referred to Romania's violation of Article 6 of the European

Convention on Human Rights (hereinafter: the Convention) [3], which protects the right to a fair trial, and of Article 11 (freedom of assembly and association).

As regards the first objection, the Strasbourg Court found that political party registration did not fall within the category of civil or criminal matters referred to in Article 6 of the Convention and found the application inadmissible in this respect (§§ 107–109 of the judgment). With regard to the alleged violation of Article 11, the judges declared the complaint admissible, dismissing *inter alia* the Romanian Government's argument that, in the meantime, at the request of another RCP activist, a domestic court had registered a party called the Romanian Communist Party for the 21st Century (§ 59 et seq. of the judgment).

In a fairly long justification of the judgment, the ECHR first of all emphasized the importance of the freedom to establish and operate political parties for the democratic system, citing a number of judgments, including those against Romania (which will be discussed in more detail later in the study). In this respect, it pointed out that all exceptions should be construed restrictively, and the so-called the margin of appreciation left to the States parties to the Convention must remain narrow (§ 76 et seq. of the judgment). Next, the Court dealt with formal issues, including the issue of signatures under the application for registration, considering the requirements of the domestic legislation to be justified (due to the lack of relevance to the main assumptions of this article, these issues will not be discussed further).

The following paragraphs of the justification were devoted to the evaluation of the party's statute and program. It was also emphasized that the mere fact that a political project does not comply with the current political system and structures of the state does not make it contradictory to the principles of democracy (§ 96 of the judgment). Moreover, even the historical context of Romania was not a sufficient premise, in the opinion of the Court, to ban the operation of communist parties with Marxist ideology. It was also noted that such parties already existed in Romania.

However, due to the fact that the applicants had officially tried to reactivate the party that had formed a totalitarian regime in the past – even if they

[3] Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, 213 UNTS 221.

only referred to its 'positive' sides in their program and proclaimed respect for the principles of the democratic system – the assessment made by the domestic courts was not unfounded (*n'est pas dénuée de fondement*, § 103 of the judgment). In the Court's view, *the reason for the refusal to register the applicants was the desire to prevent a future misuse of the rights by a political group, which for a long time had seriously abused its position by establishing a totalitarian regime, and thus to avoid harm to the security of the state or the foundations of a democratic society* (§ 104 of the judgment). Consequently, the judges concluded (unanimously) that the state's interference was justified and proportionate, and that there had therefore been no violation of Article 11 of the Convention.

2. Commentary

1. The present case has to be seen in several important contexts. The first is, of course, the freedom to register and operate political parties, as well as restrictions in this regard. There is no doubt that the possibility of operating political parties is the foundation of a democratic system, and banning such activities should be exceptional.[4]

The ECHR dealt with this subject in a number of high-profile judgments, including those concerning communist parties.[5] At least one of those, also against Romania, in the case of *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*,[6] deserves a more detailed discussion at this point. This case concerned the refusal to register a party referring to communist ideology, but distancing itself from the history of the Romanian Communist Party. In the justification of the judgment, the Court stressed that the applicant party's program documents did not contain any passages that could be considered as calling for violence, insurrection or any other form of rejection

[4] For more on this, see M.A. Nowicki, commentary on art. 11, in: id, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2015, item 11.3.

[5] See e.g. A.K. Bourne, F. Casal Bértoa, *Mapping 'Militant Democracy': Variation in Party Ban Practices in European Democracies (1945–2015)*, "European Constitutional Law Review", 2017, vol. 13, p. 237 ff.

[6] Judgment of the ECHR of 3 February 2005 in the case *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, No. 46626/99.

of democratic principles. It was also indicated that communist parties operate in several States parties to the Convention. Therefore, even the historical experience of communist totalitarianism in Romania did not justify such a far-reaching interference with the rights protected under Article 11 even before the party began to its activities. Consequently, according to the judges, the provisions of Article 11 were violated in the case. The Court adopted a similar position regarding the registration of a communist party in Bulgaria in the *Tsonev v. Bulgaria* judgment.[7]

Obviously, it is impossible to disagree with the view that political parties play a key role in ensuring pluralism and the proper functioning of democracy.[8] It is also rightly pointed out that in the event of interference in the activities of a political party, states should have a narrow margin of appreciation, and that should be subject to strict control.[9] Sanctions, including – in the most serious cases – dissolution of a party, should in principle only be applied to parties that use unlawful or undemocratic methods, incite violence or pursue a policy of destroying democracy and opposing the exercise of its recognized rights and freedoms. This requires a convincing determination in specific circumstances and on the basis of specific information that there was a real threat to the national interest.[10]

In my opinion, the above position (in principle, fully justified) should, however, be modified in the case of parties advocating the ideas of Nazism, fascism and communism, to allow states a wider margin of appreciation in terms of interference in the activities of this type of organizations. Not only because of the tragic historical experiences (in the case of communism, there are almost 100 million victims worldwide by 1997[11]), but also because of the very

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[7] Judgment of the ECHR of 13 April 2006 in the case *Tsonev v. Bulgaria*, No. 45963/99.

[8] *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, sec. 44.

[9] M.A. Nowicki, op. cit.; On the margin of appreciation, see e.g. A. Wiśniewski, *Koncepcja marginesu oceny w orzecznictwie Europejskiego Trybunału Praw Człowieka*, Gdańsk 2008; C. Ovey, B. Rainey, E. Wicks, *Jacobs, White and Ovey: the European Convention on Human Rights*, Oxford 2014, pp. 79–81 and pp. 328–333; P. van Dijk, G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, The Hague 1998, pp. 87–91; K. Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, "German Law Journal" 2011, vol. 12, pp. 1730–1745.

[10] M.A. Nowicki, op. cit.

[11] S. Courtois, *Zbrodnie komunizmu*, [in:] S. Courtois et al., *Czarna księga komunizmu. Zbrodnie, terror, prześladowania*, Warszawa 1999, p. 27.

assumptions of these ideologies (in the case of mainstream communism the revolution carried out by violence, class struggle, dictatorship of the proletariat, let alone the nationalization / collectivization of private property).[12] Hence, in my opinion, in particular the countries that suffered from the above-mentioned ideologies have the right to demand that political parties operating in their territory do not directly refer to these ideologies, even if these organizations do so only partially, while proclaiming respect for democratic principles. For this reason, I consider the Court's invoking the existence of communist parties in other States parties to the Convention as irrelevant.

Of course, one should be aware of the risk of departing from the above strict case-law line of the Court as regards interference in the operation of political parties, but given the scale of the crimes committed in the name of these three ideologies, to leave a wider margin of appreciation to states in this regard is, in my opinion, nevertheless justified.

Incidentally, the issue under discussion also reverberates in Polish law. According to Article 13 of the Constitution of the Republic of Poland,

> Political parties and other organizations whose programmes are based upon totalitarian methods and the modes of activity of Nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership, shall be prohibited.

The wording relating to the reference to totalitarian methods and practices raises doubts as to the scope of permitted interference by the state.[13] These doubts also arise in practice, given the existence and operation the Communist Party of Poland, registered in 2002.[14]

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[12] Cf. e.g. L. Kołakowski, *Główne nurty marksizmu. Powstanie – rozwój – rozkład*, London 1988, p. 303 ff.

[13] M. Zubik, W. Sokolewicz, Komentarz do art. 13, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, L. Garlicki, M. Zubik (eds.), Warszawa 2016, sec. 16.

[14] W. Ferfecki, *Komunistyczna Partia Polski nie została zdelegalizowana*, „Rzeczpospolita" of 12 August 2019, available at https://www.rp.pl/Polityka/308119965-Komunistyczna-Partia-Polski-nie-zostala-zdelegalizowana.html [accessed: 18.11.2022]; *Ziobro chce delegalizacji Komunistycznej Partii Polski. Wniosek trafił do TK*, „Dziennik Gazeta Prawna" of 6 December

2. Regardless of the issues related to Article 11 of the Convention, both the case of *Ignatencu and the Romanian Communist Party* discussed here and the previous ones also fit into the wider context of the so-called historical cases examined by the European Court of Human Rights. For the purposes of his work, Ireneusz Kamiński defined them as "*situations arising out of events during the World War II and the years immediately following its end.*"[15] For the purposes of this study, I will move the above time frame until 1989.

These cases can be divided into a number of types, depending both on their subject matter and on the Convention rule, a violation of which was alleged by the applicants. The most important categories of cases include:

1. conducting criminal cases against persons committing crimes under Nazi / fascist or communist regimes – in the context of Article 7 of the Convention;[16]
2. vetting and restricting the public rights of regime officials – in the context of Article 6 and Article 8 of the Convention;[17]
3. freedom of assessment of historical events, including denial of crimes (e.g. Holocaust denial) – in the context of Article 10 of the Convention;[18]

2020, available at: https://www.gazetaprawna.pl/wiadomosci/artykuly/1498193,ziobro-chce-delegalizacji-komunistycznej-partii-polski-wniosek-trafil-do-tk.html [accessed: 18.11.2022].

[15] I.C. Kamiński, *"Historical Situations" in the Jurisprudence of the European Court of Human Rights in Strasbourg*, "Polish Yearbook of International Law" 2010, No. XXX, p. 10.

[16] For more on this, see: I.C. Kamiński, op. cit., p. 40 ff; G. Andrescu, *European Ban on the Denial of Communist Crimes: Regulations, Ideology, Rights*, available at https://www.academia.edu/35596721/European_Ban_on_the_Denial_of_Communist_Crimes_Regulations_Ideology_Rights [accessed: 18.11.2022], sec. 5.4 (it is an English version of the author's article under the title *Interzicerea negarii crimelor comuniste pe plan european: de la ideologie la drepturi fundamentale*, originally published in "Noua Revistă de Drepturile Omului" 2011, No. 1, pp. 41–61. At this point, I would like to thank Professor Andrescu for bibliographic guidance.

[17] Cf. e.g. A. Mężykowska, *Orzecznictwo ETPCz w sprawach dotyczących polskich postępowań lustracyjnych*, „Europejski Przegląd Sądowy" 2008, No. 4; C. Home, *International Legal Rulings on Lustration Policies in Central and Eastern Europe: Rule of Law in Historical Context*, "Law & Social Inquiry" 2009, vol. 34, No. 3, pp. 713–744.

[18] I.C. Kamiński, op. cit., p. 54 ff; ibid., *Debates over History and the European Convention on Human Rights*, [in:] *Responsibility for negation of international crimes*, P. Grzebyk (ed.), Warsaw 2020, pp. 69–83; A. Gliszczyńska-Grabias, *Memory Laws or Memory Loss? Europe in Search of its Historical Identity through the National and International Law*, "Polish Yearbook of International Law" 2014, vol. 34, p. 178 ff; A. Wójcik, *European Court of Human Rights, freedom of expression and debating the past and history*, „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" 2019, vol. 17, p. 38 ff.

4. irregularities in the conduct of investigations in cases of regime victims – in the context of Article 2 of the Convention (in the procedural aspect);[19]
5. reprivatization and compensation for nationalized property – in the context of Article 1 of Protocol 1 to the Convention.[20]

The case of reactivating a party with a totalitarian past can certainly be included among the "historical cases."[21] For this reason, it is regrettable that in such an extensive justification of the *Ignatencu and the Romanian Communist Party* case, so little space was devoted to the history of Romania during the rule of the Communist Party, as this history is yet another important aspect of the case at hand.

3. Established in 1921, the Romanian Communist Party took power in the country after World War II (formally in alliance with Socialists), as a result of the entry of Soviet troops[22] and rigged elections.[23] Gheorghe Gheorghiu-Dej, a staunch supporter of policies originated in Moscow, became head of the state. With the help of the NKVD, the creation of the *Securitate*, modelled on the Soviet security structures, began.

As the author of the "Black Book of Communism" points out, with the "help" of this institution,

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[19] One of the most notorious cases was the so-called Katyn case (*Janowiec and others v. Russia,* nos. 55508/07 and 29520/09. Cf. e.g. I.C. Kamiński, E. Łosińska, *Skarga katyńska*, Kraków 2015.

[20] D. Szańca, *O koncepcji reprywatyzacji w kontekście orzecznictwa Europejskiego Trybunału Praw Człowieka*, „Transformacje Prawa Prywatnego" 2006, vol. 1, pp. 95–111; M. Bazyler, Sz. Gostyński, *Restitution of Private Property in Postwar Poland: The Unfinished Legacy of the Second World War and Communism*, „Loyola of Los Angeles International and Comparative Law Review" 2018, vol. 41, No. 3, p. 306 ff; A. Mężykowska, *Procesy reprywatyzacyjne w państwach Europy Środkowo-Wschodniej a ochrona prawa własności w systemie Europejskiej Konwencji Praw Człowieka*, Gdańsk 2019.

[21] The query completed in the HUDOC database did not yield any results for another ruling of the ECHR in a similar case (reactivation of a party with a totalitarian past, but with a changed program). On the other hand, there were instances of complaints from those convicted of activities in post-war organizations simply referring to ideologies, especially Nazi and fascist ones; cf. I.C. Kamiński, *"Historical Situations"…*, p. 47.

[22] During World War II, Romania was an ally of Hitler's.

[23] M. Kramer, *Stalin, Soviet Policy, and the Establishment of a Communist Bloc in Eastern Europe, 1941–1948*, [in:] *Stalin and Europe: Imitation and Domination, 1928–1953*, T. Snyder, R. Brandon (ed.), Oxford 2020, pp. 264 ff.

> Romania made a special contribution to the history of repression in Central and South-Eastern Europe. It was probably the first country in the European continent to introduce "reeducation" by "brainwashing" (…) A truly satanic plan of this undertaking was to lead the prisoners to torture one another.[24]

The Pitești prison operated by the *Securitate* has become a symbol of atrocities, and the description of the torture used there is terrifying even in the light of other brutal totalitarian practices known from the history of the 20th century.[25] This happened, incidentally, under the new constitutions of 1948 and 1952, which formally guaranteed all civil rights and liberties.[26]

Although – as in other countries of the communist camp – the regime eased to a large extent after Stalin's death, political repression in Romania (including imprisonment for political reasons) continued until the end of the RCP period and the tragic end of Nicolae Ceaușescu and his wife in December 1989.[27]

4. From this perspective, the Court was right in that it did not find a violation of Article 11 in the *Ignatencu and the Romanian Communist Party* case. On the other hand, doubts arise given that the Court declared the complaint admissible at all. According to Article 35 (3) (a) of the Convention,

> the Court shall declare inadmissible any individual application submitted under Article 34 if it considers that the application is incompatible with

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[24] K. Bartosek, *Europa Środkowa i Południowo-Wschodnia*, [in:] Courtois et al., *Czarna księga komunizmu…*, p. 391.

[25] Ibid., pp. 391–392.

[26] *Romania: A Country Study*, R.D. Bachman (ed.), Washington: U.S. Library of Congress, 1989, subsection *Three Constitutions*, available at http://countrystudies.us/romania/65.htm; I would like to emphasize that, without a shadow of a doubt, in post-war Romania, General Ion Antonescu, who allied with Hitler, and his associates, in particular those responsible for the deaths of thousands of Romanian Jews, were rightly brought to justice. On the other hand, the repressions by the communists also extended onto supporters of democracy (including the leader of the National Peasant Party, Iuliu Maniu, who died in prison), not to mention rivals inside the communist party. Cf. P. Bielicki, *„Żelazna kurtyna" jako aspekt sowietyzacji Europy Wschodniej w latach 1949–1953*, „Studia z Dziejów Rosji i Europy Środkowo-Wschodniej" 2017, vol. 52, iss. 1, p. 184 ff.

[27] K. Bartosek, op. cit., pp. 416–417.

the provisions of the Convention or the Protocols thereto, is manifestly ill-founded or constitutes an abuse of the right of application.

As M. Nowicki points out, the case of a manifestly ill-founded complaint occurs, *inter alia*, in the event that the authorities have convincingly indicated the reasons for limiting the exercise of certain rights guaranteed by the Convention.[28] Regarding the case at hand, the question arises – is the dismissal of a demand to reactivate a party because it had installed a totalitarian regime in the past and used (especially in the initial period) mass violence against political opponents – not based on a clear and convincing reason for the interference? (even where the party has significantly changed its political program)? In my opinion, it is difficult to recognize a complaint against such an interference other than manifestly ill-founded.

It seems that the opposite decision could have also be driven by the differences in the assessment not only of ideologies, but also of the activities of the Nazi / fascist and communist regimes, as can be seen in the earlier case-law of the European Court of Human Rights. This differentiation is based on a more lenient treatment of the latter, which some authors aptly point out in the context of other "historical" cases.[29] Hypothetically, one can imagine an attempt to reactivate the Italian National Fascist Party but with a program that would recognize the principles of the democratic system (e.g. focusing on selected fascist ideas, including anti-globalization and corporatism). Would the Court, in such a case, also declared a complaint itself by such a hypothetical party admissible, and the refusal of its registration by the domestic courts merely "not unfounded? (*n'est pas dénuée de fondement*, § 103 of the judgment).

It is regrettable that, when it comes to knowledge of the history of communist regimes, so much remains "manifestly" unknown.

[28] M.A. Nowicki, Komentarz do art. 35, [in:] *Wokół Konwencji Europejskiej*…, sec. 4.3.

[29] See A. Gliszczyńska-Grabias, op. cit., p. 183 ff; ibid., *The Jurisprudence of the European Court of Human Rights in the Area of Europe's Totalitarian Past – Selected Examples*, [in:] *Responsibility for negation of international crimes*…, pp. 85–92; I.C. Kamiński, *"Historical Situations"*…, pp. 53–54; G. Andrescu, *European Ban*…, p. 10 ff.

IN POLAND

KAMIL A. STRZĘPEK

The communist crime – general remarks against the background of the *K.-H.W. v. Germany* case

Introduction

The purpose of this text is to answer the question under what legal and factual circumstances a prohibited act can be considered a communist crime in the light of both domestic and international law. The analysis of this question will be made primarily from the perspective of Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms[1] (hereinafter referred to as the "Convention"), with the case of *K.-H.W. v. Germany*, heard by the European Court of Human Rights (hereinafter referred to as the "ECHR") on 22 March 2001[2] taken as a point of reference.

Accordingly, the analysis concerns not only the text of the Convention, but also the judgment in the *K.-H.W. v. Germany* case. In my opinion, when it comes to legal sciences, the case-law of courts, both domestic, foreign and international, presents an invaluable empirical material for scholarly analysis. The case-law can be used as a source of knowledge (often new) about, for example, the principles and methods of interpretation of law by the bodies that apply it, or about the scope of protection implied in practice by a specific legal provision with reference to human rights and freedoms. Based on the "phenomena" observed in judicial practice, *de lege lata* and *de lege ferenda* postulates can be proposed.

[1] Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (213 UNTS 221).

[2] Judgement of the ECHR of 22 March 2001 in the case of *K.-H.W. v. Germany*, application No. 37201/97.

In addition to the analysis of the *K.-H.W. v. Germany* case, this text presents some remarks on a wider problem of the relationship between domestic courts and the ECHR, and the fundamental principle of international law, that is, the principle of subsidiarity, and further points to a certain "interpretative choice" (or in fact the lack thereof) faced by the ECHR in the *K.-H.W. v. Germany* case.

1. The case of *K.-H.W. v. Germany*

The *K.-H.W. v. Germany* case concerned the applicant who, from 1971, was a member of the 35th Regiment of the Border Guard of the German Democratic Republic (hereinafter referred to as "the GDR"). By a judgment of 17 June 1993, the Berlin Regional Court sentenced the applicant to a suspended prison sentence of one year and ten months, for intentional homicide. The Regional Court established that on the night of 14/15 February 1972 the applicant had fired five series of shots which resulted in the deaths of those trying to get from East Berlin to West Berlin. The shots were fired after these people were called to turn back, and following a series of warning shots. The Regional Court applied the criminal law of the Federal Republic of Germany (hereinafter referred to as "West Germany"), which was more lenient than East German law, and convicted the applicant for intentional homicide. With regard to the statute of limitations, the Regional Court referred to the established case-law of the Federal Court of Justice and to the German law of 26 March 1993 on the suspension of the statute of limitations in relation to injustices committed by the regime of the Socialist Unity Party of Germany. The applicant appealed against the judgment. The Federal Court of Justice found that to assume that the border crossing ban was more important than the victims' right to life grossly and unacceptably violated the fundamental principles of justice and human rights protected under international law. The Federal Constitutional Court dismissed the applicant's constitutional complaint as unfounded. In the proceedings before the ECHR, the applicant alleged that the act for which he was tried did not constitute a crime at the time when it was committed, both under domestic and international law, and

therefore that his conviction by the German courts violated Article 7 (1) of the Convention. Article 7 of the Convention stipulates that:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

It follows from the *K.-H.W. v. Germany* case that when determining criminal liability of persons for communist crimes, the following aspects should be taken into account: 1) responsibility for communist crimes under domestic law; 2) responsibility for communist crimes under international law; 3) limitation periods.

In the light of Article 7 (1) of the Convention, it must first be determined whether domestic law provided for criminal liability for the act at the time of its commission. This does not necessarily mean that the act in question had, at the time of its commission, been called a "communist crime" in the domestic legal order. For example, if the act consisted in taking the life of another person, it would be necessary to establish whether, at the time of its commission, the act of taking another person's life constituted a criminal offence.

As for criminal liability for communist crimes, it follows from the *K.-H.W. v. Germany* case that with regard to domestic law, the following should be taken into account:

1. the legal basis for a person's conviction;
2. any circumstances justifying the act or omission of a person under the law of a communist state;
3. circumstances justifying the act or omission of a person under the operational practice of the communist state;
4. the foreseeability of conviction for the act or omission in a case.

As for the legal basis for a person's conviction, Article 7 (1) of the Convention provides clearly that no one can be found guilty of any criminal offence on

account of any act or omission which did not constitute a criminal offence under national law at the time when it was committed. In the *K.-H.W. v. Germany* case, the Berlin Regional Court first found the applicant guilty of intentional homicide under the criminal law in force in the GDR at the time (Article 113 of the GDR Criminal Code). The court found that on the night of 14/15 February 1972, the applicant and another border guard fired five series of shots which resulted in the death of a person attempting to cross from East Berlin to West Berlin, and rejected the argument that the applicant's act was based on the law and practice of the GDR and that the applicant was following orders. Subsequently, the Berlin Regional Court applied West Germany's criminal law as more lenient than East German law.

At this point, an explanation must be made as to why the German courts applied East German law to the case. The ECHR explained it in the judgment of 22 March 2001, pointing out that:

> The German courts thus applied the principle, formulated in the Unification Treaty of 31 August 1990 and in the Treaty's implementing Act of 23 September 1990, that for acts committed by citizens of the GDR inside the territory of the GDR the applicable law is that of the GDR, the law of the FRG being applied only where it is more lenient (…)[3]

Regarding the grounds to justify an act in reliance on the law of a communist state, many of those accused of committing communist crimes would probably argue that they acted in accordance with the law of their communist state and were never even suspected of committing a crime in that state. In the *K.-H.W. v. Germany* case, the applicant claimed that the provisions of relevant laws allowed the use of firearms in the circumstances of the case. The Federal Court of Justice ruled that the statutory grounds of justification in East German law should have been interpreted restrictively and in a manner favourable to human rights, so that the killing of an unarmed fugitive who merely wanted to cross from one part of Berlin to the other was unlawful. The ECHR referred to the relevant provisions of the GDR Constitution, i.e. to Article 89 (3), which stated that legal norms under from statutes should not

[3] Ibid., para. 3.

be inconsistent with the Constitution. Article 19 (2) of the GDR Constitution provided as follows: "Respect for and protection of the dignity and liberty of the person (*Persönlichkeit*) are required of all State bodies, all forces in society and every citizen;"[4] in conclusion, the ECHR pointed to Article 30 (1) and (2) of the Basic Law, which stipulated: "The person and liberty of every citizen of the German Democratic Republic are inviolable," and "citizens' rights may be restricted only in so far as the law provides and when such restriction appears to be unavoidable (*unumgänglich*)."[5] In the light of the above principles, enshrined in the Constitution and other provisions of the law of the GDR, the ECHR found that the applicant's conviction by the German courts, which interpreted those provisions and applied them to the case at hand, did not appear to be arbitrary or contrary to Article 7 (1) of the Convention.

As for the grounds of justification under the practice of a communist state, it should be noted that in the *K.-H.W. v. Germany* case, the ECHR stated as follows:

> Since the term "law" in Article 7 (1) of the Convention comprises written as well as unwritten law, the Court must first (…) consider the nature of the GDR's State practice, which was superimposed on [the rules of written law] at the material time. In that context, it should be pointed out that at the material time the applicant was not prosecuted for the offence in the GDR. This was because of the contradiction between the principles laid down in the GDR's Constitution and its legislation, on the one hand, which were very similar to those of a State governed by the rule of law, and the repressive practice of the border-policing regime in the GDR and the orders issued to protect the border, on the other.[6]

The ECHR considered the practice of the GDR state and found that it violated an obligation under the GDR Constitution. The ECHR found that:

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[4] Ibid., para. 56.
[5] Ibid.
[6] Ibid., para. 62–63.

> the categorical nature of the border guards' orders to "annihilate border violators and protect the border at all costs" flagrantly infringed the fundamental rights enshrined in Articles 19 and 30 of the GDR's Constitution, which were essentially confirmed by the GDR's Criminal Code (Article 213) and successive statutes on the GDR's borders (section 17(2) of the People's Police Act 1968 and section 27(2) of the State Borders Act 1982). This State practice was also in breach of the obligation to respect human life and the other international obligations of the GDR, which, on 8 November 1974, ratified the International Covenant on Civil and Political Rights, expressly recognising the right to life and to the freedom of movement (…), regard being had to the fact that it was almost impossible for ordinary citizens to leave the GDR legally.[7]

As regards the foreseeability of conviction, the applicant argued that, as an East German border guard, he was the last link in the chain of command and had always carried out the orders he received. He could not have foreseen his conviction by the German courts and it was absolutely impossible for him to foresee that he would one day be held criminally liable in court because of a change in circumstances. The ECHR found that:

> In the present case the question therefore arises to what extent the applicant, as a private soldier, knew or should have known that firing on persons who merely wanted to cross the border was an offence according to GDR law. In that connection, the Court first observes that the written law was accessible to all. The provisions concerned were the Constitution and Criminal Code of the GDR, not obscure regulations. The axiom "ignorance of the law is no defence" applied to the applicant too. Furthermore, the Court takes the view that even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only the GDR's own legal principles but also internationally recognised human rights, in particular the right to life, which is the supreme value in the hierarchy of human rights.[8]

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[7] Ibid., para. 67.
[8] Ibid., para. 72 ff.

As regards the limitation periods, the ECHR directly referred to the West German law of 26 March 1993 on the suspension of limitation in relation to injustices committed by the regime of the Socialist Unity Party of Germany, while pointing out that 84 of the East German Criminal Code provided that crimes against peace, humanity and human rights were not subject to limitation.[9]

In the opinion of the ECHR, the applicant's conviction by the German courts over his charges was consistent with Article 7 (1) of the Convention and there was no need to assess the circumstances of the case from the point of view of Article 7 (2) of the Convention.[10]

In the *K.-H.W. v. Germany* case, when determining the legal classification of the offence committed by the applicant, ECHR referred to both domestic law and international law and found that the applicant had committed a communist crime. At the same time, in the opinion of the ECHR, there was no need to consider the case from the perspective of Article 7 (2) of the Convention or to analyze whether the committed act constituted a criminal offence from the point of view of the principles recognized by civilized nations. Therefore, for the ECHR, in view of the provision of Article 7 (1) and (2) of the Convention, the concept of "provisions of international law" is understood mainly as the provisions of international treaties, since a distinct editorial unit, i.e. the aforementioned Article 7 (2) provides, as it were, separately for general principles recognized by civilized nations. Noteworthy, Article 38 of the Statute of the International Court of Justice does not make a similar distinction, to read:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b) international custom, as evidence of a general practice accepted as law;
> c) the general principles of law recognized by civilized nations;

[9] Ibid., para. 110 and 111.
[10] Ibid., para. 113 and 114.

d) subject to the provisions of Article 59 (binding character only on the contesting parties), judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, (*according to what is fair and equitable, or in good conscience and notwithstanding the written law*), if the parties agree thereto.[11]

Regarding Article 7 (2) of the Convention, authors point out that its purpose is to ensure that the *lex retro non agit* principle does not affect the laws that were passed in exceptional circumstances at the end of the Second World War to punish war crimes, treason and collaboration.[12] The ECHR ruled that this provision also applied to subsequent legal acts concerning crimes against humanity.[13] It seems that where the above the exception applies, the ECHR will not intervene to verify the correctness of domestic courts' decisions or interpretation of the applicable law.[14]

When looking for provisions of international law on international criminal liability for communist crimes, one should indeed first of all refer to international treaties on human rights and fundamental freedoms. Assuming that the communist crime consisted of taking someone's life, it is worth referring to all provisions of international law that concern the right to life. Therefore, it is worth referring to Article 3 of the Universal Declaration of Human Rights of 10 December 1948, which states: "Everyone has the right to life, liberty and security of person."[15] This right was confirmed by the International Covenant on Civil and Political Rights of 16 December 1966, which provides as follows in its Article 6: "Every human being has the inherent right to life."[16] It is also included in the Convention, in its Article 2 (1):

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[11] Statute of the International Court of Justice 33 UNTS 993.

[12] See K. Reid, *A Practitioner's guide to the European Convention on Human Rights*, London 2012, p. 246.

[13] Ibid.

[14] Ibid.

[15] Universal Declaration of Human Rights adopted by the UN General Assembly by Resolution 217/III A on 10 December 1948 in Paris.

[16] The International Covenant on Civil and Political Rights of 16 December 1966 (Journal of Laws of 1977, No. 38, item 167).

> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Someone's conduct may be found justified by the exceptions contained in Article 2 (2) of the Convention, which provides:

> Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
> a) in defence of any person from unlawful violence;
> b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> c) in action lawfully taken for the purpose of quelling a riot or insurrection.

However, the deaths of the victims of communist regimes were usually in no sense the result of the use of force which was "absolutely necessary." It should be noted that the practice of communist states usually did not protect victims of a communist regime from unlawful violence. It is easy to prove that the acts or omissions of communist criminals were in no way justified under Article 2 (2) of the Convention.

When it comes to the responsibility of communist states, it can be very difficult to enforce it today, as many communist states simply no longer exist. Here is how the ECHR dealt with this problem in the *K.-H.W. v. Germany* case:

> If the GDR still existed, it would be responsible from the viewpoint of international law for the acts concerned. It remains to be established that alongside that State responsibility the applicant individually bore criminal responsibility at the material time.[17]

Communist states that have ceased to exist cannot be held responsible because they are no longer there, but that does not mean that such responsibility cannot be attributed to those who violated human rights.

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[17] Judgment of the ECHR of 22 March 2001 in the *K.-H.W. v. Germany* case, para. 103.

2. The principle of subsidiarity

Where national and international competences converge, i.e. when both national and international entities may carry out the same specific activity, there is a need to refer to the principle of subsidiarity.[18] The general question of whether these competences can be exercised differently (but not in an arbitrary manner) at the national and international level should be answered in the affirmative, and this follows from the very essence of the principle of subsidiarity, which would otherwise be superfluous. Thus, the principle of subsidiarity does not apply to exclusive competences reserved for one entity only.

The Convention expresses a kind of respect for the state authorities – parties to the treaty in the demand that domestic remedies should be exhausted before an application is brought before the ECHR.[19] This is to ensure mutual and correct cooperation between the national and convention-based legal orders. The principle of subsidiarity so understood was formally expressed in Article 35 of the Convention, which reads as follows:

> 1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken. (…).

At the same time, pursuant to Article 13 of the Convention, states – parties to the Convention are obliged to ensure that everyone whose rights and freedoms under the Convention are violated has an effective remedy before a domestic authority, regardless of the fact that the violation may have been committed by persons acting in an official capacity. The principle of subsidiarity was strengthened by Protocol No. 15 to the Convention, by which the following sentence was added to the Recitals:

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[18] See S. Cassese, *Ruling indirectly. Judicial subsidiarity in the ECtH*R, https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf [accessed: 20.08.2020].

[19] Ibid.

> Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

Some authors argue that the above excerpt is, *inter alia*, a response to a large number of cases pending before the ECHR.[20]

At the same time, it is pointed out that the ECHR does not constitute a so-called fourth-instance court, and its decisions cannot be based on the conviction that domestic courts have made a wrong decision or made a mistake while adjudicating in a specific case.[21] Rather, the role of the ECHR is to ensure that the acts (or omissions) of the contracting states comply with the Convention.[22]

In my opinion, the principle of subsidiarity, understood as applicable where domestic remedies have been exhausted before an application may be brought before the ECHR, is the principle of subsidiarity in the procedural aspect. In the substantive aspect, the principle of subsidiarity is defined by the doctrine of the margin of appreciation. It could therefore be concluded that the principle of subsidiarity has two dimensions: procedural and substantive.

When examining cases, the ECHR is often faced with various interpretative choices.[23] One of these is the choice of whether, when considering a specific case, it should limit itself to the interpretation of the relevant provisions of the Convention, or to refer also to other acts of international law (system).[24] In the *K.-H.W. v. Germany* case, the ECHR did not stop at the interpretation of Article 7 of the Convention only, but also referred, *inter alia*, to the International Covenant on Civil and Political Rights of 16 December 1966 and the

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[20] See M.I. Vila, *Subsidiarity, margin of appreciation and international adjudication within a cooperative conception of human rights*, "International Journal of Constitutional Law" 2017, vol. 15, iss. 2, p. 394.

[21] See K. Reid, *A Practitioner's…*, p. 58.

[22] Ibid.

[23] See J. Pauwelyn, M. Elsig, *The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunal*s, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1938618 [accessed: 20.08.2020].

[24] Ibid.

Universal Declaration of Human Rights of 10 December 1948. Moreover, the ECHR also took into account the German-German Unification Treaty of 31 August 1990 (*Einigungsvertrag*[25]), as well as the provisions of domestic law in force in East Germany and West Germany. It is worth noting, however, that in the *K.-H.W. v. Germany* case, the need to refer to other legal acts (apart from the Convention) resulted from the very wording of Article 7 of the Convention, which states that it is necessary to refer to other legal acts. Therefore, it is not that the choice in question is always a free choice the ECHR (the judicial panel) may make. In view of the provision of Article 7 of the Convention, it can be concluded that in the case a reference had to be made to other legal acts, and that this need arises from the literary wording of Article 7 of the Convention. It is also worth noting that the concept of 'international law' contained in Article 7 (1) of the Convention does not cover the general principles recognized by civilized nations. Otherwise, the regulation contained in Article 7 (2) of the Convention would be superfluous.

Conclusions

The conclusion that follows from the *K.-H.W. v. Germany* case is that every criminal offence should be viewed from the perspective of both domestic law and international law, understood not only as international treaties but also as other sources of international law and – importantly – as a state practice. Whether an act or omission is a communist crime is mainly left for the decision of national courts in particular cases. It should also be noted that the statutory grounds of justification for a criminal offence should be interpreted narrowly and so as to favour human rights. The practice of a communist state cannot be regarded as justifying an offence either. The mere fact that a communist state did not prosecute a person also does not justify committing an offence. As the *K.-H.W. v. Germany* case shows, there may be a contradiction between the principles laid down in the law of a communist state or in international treaties to which the state is party, on the one hand, and the repressive practices

[25] Einigungsvertrag BRD-DDR vom 31. August 1990 (The Unification Treaty of 31 August 1990 between the Federal Republic of Germany and the German Democratic Republic.

of a communist regime, on the other. The lapse of the limitation period should also be assessed from the perspective of both national law and international law.

Apart from the above, it should be borne in mind that the relations between domestic courts and the ECHR are governed by a long-standing principle of subsidiarity, which in my opinion may be understood as applicable where domestic remedies have been exhausted before an application may be brought before the ECHR (procedural aspect), and as the doctrine of the margin of appreciation (substantive aspect). Therefore, in my opinion, the principle of subsidiarity has two dimensions: procedural and material. When assessing cases of communist crimes, the doctrine of the margin of appreciation takes on special importance. Communist crimes often influenced the historical development of states, their culture, economy and identity. It must be recognized that domestic courts are better equipped to assess the consequences of communist crimes. In the *K.-H.W. v. Germany* case, the ECHR understood the difficult process of legal assessment of communist crimes and duly referred not only to the provisions of domestic law but also to the provisions of international law and the state practice of a communist state.

KRZYSZTOF MASŁO

A Polish initiative aimed at establishing an international Tribunal to judge crimes committed by the communists

Despite numerous crimes committed by communist regimes in various parts of the world, for many years it was impossible to fairly bring their perpetrators to justice. Because the Soviet Union belonged to the victorious countries, the communist crimes committed during World War II in Europe were not included in the Charter of the International Military Tribunal, which only covered crimes committed by persons acting in the interests of the European Axis states (Article VI of the Agreement).[1] Although the Soviet prosecutor in the Nuremberg trials attempted to accuse the Germans of the Katyń massacre, the1940 murders of Polish officers never appeared in the Tribunal's jurisprudence. The only exception to the settlement of communist crimes was the establishment of Extraordinary Chambers in Courts of Cambodia, based on the Cambodian law of 2001[2] and the 2003 Agreement between Cambodia and the United Nations regarding the prosecution of crimes committed under the Cambodian law during the Democratic Kampuchea.[3] However, the tribunal's activity was purely symbolic and covered the crimes committed by 5 people: Kaing Guek Eav, Khieu Samphan, Ieng Sary, Nuon Chea, and Ieng Thirith. What is more, due to the defendant's dementia the case of Ieng Thirith was

[1] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8.8.1945, 82 UNTS 280: D. Schindler, J. Toman, *The Laws of Armed Conflicts*, Dordrecht 1988, pp. 912–919.

[2] Law on the Establishment of the Extraordinary Chambers, NS/RKM/1004/006.

[3] Agreement between the UN and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6.6.2003.

dismissed during the proceedings, and Ieng Sary died in March 2013 before the case was closed.

For the victims, communities and states involved, personal justice and accountability for totalitarian atrocities are essential components in the regional reconciliation process. In order to ensure efficient administration of justice in the region, it is crucial to emphasize the significance of effective domestic accountability procedures and cooperation between the countries concerned. The fall of the Iron Curtain and the democratic changes in Europe created a new climate for the settlement of crimes committed mainly in Central and Eastern European states by the communist apparatus after 1939. Since 2000 ideas for punishing crimes committed by communists have begun to surface in Europe. A declaration calling for the establishment of mechanisms to successfully prosecute crimes committed by totalitarian regimes was adopted by European countries in 2015 during the European Day of Remembrance for the Victims of Totalitarian Regimes.[4] A year later, in response to this declaration Estonian Ministry of Justice proposed to other European states that a new, supranational mechanism be established for prosecuting international crimes committed by representatives of totalitarian regimes. The proposed mechanism would take one of three forms:

- the international investigation mechanism;
- a regional framework agreement setting out standards for conducting domestic proceedings against perpetrators of this type of crimes;
- an intergovernmental foundation whose activity would be similar to that of the Simon Wiesenthal Centre in relation to Nazi criminals.

The Estonian proposal met with the initial interest of Central and Eastern European states, especially Poland, Lithuania, Latvia and Czech Republic. What is more, Estonians proposed to establish a Council for investigating crimes of communist regimes. It would be an investigative body whose primary task would be to gather evidence for the possible initiation of criminal proceedings at a national level. Estonians also suggested that this body could contribute to facilitate international cooperation in prosecuting perpetrators of communist crimes, raising awareness of such crimes and improving

[4] The text of the declaration is available on the website: https://ipn.gov.pl/en/news/791,European-Day-of-Remembrance-for-Victims-of-Totalitarian-Regimes-23-August-2015-T.pdf.

the quality of domestic investigations. The seat of the authority would be mainly Tallinn.

Estonian proposal was very interesting mainly because of the soft nature of the draft mechanism. The mechanism was not a judicial (or prosecutorial) body with the competence to investigate and judge the members of communistic apparatus. Rather, it assumed a subsidiary role to national judicial (or prosecutorial) authorities. It was a salute to those states which, on grounds of the exclusivity of their national criminal jurisdiction, could not transfer the powers to judge communist criminals to an international court. Therefore, more European states should be interested in implementing this mechanism. What is more, Estonians had organized (in Tallinn) special intergovernmental consultations, during which their proposals were discussed. Consultations were directed at the officials of the European ministries of justice and bodies dealing with the settlement of the communist past and revealed differences between participating states.

From the very beginning, Poland took an active part in the work on implementing the Estonian draft. The author of this project himself participated, on behalf of the Polish Ministry of Justice, in consultations in Tallinn. Recognizing the significant nature of this institution, however, the Polish Ministry of Justice was finally convinced that it was necessary to go a step further, and the most effective solution would undoubtedly be the creation of an international tribunal, which, equipped with a prosecution function, would conduct proceedings concerning communist crimes. Therefore, in 2017 Poland proposed to initiate consultations on the establishment of an international tribunal for crimes committed by totalitarian regimes, in particular by the communist apparatus (the Tribunal).

According to the Polish draft of the project, countries interested in establishing such a new organ would have to first decide on its organisational model and on establishing appropriate operating procedures, which could be based on pre-existing international models like the one outlined in the Rome Statute of the International Criminal Court (The ICC Statute). Some European states have already established local agencies with particular expertise to address issues relating to the crimes committed by totalitarian regimes (for example Poland, Estonia, and Germany). The Polish draft encouraged states to establish a connection between their own national jurisdiction and the Tribunal. The

ultimate resolution should, of course, take into account any potential overlap in responsibilities between the new mechanism and the current system and should propose some build-in norms which will allow to solve disputes over jurisdiction. Poland suggested basing the Tribunal's jurisdiction on the principle of complementarity which underlines the primary role of the country's legal system in judging crimes of communist regimes. The nature of the Tribunal's jurisdiction is also determined by the principle *ne bis in idem*.

Under the Polish draft, the Tribunal would be funded and based on a multilateral international convention. This is not a novel solution, and international law has precedents for establishing international courts through treaties. The international treaty was the legal basis for the functioning of the Special Court for Sierra Leone (2002)[5] and the ECCC (2003).[6] Formally, there were bilateral agreements concluded between the UN Secretary General and the government of the country in question. They were supposed to account for crimes committed on the territory of only one state by various armed groups fighting against the legal government or by the former government. The international agreement also served as the legal foundation for the creation of the International Military Tribunal in Nuremberg. This tribunal was established on the basis of the Agreement of 8 July 1945 for the Prosecution and Punishment of the Major War Criminals of the European Axis, concluded by representatives of the USA, Great Britain, France, and the USSR[7]; annexed to the agreement was the Charter of the International Military Tribunal. Eighteen countries from Europe, (including Poland) Asia, and South America joined the Agreement on September 25, 1945. Germany was never bound by an agreement, but in 1945 the entire territory of the Third Reich was under the occupation and control of the Allies, and the German government did not exist.

According to the Polish draft, the Tribunal would be created between states from the Central and Eastern Europe. In particular Group V4 countries

[5] *Agreement between The United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone*, 16 January 2002, UNTS vol. 2178, p. 137.

[6] *Agreement between The United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea*, 6 June 2003, UNTS vol. 2329, p. 117.

[7] Journal of 1947, No. 63, item 367.

and Baltic States would be natural parties to such a treaty, although other EU member states as well as non – EU members (such as Ukraine, Moldova, Albania) could also be interested in participating in the initiative. In some of these states nobody has yet been held accountable for the crimes of the communist regimes. All interested countries should be invited to participate in the discussions and collaborative efforts to develop the new instrument.

The Polish draft assumes that the jurisdiction of the Tribunal would be limited to severe violations of international law that breach such values as human life, well-being, and freedom (genocide, crimes against humanity, and war crimes). It seems pointless for the new body to deal with the issues of the crime of aggression, which is subject to different interpretations and goes beyond the scope of the Tribunal's primary competence. What is more, it also seems necessary to create a new category of crimes, e.g., communist crime and to engage in defining it. As can be observed in Polish court practice concerning the prosecution of such crimes, the implementation of a completely new set of penal regulations may result in additional difficulties during legal proceedings already underway at the national level.[8] It may be expected that such problems would only be multiplied in the context of international legal proceedings. The limitation of the Tribunal's competencies to the prosecution of the most severe crimes, also of cross-border nature, seems to be favourable in view of the *nullum crimen sine lege* principle, which becomes even more critical in the prosecution of ordinary crimes, usually domestic. Consequently, it will not be necessary to examine historic regulations in each country or adjust rules governing the Tribunal's operations accordingly.

Genocide was not covered by the Charter of the International Military Tribunal (or the Charter of the International Military Tribunal for the Far East) and did not appear in Law No. 10 of the Allied Control Council of December 20, 1945.[9] The definition of genocide appeared in the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948.[10]

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[8] E. Leniart, *Odpowiedzialność karna funkcjonariuszy komunistycznego państwa za zbrodnie komunistyczne*, „Miscellanea Historico-Iuridica" 2015, vol. 14, iss. 1.

[9] Control Council law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity.

[10] Convention on the Prevention and Punishment of the Crime of Genocide, 9.12.1948, UNTS 78.

The jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and – of course – International Criminal Court (ICC) all introduced jurisdiction on genocide. Currently, the universal nature of the 1948 Convention and the customary nature of genocide are not disputed.[11]

Crimes against humanity were first defined in the Charter of the International Military Tribunal (and the Charter of the International Military Tribunal for the Far East). According to the statutes of both Military Tribunals, crimes against humanity included murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, as well as persecutions on political, racial, or religious grounds in the execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where the crime was committed. This definition was the basis for the understanding of crimes against humanity in the statutes of the ICTY and ICTR.[12] The definitions covered by both statutes are based on customary international law and are binding upon states. Moreover, in one of its judgments, the Cambodian Tribunal found that crimes against humanity were understood in this way as early as in 1975.[13] In this context, it should be noted that the reference to the definition contained in the ICC Statute is not the most accurate, as art. 7 does not reflect customary norms, and already in 1945 the definition of crimes against humanity was much narrower.

According to the Polish draft, and following the example of international criminal tribunals and courts, the Tribunal should have international legal personality and consist of three organs: Chambers (to conduct legal and appellate proceedings), the Prosecutor's office, and the Secretariat, to provide administrative support.

Different historical circumstances in the countries make establishing a consistent period for the tribunal's investigations challenging. As a result,

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[11] K. Wierczyńska, *Komentarz do Konwencji w sprawie zapobiegania i karania zbrodni ludobójstwa (Dz.U.52.2.9),* LEX/el. 2008.

[12] M.J. Filipek, *Koncepcja zbrodni przeciwko ludzkości w międzynarodowym prawie karnym*, Warszawa 2020, p. 78.

[13] Guek Eav Kaing alias Duch, Appeal Judgment of 3.2.2012 r., 001/18–07–2007 ECCC/TC, § 100; similarly: Nuoan Chea, Khieu Samphan, Judgment of 7.8.2014 r., § 177.

the Polish draft assumed that each country, would declare the length of time that would be subject to scrutiny by the Tribunal when it became a party to the new convention.

According to the Polish draft, the Tribunal will have jurisdiction over cases concerning totalitarian crimes committed on the territory of the states-parties. The issue that will require additional attention of the countries interested in the new mechanism is the application of the convention's regulations to deeds that took place on the historical territory of a party-state that is currently in the possession of another state, and this in turn may pose political and practical challenges.

The Polish draft is introduced as the basis for prosecuting and judging natural persons who at the time of committing the deed were at least 18 years of age and who bear the greatest responsibility for the crime, especially those who played a crucial role in committing communist crimes. What is more, Poland also suggested that the Tribunal should be given authority to assess whether the legislation issued by totalitarian regimes was in compliance with universal norms on human rights and freedoms. This would allow not only for the prosecution of individual criminals, but also for the condemnation of entire legal systems and the assessment of their validity in view of the commonly accepted international standards. It should be considered whether the Tribunal would be granted authority to:

- recognise certain entities functioning within totalitarian regimes (internal security forces, communist party) as flagitious.
- determine whether totalitarian regimes' legislation was compliant with the universal norms underlying human rights and freedoms.

Since the death penalty is prohibited by the international standards of human rights, the Polish draft excluded the possibility of passing death penalty sentences by the Tribunal. Hence a person convicted of a crime should be punished by the Tribunal with a sentence of imprisonment for a period not exceeding 30 years, or life imprisonment. The Tribunal should also have the authority to impose sentences such as asset confiscation and the confiscation of income derived directly or indirectly from crime without however violating the rights of third parties acting in good faith. The international agreement should also outline the principles for determining the punishment, including

cases where a person receives a combined sentence or is convicted for more than one crime.

Poland proposed incorporating (with relevant modifications) the ICC's procedure. The ICC Statute and thus the procedures adopted by the ICC have been wildly accepted worldwide (123 countries ratified the Rome Statute). The future Polish treaty should also regulate the *aut dedere aut iudicare* principle, extradition, mutual legal assistance, access to documentation and domestic archives, or the obligation of state parties to hand over a person to the Tribunal.

The future treaty should also include provisions for victim protection. Here the following concerns should be addressed: the definition of a victim, the right to the truth, the right to participate in legal proceedings, the right to act collectively, and the obligation of the states to respect human remains. Further regulations could be modelled after the currently binding treaties (e.g. art. 15 and 24 of International Convention for the Protection of All Persons from Enforced Disappearance).

One of the most important things every victim of a human rights' violation is entitled to is the right to the truth. Denying committed crimes is like denying truth and therefore treating the victim in an objectifying, humiliating and undignified manner. Apart from this individual aspect, this right can also be pursued on a collective level – knowledge of the past is valuable for the society as a whole. Without knowing the truth about the past, one cannot avoid repeating it. Without determining what has happened it is impossible to decisively solve the problem at the root of human rights violations. Establishing the truth is also important for the international community and may aid in the resolution of future crisis of a similar nature. In such instances it is advised to report and document not only individual cases but also the more complex social and institutional mechanisms that gave voice to totalitarian ideologies and allowed them to build sinister regimes. The right to the truth encompasses the right to knowledge about three factors: the circumstances surrounding the human rights violations, the progress and results of an inquiry, and the fate of the victims. In fact, it is mostly about determining the course of events in the context of time, location, and their sequence. The truth also has a humane aspect, which is identifying all the victims and those responsible for the crimes of totalitarian regimes. Among the circumstances

that should be revealed are the type, nature and scope of the damage and, in particular the level of victims' physical and psychological suffering.

Domestically, the right to the truth is congruent with the State's obligation to not only reveal and identify the perpetrator of a human rights violation but also to provide a comprehensive analysis of all circumstances surrounding the case, including determining the victims, the scope of the damage, as well as circumstances favourable to the violation. The State is responsible for gathering all of the above-mentioned information and making it available to the victims.

The Polish concept of establishing the Tribunal was not made public, but was presented to the countries of our region and to the Platform of European Memory and Conscience. While the Platform was very enthusiastic about the Polish idea, the governments were reluctant to create a new mechanism. State representatives raised doubts of a constitutional nature (especially, the inability to transfer a criminal jurisdiction to international body other than ICC) and expressed scepticism about the effectiveness of this mechanism. That way, the only idea of internationalization of the issue of communist crimes, which would undoubtedly contribute to an increased awareness of their nature and scope in the society, especially in Western Europe, failed.

HANNA KUCZYŃSKA

Criminal responsibility of the Polish Communist Party (PZPR) for so-called "communist crimes"

Introduction

The crimes committed by communist regimes in the states of Eastern Europe are numerous and various. They include both the most serious crimes of international law, such as crimes against humanity (e.g., mass killings, torture and persecution, deportations) or war crimes (when committed in times of armed conflict or occupation, e.g., attacks on civilian population and civilian objects, rape and sexual violence, pillage, wilful killing of members of the resistance and deprivation of appropriate fair trial guarantees, etc.), or even genocide in its conventional meaning (especially as committed by the regime of the Soviet Union)[1] but also crimes committed in everyday life, usually considered to cause little social harm, but when analysed as a whole, in totality touching every citizen – constituting the menacing and prejudicial reality of life in a communist state.[2]

[1] D. Žalimas, *Crimes Committed By The Communist Regimes From The Standpoint Of International Legislation: Lithuanian Case Study*, The Institute for the Study of Totalitarian Regimes Conference on the Crimes of Communist Regimes, February 24–26, 2010, Prague, p. 6, available at https://www.ustrcr.cz/data/pdf/konference/zlociny-komunismu/Dainius_Zalimas.pdf [accessed: 20.08.2020].

[2] Citing the facts given in the literature: the Special Rapporteur on the PACE Draft Resolution on the need to condemn the crimes of the communist regimes provided the following numbers of the victims of the communist regimes: in the former Soviet Union – 20 million people, in China – 65 million, Vietnam – 1 million, North Korea – 2 million, Cambodia – 2 million, Eastern Europe (excluding the Soviet Union) – 1 million. The Holodomor in Ukraine of 1930s when the Soviet totalitarian regime deliberately implemented special measures to create artificially the situation of a large scale famine resulted in loss of up to 5 millions of Ukrainians, mostly peasants who had not been favourable to the regime. More than 300.000 citizens of the Republic of Estonia – almost a third of its then population – were affected by arrests, mass murder, deportation and other acts of repression – see: D. Žalimas, *Crimes Committed…*, p. 6.

A particular feature of the communist regime was precisely the support and/or execution of the "communist crimes" in question by the functionaries of the state apparatus – an individual could not do much during those times without this support.[3] It was this "macro-criminal" aspect, this "context" of communist crimes, that led to the conclusion that the crimes committed by individuals within the communist system were marked by such a large amount of social harm.[4] Most often it was the organized character of such types of criminality, and the monopolist position of the communist party, that leads to considering such crimes as "state crimes." That is why the subject of crimes committed by the communist regime in Poland should be analysed not only on the level of criminal responsibility of individuals, but also on the level of the possible responsibility of the communist party.

The Polish United Workers' Party (Polish: *Polska Zjednoczona Partia Robotnicza*), commonly abbreviated to „PZPR", was the communist party which governed the Polish People's Republic as a one-party state from 1948 to 1989.[5] According to the definition, ideologically it was based on the theories of Marxism-Leninism, and had total control over public institutions in the state. Between 1948 and 1954, nearly 1.5 million individuals registered as members of the Polish United Workers' Party, and membership of the party rose to more than 3 million by 1980.[6]

The main goal of this paper is to analyse four of the legal provisions constituting possible foundations for prosecution of the Polish Communist Party (PZPR) for the so-called "communist crimes", allowing for linking the legal entity with criminal activities of its members. Therefore, the scope of the problem will be limited: both subjectively and temporally. Firstly, the subjective scope of responsibility should be introduced – that is: whom

[3] A. Grześkowiak, *Odpowiedzialność karna za zbrodnie komunistyczne według polskiego prawa karnego*, [in:] *Gaudium in litteris est. Księga jubileuszowa ofiarowana Pani Profesor Genowefie Rejman z okazji osiemdziesiątych urodzin*, L. Gardocki, M. Królikowski, A. Walczak-Żochowska (eds.), Warszawa 2005, p. 85.

[4] H. Kuczyńska, *„Criminal Enterprise" jako szczególna podstawa odpowiedzialności karnej przed międzynarodowymi trybunałami karnymi*, [in:] *Reforma prawa karnego propozycje i komentarze. Księga pamiątkowa Profesor Barbary Kunickiej-Michalskiej*, C. Nowak, J. Jakubowska-Hara, J. Skupiński (eds.), Warszawa 2008, p. 599.

[5] It was founded on the 15th December 1948 and on 27–30 January 1990 it was dissolved.

[6] https://pl.wikipedia.org/wiki/Polska_Zjednoczona_Partia_Robotnicza [accessed: 12.07.2022].

to hold responsible. The topic of this paper is the criminal responsibility of a legal entity – and not a single individual.[7] Thus, the rules of corporate criminal liability theoretically should be applicable. Secondly, as to temporal scope, according to the basic principles of criminal law, one can only be held responsible for acts committed that were forbidden at the time of the criminal behaviour. In this context the analysis should go into the problem of delimiting the temporal scope of crimes committed in the totalitarian regime – that in this case must correspond to the period of existence of the PZPR.

Based only on these preliminary assumptions, it must be stressed that in Polish law assigning criminal responsibility to the Polish communist party as a legal person is not possible. The issue in question here does not refer to non-binding acts and declarations and condemnation,[8] but real criminal responsibility, of a repressive type, allowing for the issuing of an indictment against legal persons and placing their representatives before a judge. This does not mean that no criminal responsibility at all is possible. There is the possibility to prosecute functionaries of the communist regime suspected of committing communist crimes, on the basis of the act of 18 December 1998 on the Institute of National Remembrance (later: IPN) – Commission for the Prosecution of Crimes against the Polish Nation.[9] However, there is no ground to claim that one could be held criminally responsible for the mere fact of participation,

[7] M. Łoś, A. Zybertowicz, *The Failure to Prosecute Communist Crimes*, [in:] *Privatizing the Police-State*, London 2000, p. 186; D.A. Loeber (ed.), *Ruling Communist Parties and Their Status Under Law*, Dordrecht 1986; J. Kulesza, *Z problematyki strony podmiotowej zbrodni komunistycznej*, „Wojskowy Przegląd Prawniczy" 2005, No. 3, p. 103; G. Rejman, *Zbrodnie komunistyczne w koncepcji polskiego prawa karnego*, „Wojskowy Przegląd Prawniczy" 2006, No. 1, p. 3; S. Przyjemski, *W kwestii pojęcia „zbrodni komunistycznej", zdefiniowanej w art. 2 ust. 1 ustawy z dnia 18 grudnia 1998 r. o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu*, „Wojskowy Przegląd Prawniczy" 2006, No. 1, p. 15; J. Kulesza, *Funkcjonariusz państwa komunistycznego jako podmiot zbrodni komunistycznych*, „Palestra" 2006, No. 9–10, p. 84.

[8] Such as several acts issued by the EU: the EU Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008, p. 55–58; the European Parliament resolution of 2 April 2009 on European conscience and totalitarianism, P6_TA(2009)0213; Resolution 1481 (2006) of the Council of Europe Parliamentary Assembly: Need for international condemnation of crimes of totalitarian communist regimes.

[9] Journal of Laws 1998, No. 155, item 1016.

or leading the party, in the communist regime, i.e. the PZPR, which has been stressed in the judgment of the Polish Constitutional Tribunal.[10]

1. Legal basis for responsibility of legal entities in the Polish law

a/ Repressive responsibility of legal entities

The first aspect that should be considered is the responsibility (liability in fact) of legal entities. It was only in 2002 that this type of repressive responsibility of legal entities was introduced in Polish law. The law on criminal liability of corporations and other collective entities in Poland is governed by the October 28, 2002 Act on the Liability of Collective Entities for Acts Prohibited Under Penalty (hereinafter referred to as "the 2020 Act").[11] The Act sets out the principles of "criminal liability" of collective entities for offenses punishable under penalty or fiscal offenses and rules of conduct regarding such liability. One of the "collective entities" that can be considered to be punishable under this act are non-profit legal persons whose purpose may not be to conduct business, e.g. political parties.[12] The liability specified in the 2002 Act is a liability remaining in the area of criminal law – certainly a responsibility of a repressive type,[13] but it is not strictly criminal liability. In this case, the liability of a collective entity is secondary and derivative, and the sanctioned criminal law norm must be violated not by the collective entity, but by a natural person.[14] According to Polish law, crime can still only be committed by a physical person; legal entities cannot commit "crimes" but only "acts prohibited under penalty."

The 2002 Act sets out the principles of material (substantive) law and creates new types of offences. According to the rules of non-retroactivity,

[10] The judgment of the Polish Constitutional Tribunal of 28 April 1999, case No. K 3/99, analysed by B. Banaszkiewicz, *Rozrachunek z przeszłością komunistyczną*, „Ius et Lex" 2003, No. 1: Orzecznictwo, p. 446.

[11] Journal of Laws 2002, No. 197, item 1661.

[12] D. Habrat, *Odpowiedzialność podmiotów zbiorowych za czyny zabronione pod groźbą kary. Komentarz do art. 2 ustawy*, published in: LexisNexis 2014, thesis 3.

[13] B. Nita, *Model odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary*, „Państwo i Prawo" 2003, No. 6, p. 16.

[14] D. Habrat, *Odpowiedzialność podmiotów zbiorowych*…, thesis 2.

only a legal entity that existed after 2002 can be held liable under this Act. Thus, the temporal scope of responsibility is clear the date of committing the offense or fiscal offense by a natural person is relevant. The 2002 Act may be applied only to situations where the criminal behaviour took place after the Act entered into force.[15] Moreover, if there is no longer a collective entity that could be held liable, where it no longer exists (in the legal sense) – then it is not subject to responsibility. Taking into consideration that the PZPR was dissolved in 1990, it is clear that the 2002 Act cannot apply to its responsibility.

Also, the other premises of responsibility provided for in the 2002 Act would make it impossible to hold the PZPR liable.

Firstly, a legal entity is not responsible for its behaviour, but for the behaviour of its employees acting within the entity.[16] This model has been described as "secondary responsibility". According to Art. 3 of the 2002 Act, a collective entity is liable for a criminal act, which is the behaviour of a natural person acting on behalf of or in the interest of a collective entity under the right or obligation to represent it, make decisions on its behalf or perform internal control, or when this right is exceeded or the obligation is not met, or allowed to act as a result of exceeding the rights or failure to fulfil obligations by such a person. In consequence, a condition of liability of the collective entity is the establishment of a specific kind of culpability: it is either a fault in the selection or supervision, or a so-called organizational fault.

Secondly, legal entities' liability comes into play only if this behaviour brought or could bring any benefits for the collective entity, even non-pecuniary benefits.

Thirdly, a collective entity can be held liable only if the fact of the commission of a criminal act mentioned in Art. 16 of the 2002 Act by a person referred to in Art. 3, was confirmed by a final conviction of that person, conditional discontinuation the criminal proceedings against them, also in cases of tax offenses, a decision granting the person permission to voluntarily submit to liability or a court decision to discontinue the proceedings against them due to circumstances excluding punishment of the perpetrator.

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[15] B. Namysłowska-Gabrysiak, *Ustawa o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary. Komentarz*, Kraków 2004, p. 347.

[16] A. Bartosiewicz, *Przesłanki odpowiedzialności podmiotu zbiorowego – aspekty praktyczne*, „Przegląd Prawa Handlowego" 2004, No. 2, p. 38–43.

Last, but not least, the entity can be held criminally responsible for enumerated offences (a closed group of crimes), among others: offences against property, against sexual freedom and decency, against the environment, crimes against humanity and the crime of denial of Nazi and communist crimes (Art. 55 of the Act of National Remembrance Institute) – but not other offences that could come into play in the case of "communist crimes."

The last problem with reaching for this type of legal liability of collective entities would be the limited sanction provided by the Act of 2002: a fiscal penalty from 1,000 to 5,000,000 PLN. This penalty, being of a strictly financial character, is the final element convincing readers that this Act was designed to be an instrument applied against offences committed by entrepreneurs, not by political parties.

b/ Specific responsibility for communist crimes based on the IPN-regime

The Act of 18 December 1998 on the Institute of National Remembrance (IPN) – Commission for the Prosecution of Crimes against the Polish Nation (later: the 1998 Act), in Art. 2(1) defines the notion of "communist crimes": they are actions performed by the officials of the communist state between 8 November 1917 and 31 July 1990 which consisted of applying reprisals or other forms of human rights violations in relation to individuals or groups of people, or which constituted crimes as such according to the Polish penal act in force at the time of their perpetration. Communist crimes are actions of those state officials in the period in question who fulfilled unlawful acts defined in certain articles of the Criminal Code.

As to the personal scope of the criminal responsibility – these crimes could only have been committed by "a communist state official", a public functionary, as well as a person who was granted equal protection to that of a public functionary and in particular, a public functionary and a person who performed executive functions within the statutory body of the communist party.

It should be stressed that nowhere in the 1998 Act on IPN is there a basis to presume that legal entities can be held responsible. Nonetheless, it plays a distinct role, as it defines the substantive scope of forbidden acts grouped

as "communist crimes." On the basis of the definition given by the 1998 Act, the Polish courts held that the concept of a "communist crime" is not the same as the definition of a crime as constituted in the criminal code, and the meaning of this concept is very broad. There is no doubt that the provision of Art. 2(1) of the 1998 Act, which defines the concept of communist crimes very broadly, does not constitute a separate type of criminal act, but the courts use it for precising the legal definition of this concept, establishing a set of provisions that may constitute a communist crime under the Polish criminal law system. The 1998 Act, and the courts' jurisprudence based on it, the substantive elements of crimes for which the communist party could be held responsible. There is no doubt that a communist crime is only an act that fulfils the elements of a crime (in the light of the provisions of the Polish criminal law in force at the time of committing them) – and in a specific form, because this crime occurs in various forms.[17] However, there is no legal entity that could be held responsible: the essence of the subjective element of a communist crime is that the perpetrator identifies with the system under which he or she performs acts involving the use of repression or violation of the rights of individuals or entire social groups. In such cases perpetrators do not consider these activities forbidden, on the contrary, they are seen as legally justified, thus consolidating the totalitarian system.[18]

Even if the basis for holding the Polish communist party responsible for these crimes was adopted now, or had been adopted in the 1998 Act, criminal law looks forward. The basic rule of the Polish Constitution expressed in article 42(1) is that "Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law." Therefore,

[17] Decision of the Polish Supreme Court of 5.07.2005, case No. WZ 13/05, published in: OSNKW 2005/10/98, see also: E. Leniart, *Odpowiedzialność karna funkcjonariuszy komunistycznego państwa za zbrodnie komunistyczne*, „Miscellanea Historico-Iuridica" 2015, vol. 14, iss. 1, p. 338.

[18] See: judgment of the Appeal Court in Katowice of 6.10.2011, case No. II Aka 373/11, LEX nr 1102925 and judgment of the Appeal Court in Katowice of 28.02.2003, case No. II Aka 298/02, LEX nr 84143. Also: G. Rejman, *Zbrodnie komunistyczne w koncepcji polskiego prawa karnego*, „Wojskowy Przegląd Prawniczy" 2006, No. 1, p. 3.

there is no legal possibility to bring the communist party to justice based on substantive provisions adopted after the prohibited acts were committed (and, as has been shown, after the entity ceased to exist).

c/ Strictly criminal responsibility for participation in a "criminal group"

It is worth underlining that the Polish courts solve the problem of criminal character of acts committed by many PZPR functionaries in a specific manner. They always deal with the individual responsibility of functionaries; however, they assign these activities, defined by the 1998 Act on IPN as "communist crimes" committed in the frames of a "criminal group" – as if they were committed in affiliation with organized crime. Therefore, the courts defined the PZPR as a "criminal group." According to Art. 258(1) of the Criminal Code:

> Whoever participates in an organised group or association having for its purpose the commission of offences shall be subject to the penalty of deprivation of liberty for up to 3 years.

This was the legal qualification of acts adopted in the case concerning the introduction of the Martial Law in 1981. The District Court in Warsaw sentenced, among others, C.K.[19] to 2 years of imprisonment (suspended for a period of 5 years) stating that

> in the period from March 27, 1981 to December 31, 1982 in W. and in the territory of P. (…) being an officer of the communist state as the Head of the Military Internal Services and the Minister of the Interior, in cooperation with other established persons, he committed a communist crime in that he participated in an organized criminal association of an armed nature aimed at committing crimes involving deprivation of liberty by internment and

[19] See: judgment of the District Court in Warsaw of 12.01.2012, case No. VIII K 24/08 and the judgment of the Appeal Court in Warsaw of 15.06.2015, case no II AKa 82/13: http://orzeczenia.ms.gov.pl/content/stan$0020wojenny/154500000001006_II_AKa_000082_2013_Uz_2015–06–15_001 [accessed: 29.06.2020].

> execution of imprisonment sentences imposed for criminal offenses at the time of their commission and other crimes against freedom, as well as violation of physical integrity, confidentiality of correspondence and employee rights of Polish citizens, mainly concentrated in the social movement related to NSZZ "SOLIDARNOŚĆ", participating in the preparation of draft normative acts and plans and schedules of activities of state authorities and administration as well as public media regarding the illegal introduction of Martial Law, followed by the illegal issuing of decrees of and on December 12, 1981: "on Martial Law (…).

The courts of both instances came to the conclusion that all elements specified in Art. 258(2) of the Criminal Code were fulfilled explaining that the group of supreme commanders of the Polish People's Army were aptly recognized as an armed criminal organization under which there was a division of duties:

> The evidence gathered and findings made also clear that the accused C.K. joined the said group being aware of both the purpose and the forms of its operation.

The judgment presented above, among a couple of similar ones, shows a method of linking the commission of communist crimes with the criminal nature of the communist party and the totalitarian context of the committed crimes in the practice of the Polish courts. However, this method is not an equivalent of legal ground for a strict criminal responsibility of the communist party itself – as an entity.

2. Responsibility for participation in a Joint Criminal Enterprise (and possible application of international law)

The last level of analysis is related to the possible scope and method of applying international law in the Polish legal order.

In international law, the concept of *Criminal Enterprise* has been known since the Nuremberg judgment of 1946. In Art. 9 of the IMT Charter (which constituted an attachment to the London Agreement of August 8th 1945 for

the Prosecution and Punishment of the Major War Criminals of the European Axis),[20] it was decided that:

> At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization

and in Art. 10:

> In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

The Nuremberg Tribunal found that the leadership of the NSDAP National Socialist Party, the Gestapo (secret state police), the SS (Schutzstaffel special units) and the SD (security service) took part in criminal organizations.[21]

The basic elements of criminal participation in a common plan constituting *Criminal Enterprise* were more recently explained in the ICTY[22] Appeals Chamber's judgment in the case of *Prosecutor v. D. Tadić*. The Appeals Chamber stated that "the notion of common design as a form of accomplice liability is firmly established in customary international law." According to the opinion of this Court, the *mens rea* can be based on the notion of "common purpose" – and is satisfied when the following requirements concerning *mens rea* are fulfilled:

> (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group

[20] Journal of Laws 1947, No. 63, item 367.

[21] T. Cyprian, J. Sawicki, *Prawo norymberskie. Bilans i perspektywy*, Warszawa–Kraków 1948, p. 383.

[22] UN Doc. SC Rep. 808, of 22.2.1993.

> of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to predict this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called "advertent recklessness" in some national legal systems).[23]

Thus the ICTY acknowledged the concept that belonging to a group of people responsible for serious violations of international criminal law (e.g. a state government or rebel command group) can lead to criminal responsibility for participating in the joint criminal plan as furthered by this organization – as long as the awareness of the criminal nature of this goal and its acceptance have been proven by the accusation. This does not limit liability to persons who directly performed the elements (*actus reus*) of acts enumerated in the criminal law, but also extends to persons who otherwise participate in their performance. Each person is responsible for their own intentions (*mens rea*).[24] However, this concept (or at least the most far-reaching consequences of it) was the subject of mass criticism and was not accepted in the jurisprudence of other tribunals. It was explicitly denied in the International Criminal Tribunal for Rwanda[25] case law, and has not been used in this wide scope by the ICC.[26]

Now that this fourth basis for criminal responsibility has been introduced in the text, two key issues lead to the conclusion that it cannot be applied to

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[23] The ICTY Appeals Chamber judgment of 15 July 1999, in the case of D. Tadić, case No. IT-94–1-A, § 220.

[24] H. Kuczyńska, *„Criminal Enterprise"*…, p. 600–607; P. Hofmański, H. Kuczyńska, *Międzynarodowe prawo karne*, Warszawa 2020, p. 126; M. Królikowski, *Odpowiedzialność karna jednostki za sprawstwo zbrodni międzynarodowej*, Warszawa 2011 (chapter 4.2).

[25] UN Doc. SC Rep. 955, of 8.11.1994.

[26] Prosecutor v Lubanga Dyilo, Decision on the Confirmation of Charges, ICC-01/04–01/06, 29 January 2007, § 301–367.

the possible responsibility of the Polish communist party (PZPR). The first issue relates to the conclusion that this concept of criminal responsibility is still an individual type of responsibility and not the basis for holding a legal entity liable.

The second issue relates to the question of whether jurisprudence of an international tribunal could be used before the Polish courts at all – and it is an academic question. From the academic point of view, Art. 42 of the Polish Constitution allows for application of international law – in a certain scope. The formula "This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law" can lead to the conclusion that prosecution of crimes of international law constitutes an exception from the strict legality principle (the *nullum crimen, nulla poena sine lege* clause). This expression is considered to constitute a "Nuremberg clause" and places an obligation on national organs to prosecute crimes forbidden by international law (and it is not limited to Nazi crimes only) notwithstanding the provisions of national law.[27] In the literature it is commonly stated that the notion „international law" should be given a wide meaning, including not only formally binding international agreements but also *ius cogens* and *opinio iuris*, as well as general principles recognized by the international community.[28] Although such an interpretation would also be possible from the jurisprudence of the ECHR, the Polish courts do not accept and apply this possibility.

It should be stressed that there are key differences between being a member of a criminal group as defined in Art. 258 of the Criminal Code and taking part in a *Joint Criminal Enterprise*. In the first case it is not the common plan that defines the criminality of a specific behaviour but mere formal requirement of "participation" in a group. The mere fact of "participation" is punishable, and a person does not have to take part in other crimes committed by the group of persons – for the commission of such other crimes the suspect will be responsible on the basis of relevant, provisions of the Criminal Code applied in convergence.

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[27] See: B. Banaszek, *Konstytucja Rzeczypospolitej Polskiej, Komentarz*, Warszawa 2012, published in: Legalis thesis 5.

[28] See: W. Wróbel, *Zmiana normatywna i zasady intertemporalne w prawie karnym*, Warszawa 2003, p. 402.

On a lower "level" of international law, European Union law also approaches the issue of communist crimes – however, it does not provide for any grounds for responsibility of legal entities. The EU Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law[29] obliges a Member State to take the measures necessary to ensure that certain conduct should be prosecuted – without mentioning the type and model of prosecution of such crimes. Obviously, the Framework Decision – being only adopted in 2008 – does not cover crimes committed by the Eastern European communist regimes.

Conclusions

Several conclusions come into play following the analysis of the titular issue. They are all influenced by the finding that the criminal responsibility of the communist party of Poland (PZPR) constitutes an element of a wider research area of the so-called "post-conflict justice" – meaning the taking into account of the state systems which instigated committing crimes, where it is the state (most often the government) that was the organ responsible for taking decisions which led to the criminal behaviour of its functionaries. Therefore, such crimes can be called "crimes of the state".[30] Adopting rules of criminal responsibility, which first look to the past, is perceived to serve to build the future moral order.[31] This aspect should be understood from the perspective that there was never a "clear line" between the People's Polish Republic and the Third Republic of Poland. A question can be posed whether in the process of accounting for the past, a state can use institutions that go beyond the classical legal forms applied to prosecute criminal behaviours, which is supposed to be justified by the historical context and axiological separation of the state from the assumptions of the old system.[32] As we have seen, in Poland

[29] OJ L 328, 6.12.2008, p. 55–58.

[30] S. Cohen, *Crimes of the State Accountability, Lustration and the Policing of the Past*, „Law and Social Inquiry" 1995, vol. 20, No. 1, p. 7–50.

[31] J. Kochanowski, *Rozliczenie z przeszłością w Polsce*, „Ius et Lex" 2003, No. 1, p. 238.

[32] T. Snarski, S*prawiedliwość transformacyjna, filozofia prawa i rozliczanie przeszłości przez demokratyczne państwo prawa, Pamięć i Sprawiedliwość*, „Biuletyn Głównej Komisji

such instruments were only partially adopted. The Polish Constitution of April 2, 1997 is implicit in the position of formal continuity of the post-war constitutional order. It provides for no type of laws of a retroactive effect, and does not contain any provisions that would constitute a hint of the need for "settlement" regulations at the level of ordinary legislation, their shape and direction of interpretation.[33] The Constitution, just as with the criminal acts, looks into the future: Art. 13 prohibits activities by

> political parties and other organizations whose programmes are based upon totalitarian methods and the modes of activity of Nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership.

Secondly, it is not possible to hold the communist party of Poland responsible for criminal actions as a legal entity. The provisions allowing for repressive type of liability of collective entities came into force in 2002, and they relate to repressive liability of entrepreneurs not political parties. However, the model adopted, where the communist party cannot be held criminally responsible does not lead to total impunity of persons involved in the commission of communist crimes – prosecutions of individuals are still possible and ongoing. Within the limits set by criminal law statutes, it is possible to hold a person criminally responsible for specific acts committed within the functioning of a communist state, taking into account the principles obvious in a state of law such as *nullum crimen sine lege praevia*, right of defence, presumption of innocence – but only in the case of individuals and provided the individual *mens rea* has been proven.[34]

It is worth attempting to answer the question if a special model of responsibility for the communist party is necessary, or if it ever has been. In my opinion it was necessary in 1991 – however, the criminal responsibility of

Badania Zbrodni przeciwko Narodowi Polskiemu Instytutu Pamięci Narodowej" 2010, No. 2, p. 212.

[33] B. Banaszkiewicz, *Rozrachunek z przeszłością*…, p. 445.

[34] Ibid., p. 447.

the Polish communist system was then answered by drawing a "clear line." Nowadays there is still a need to solve this problem, not necessarily through the liability of collective entities but in such a way that the macro-criminality, the true actor behind the crimes and their context, can be acknowledged. However, there is no possibility – and need – to create a separate model of prosecution of such crimes in the form of an international (or quasi-international) criminal tribunal. In my opinion, the legal qualification from Art. 258 of the Criminal Code, as adopted by the Polish courts, also meets the desired goal of linking the state to its criminal actions. It is just a pity that this solution has been elaborated only on the level of the courts – the answer to the needs of "reckoning the past" is thus being done by judges, not legislators.

Thirdly, it can be seen that international criminal law has introduced two measurements of justice for two totalitarianisms – Nazism and communism – and two different legal assessments of crimes committed within them.[35] Communism, although lasting longer, has never faced any settlement or any organised reaction by the international community such as Nazism did in Nuremberg. While the model of "comprehensive criminal prosecution" was applied to the Nazi system and several state organs were declared to be "organised criminal groups" (Criminal Enterprises) – there has never been a legal instrument dealing with all the crimes committed by communist regimes. At the same time the need has been stressed in the literature for the same moral and legal assessment and condemnation of all the crimes of genocide, crimes against humanity and war crimes, notwithstanding which regime is responsible for these crimes, who their perpetrators are, and what kind of ideology stands behind them. If criminal acts committed by different totalitarian regimes are qualified in the same way under criminal law, obviously they deserve the same condemnation.[36] In this case it is hard to keep the analysis on a strictly legal level – as a simple question comes to mind: why there was no international criminal tribunal created in 1991? It could have used the Nuremberg principles as substantive provisions and thus no retroactivity would have been invoked. The reason why this could not have happened was that there was no "victors' justice" possible, since the main

[35] A. Grześkowiak, *Odpowiedzialność karna*…, p. 87.
[36] D. Žalimas, *Crimes Committed*…, p. 23.

"suspect" was still active and in possession of nuclear weapons; moreover, there was no subject interested in delivering justice – both from outside and within the states involved.

When it comes to conclusions of a more general character, as criminal law looks forward and not backward, the legislator often cannot predict the atrocities that could happen in the future that would require a formal legal framework (notwithstanding the possibility to prosecute *ius gentium* crimes). Nowadays it is more difficult for individual responsibility for communist crimes to be made real and effective. The more time passes, the more it seems that prosecution of "communist crimes" is more of a political slogan than realizing criminal law goals and functions[37] (even though in the case of communist crimes the statute of limitation does not apply in the same way as in criminal law). It also seems that (as a final conclusion of a general character) it would be advisable to establish a criminal law provision penalizing a special type of offences committed by political parties – with growing nationalist extremism from parties in Europe, which attempt to rule states in a totalitarian way, ignoring the rules of law and using the law only as a mechanism of inaugurating their reign and of preventing loss of power. The aim of such laws should not only be to meet the need to prevent such grave crimes of international law as genocide, crimes against humanity and war crimes, but any crimes committed by the governing party in the name of perpetrating its power. The same criminal law standard should apply to a political party as to any other group of people who are complicit in the commission of offences.

[37] Although there is still a discussion about the purposefulness of such "late justice" – see: S. Cohen, *Crimes of the State Accountability*…, p. 32.

KAROLINA WIERCZYŃSKA

International crimes in the jurisprudence of domestic courts in the light of Polish experience*

Introduction

There is no single, universal definition of international crimes in international law. This deficiency is severe and was recognized even before the Second World War, when attempts were made to create a permanent criminal tribunal and establish codifications common to states through the unification of criminal law.[1] Definitions of specific crimes can be found in international conventions or the statutes of criminal courts but there is no recognized normative definition that would constitute a point of reference for scholars.

Undoubtedly, international crimes are distinguished from common crimes by the fact that they are regulated and defined in international documents, while the latter are defined in national criminal codes and other statutory documents. The former are also intended to protect the interests of entire communities, and not only the interests of victims and individual values; they have a universal dimension, as the entire international community has its own interest in prosecuting such crimes. The preamble to the Statute of the International Criminal Court (hereinafter referred to as the Statute or ICC Statute) refers to the conscience of humanity, to the threat to peace, security and well-being of the world, while also indicating that such crimes must be prosecuted before national courts and that effective prosecution is in the

* This article builds on a previous work on this issue: Karolina Wierczyńska, Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation as a ground for prosecution of crimes against humanity, war crimes and crimes against peace, DOI 10.7420/pyil2017n; 37 PYIL 2017, pp. 275–286.

1 Historical Survey of the Question of International Criminal Jurisdiction – Memorandum submitted by the Secretary-General, A/CN.4/7/Rev.1, p. 11.

interest of the international community.[2] International crimes can also entail international liability.[3]

It is true that a range of specific acts can be penalized as common crimes under national law. There are many arguments in favour of jurisdiction to be exercised by the state of the perpetrator's or victim's citizenship or by the state where the crime was committed.[4] After all, what is important is that the penalty is imposed quickly and effectively, which is the key argument for jurisdiction of states.[5] Moreover, the state, in contrast to international courts adjudicating on international crimes, operates in a more stable legal and institutional framework; domestic proceedings are cheaper, more effective; the national prosecutor has wider possibilities to investigate or take evidence, interview witnesses, conduct proceedings in the national language, which reduces or even eliminates problems with possible translation and coherence of translations should the same proceedings be conducted by an international court. Simply put, domestic proceedings are more effective and cheaper[6]. The classification of crimes (insofar as crime categories are at hand, such as homicide v. genocide, torture v. crimes against humanity) also seems to be of secondary importance in this case. What is important is to combine the inevitability of punishment with its severity in order to deter potential perpetrators. For the perpetrator of a crime, it makes no difference if the conviction will be for crimes against humanity or homicide. Virtually all of these considerations support the use of national jurisdiction. However, states either are not able to carry out criminal jurisdiction or exercise it in rather sham way. For these reasons, the jurisdiction of the International Criminal Court (hereinafter referred to as the ICC) has been based on the principle of complementarity, as the Court may examine the cases of international crimes

[2] Rome Statute of the International Criminal Court, 2187 UNTS 3.

[3] For more details, see R. O'Keefe, *International Criminal Law*, Oxford 2015, p. 47 ff.

[4] The issue of application and the basis of application of universal jurisdiction is not covered here.

[5] R. Cryer, *Prosecuting International Crimes. Selectivity and the International Criminal Law Regime*, Cambridge 2005, pp. 238–239.

[6] The author does notice the flaws of domestic proceedings, but has developed it elsewhere: K. Wierczyńska, *International Prosecutors Acting before National Courts?: The Rome Statute System and the Ultimate Approach to Positive Complementarity*, "Chinese Journal of International Law" 2022, vol. 21, iss. 2, p. 259–285, https://doi.org/10.1093/chinesejil/jmac012.

only if a state fails to do so or is unable or unwilling genuinely to exercise its criminal jurisdiction.[7] What is worth noting – the crimes covered by the jurisdiction of the ICC cannot be subject to statutory limitations.[8]

In this text, the emphasis will be on the Polish experience in penalizing crimes against humanity. The critical analysis presented here covers the jurisprudence of Polish courts concerning several-day internments and their classification as crimes against humanity, based on international definitions, definitions from the Polish criminal code[9] and the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (hereinafter referred to as the INR Act).[10]

1. International conditions

While both war crimes[11] and genocide[12] are defined and criminalized under international conventions, crimes against humanity have not received their own convention.[13] There have been repeated attempts to define them, especially after World War II. In the statutes of *ad hoc* criminal courts and so called mixed tribunals there are many, though not necessarily consistent, definitions of crimes against humanity.[14] However, for a number reasons, the reference point for our considerations should be the definition contained in Article

[7] Rome Statute, Article 17, see footnote 2 above.

[8] Rome Statute, Article 29, see footnote 2 above.

[9] Consolidated text, Journal of Laws of 2019, item 1950.

[10] Consolidated text, Journal of Laws of 2019, item 1882.

[11] Examples of war crimes can be found both in the so-called Hague and Geneva law; still, there is no single convention codifying all war crimes, and the most important points of reference in this regard are the Hague Conventions adopted in the years 1899–1907 and the Geneva Conventions of 1949.

[12] See Convention on the Prevention and Punishment of the Crime of Genocide, Journal of Laws of 1952, No. 2, item 9.

[13] Extensive initiatives are underway to adopt a convention on crimes against humanity. The definition presented in the draft is a mirror copy of the definition contained in Article 7 of the Statute of the International Criminal Court; for more on the work on the convention, see *Crimes against humanity, Statement of the Chairman of the Drafting Committee*, Mr. Mathias Forteau, 5 June 2015, ILC, 67th session, pp. 5–6.

[14] See e.g. Article. 3 of the Statute of the ICTR https://legal.un.org/avl/pdf/ha/ictr_EF.pdf [accessed: 18.11.2022], and Article. 5 of the Statute of the ICTY https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [accessed: 18.11.2022].

7 of the ICC Statute. First, it is considered to be a reflection of customary law made by the drafters of the ICC Statute[15], and additionally 123 states decided to ratify the statute. Moreover, the draft convention on the definition of crimes against humanity, which is being developed in the International Law Commission, literally mirrors this definition.[16] According to it, crimes against humanity are specific acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Noteworthy, however, the ICC Statute is not a universal code which would define individual crimes. It is merely a tool with which the Court is designed to operate. The definitions of crimes under the Statute are legal definitions, but only with reference to this particular international convention. It must be emphasised that if the definitions as used in the Statute are to be a point of reference for Polish courts, these courts should consider all the regulations under the Statute, and not only those that just fit into the context of a case which they happen to examine.

The ICC Statute covers only the most serious crimes of concern to the international community as a whole (Article 5), and it is not the legal qualification of a crime but the gravity of the crime that determines whether the Court can examine a case. Colloquially speaking, not every international crime will be admissible before the Court, but only those that meet the threshold of gravity of the case under Article 17 of the Statute. In turn, the Court's case-law shows that it cannot be a crime that is not sufficiently grave. The Court has pointed out that gravity should be assessed taking into account the qualitative and quantitative criteria of a crime. The factors to be considered when assessing gravity of a crime are the scale of the alleged crimes (including geographical and temporal intensity); the nature of the unlawful conduct or of the crimes allegedly committed; the employed means for the execution of the crimes; as well as the impact of the crimes and harm caused to victims and their families.[17] In the context of our considerations, the temporal intensity is crucial; as specified by the Office of the Prosecutor

[15] Ch. Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application*, Cambridge 2011, p. 470.

[16] *Crimes against humanity, Statement of the Chairman of the Drafting Committee*, Mr. Mathias Forteau…

[17] PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31.03.2010, ICC-01/09, para. 62.

(hereinafter referred to as the OTP), it is about a high intensity of the crimes over a brief period or a low intensity of crimes over an extended period.[18] In fact, for non-international conflicts, it is required that they be protracted conflicts, because only their intensity will warrant the application of the Court's jurisdiction.[19] To summarize, it is not enough to consider the definition of a crime; also other provisions of the Statute and policies prepared by the OTP must be taken into account to know the philosophy of the Court's operation and assess whether a crime would fall under its jurisdiction at all.

2. Polish law

The Constitution of the Republic of Poland of 2 April 1997[20] in its Article 42 (1) provides that

> Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law.

The Criminal Code contains a definition of the crime against humanity (introduced in 2010), which does not fully reflect the spirit of the definition under the ICC Statute, although the Code regulations were undoubtedly intended to reflect the obligations that Poland assumed when it acceded to the Statute. Pursuant to Article 118a of the Criminal Code, punishment will be faced by

> anyone who, while taking part in a mass attack or even one of repeated attacks directed against a group of people taken to implement or support the policy of a state or organisation criminal (…).

[18] OTP, Policy paper on case selection and prioritisation 2016, para. 38.

[19] See Article 8 (2) ff; see also J.K. Kleffner, *The Legal Fog of an Illusion: Three Reflections on "Organization" and "Intensity" as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict*, "International Law Studies" 2019, vol. 95, p. 161 ff.

[20] Journal of Laws of 1997, No. 78, item 483.

It is easy to notice that this definition does not reflect the elements of the definition under the Statute, ignoring the civilian nature of the population under attack, the widespread or systematic nature of the crime, while emphasizing the mass nature of the crime. Yet another definition of crimes against humanity can be found in the INR Act, which in its Article 3 defines that these

> are especially considered the crimes of genocide as understood by the Convention on the Prevention and Punishment of the Crime of Genocide (…), as well as other serious persecutions based on the ethnicity of the people and their political, social, racial or religious affiliations, if they were performed by public functionaries or either inspired or tolerated by them.

This definition, in turn, significantly differs from the definition of the Statute, does not reflect its elements at all, and does not resemble the definition under other international documents. Moreover, to build this definition of the crime, another crime was used, namely genocide, which in international law is separate from the crime against humanity. While the definition under the INR Act is not a criminal provision and it cannot be used to infer the criminal liability of the perpetrator of a crime, it is a legal definition as it appears in the INR Act and it is widely referred to in proceedings initiated by the Institute of National Remembrance.[21] Scholarly literature does not now treat genocide and crimes against humanity as synonyms. They have their own separate criteria of criminal liability in relation to the perpetrator of such crimes,[22] and further genocide in no way links to the civilian population. It links to specific protected groups as strictly defined in the Convention. As a result, under Polish law, there are not only two inconsistent definitions of crimes against humanity (none of them fully reflects the provisions of the ICC Statute), but also two regimes relating to the crimes under analysis: one resulting from the Criminal Code and another one from the INR Act. They differ mainly in

[21] For more about the INR Act and the controversy over amendments thereto, see P. Grzebyk, *Amendments of January 2018 to the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation in Light of International Law*, DOI 10.7420/pyil2017o, 37 PYIL 2017, pp. 287–300.

[22] See Articles 6 and 7 of the ICC Statute.

that the INR Act refers to crimes committed by public officials.[23] The existence of two definitions in the Polish legal order is highly undesirable and causes chaos, especially when the analysis goes beyond the very definitions as contained in legal acts and begins to cover judicial practice in this regard. Specifically – in presented case – Polish courts were discussing the crime of unlawful deprivation of liberty, or more precisely, the so-called internment (Article 189 of the Criminal Code) as crimes against humanity. The courts have repeatedly made use of these definitions when trying the perpetrators of the so-called communist crimes and, unfortunately, this practice cannot be said to be commendable, despite the fact that even the Supreme Court supported it with its opinion in the case.

3. Polish practice

The critique in this paper covers the use of the definition of crimes by Polish courts in proceedings against communist policemen who, as public officials, deprived oppositionists of their liberty by executing decisions on internment prior to the announcement of the Decree on Martial Law.[24] District and regional courts (and even the Supreme Court – hereinafter referred to as the SC), while assessing the crime of deprivation of liberty resulting from the application of the decision on internment issued pursuant to Article 42[25] of the decree of 12 December 1981 on martial law, which was no longer in force, classified it as a crime against humanity, considering it, for example, as serious persecution. This paper analyzes the following documents: the SC decision that referred to a panel of 7 SC judges a legal question whether "the deliberate deprivation of liberty may be considered a crime against humanity (…) even if it does not meet the criteria of a criminal offence specified in Article 118a (2)

[23] See Article 2 and 3 of the INR Act.

[24] Journal of Laws of 1997, No. 29, item 154.

[25] Ibid., Article 42. Para. 1 provides that Polish citizens over 17 years of age, in relation to whom, in view of their previous conduct, there is a justified suspicion that, while at liberty, they will not comply with the legal order or will conduct activities threatening the interests of the security or defence of the state, may be interned for the term of martial law in isolation centres. These provisions do not infringe the immunities under special provisions.

of the Criminal Code";[26] a resolution of 7 SC judges in response to the presented legal question[27] and one judgment of a Regional Court,[28] chosen at random, which, however, is a flagship and typical example of a poor interpretation of international law by the Polish courts in the last decade.

The Decree on Martial Law was supposed to enter into force on the day of its announcement, with effect from the date of its adoption (Article 61). It was published on 14 December 1981, but it was actually sent for printing only 3 days later; then copies were prepared and it was only sent to recipients on 19–23 December 1981.[29] In view of the principles of the rule of law, it should be concluded that the decree was in force only from the moment of its publication, although its Article 61 gave it a retroactive effect, starting from its adoption.

Until the Decree on Martial Law was announced, internment was unlawful, and after that date it was a legally applied measure (used against political opponents). The cases examined before common courts concerned mainly the use of internment from 12 and 13 December 1981 until the measure became lawful, i.e. sanctioned under the provisions of the published decree. "Unlawful" internment campaigns lasted several days.

In this respect, one should agree with the position of the Supreme Court, which held that unlawful deprivation of liberty, which the convict caused by issuing a decision on internment, in none of the situations described in the judgment, lasted longer than 7 days, because at the moment of the actual publication in the Journal of Laws on 17 December 1981 of the Decree on Martial Law, that deprivation of liberty obtained a legal basis.[30] In connection with the proceedings conducted at the initiative of the Institute of National

[26] Decision of the Supreme Court of 12 March 2015, case ref. V KK 402/14.

[27] Resolution of a panel of seven judges of the Supreme Court, 14 October 2015, case ref. I KZP 7/15.

[28] Judgment of the Regional Court in Białystok, 18 October 2016, case ref. VIII Ka 414/16, but similarly also the Judgment of the District Court in Skierniewice, 1 February 2017, case ref. No. II K 504/15; Judgment of the District Court in Gorzów Wielkopolski, 15 October 2012, case ref. No. II K 62/11.

[29] G. Krawiec, *Czy wprowadzenie stanu wojennego w Polsce było zgodne z prawem?*, 14.01.2018, https://twojahistoria.pl/2018/01/14/czy-wprowadzenie-stanu-wojennego-w-polsce-bylo-zgodne-z-prawem/ [accessed: 18.11.2022]; K. Stokłosa, *Glosa do uchwały Sądu Najwyższego z dnia 14 października 2015 r.* (I KZP 7/15), „Studenckie Zeszyty Naukowe" 2018, vol. 21, iss. 38, p. 158.

[30] Decision of the Supreme Court of 12 March 2015, case ref. V KK 402/14, p. 8.

Remembrance under the INR Act, the SC was to decide whether such conduct, consisting in deprivation of liberty for a period of not more than 7 days, could be classified as a crime against humanity, the punishment of which is not subject to limitation.

The Supreme Court[31] in a resolution of 7 judges concluded that although a short-term deprivation of liberty (less than 7 days) may be exceptionally recognized as a crime against humanity, that may happen only if it is found at the same time that all other criteria of crimes against humanity specified in international law have been met, to the extent resulting from the context of this law. Thus, the SC decided that several days of internment may be classified as crimes against humanity. The resolution's overall direction was right, as it pointed out that the act should meet the other criteria of the crime as defined in international law. To ascertain this, a comprehensive analysis of the ICC Statute and the nature of its provisions is required. However, none is given in either the resolution of the SC itself or in judgments of common courts. The only document that the SC Court refers to is the *Elements of Crimes* as adopted by states together with the Statute, which provides an explanation of the terms used in relation to the definition of crimes. Other provisions of the Statute, including the key Article 17 concerning gravity of a case, were ignored by the SC in its resolution. Common courts also ignore them. The resolution of the SC in essence concludes that deliberate deprivation of liberty of another person – once conditions have been met – may be considered a crime against humanity, the punishment of which is not subject to limitation, even if it does not fulfil the criteria of a criminal offence specified in Article 118a § 2 (2) of the Criminal Code. This remark raises justified doubts; after all, how does this argument fit with a claim from the same resolution, that

> Article 118a of the Criminal Code indeed introduces into the Code a regulation relying on the quoted Article 7 (1) of the Rome Statute of the International Criminal Court?[32]

[31] Resolution of a panel of seven judges of the Supreme Court, 14 October 2015, case ref. I KZP 7/15, pp. 24–25.

[32] Ibid., p. 12.

If the provision of Article 118a of the Criminal Code determines the substance of the definition of crimes against humanity under Polish law, how can one allow that the criteria given in that provision might not be met? This is peculiar indeed, as after all the subject matter is about crimes against humanity, that is, the most serious crimes of concern to the international community, the nature of which the SC seems to simply ignore. Crimes against humanity are the most serious crimes under international law and their philosophy cannot be reduced to punishment for several-day internment; the SC thus shows a complete lack of restraint in this respect.[33] In the resolution, the SC argues that "acts that fall within the scope of the definitions provided, which pursuant to Article 7 § 3 of the Criminal Code are summary offences, and not indictable crimes, may also be classified as crimes against humanity," to proceed to conclude that several-day internments can be characterized as crimes against humanity, while under the Polish Criminal Code they would be characterized as summary, or petty, offences. In the resolution, the SC even refers to the interpretative principles expressed in the Vienna Convention on the Law of Treaties (hereinafter referred to as the VCLT),[34] pointing out that all language versions must be taken into account, while forgetting that the ICC Statute does not consist solely of the analyzed Article 7 and its substance also extends to the provisions of other articles that would support the explanation of the nature of the crime against humanity and its assessment by the ICC, such as the aforementioned Article 17. Thus, referring to the interpretation rules listed in the VCLT, the SC itself ignores the most important of them, namely the requirement that the entire treaty, which the Statute is, must be read as

> the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes, any agreement relating to the treaty (…) (Article 31 (2) of the VCLT).

[33] How could one classify together the cases of sexual violence and rape camps in the former Yugoslavia and several-day internments of a few persons, even with the element of a physical distress?

[34] 1155 UNTS 331.

The text of a treaty is its essential element, and the analysis of the SC should primarily cover the entire text. But the SC ignores this requirement completely, to find that

> it cannot therefore be said that the Statute of the International Criminal Court in any way makes the perception of crimes against humanity dependent on the duration of the unlawful deprivation of liberty.[35]

The resolution basically disregards the achievements of international criminal law, the case-law of international courts, while selectively citing and analyzing acts of international law. As a result, it does not eliminate the problem posed by the existence of multiple definitions in Polish law, and thus the existence of various criminal liability regimes.

There is perhaps one more observation that should be made, namely that the SC determines that what remains to be considered is the applicability of the provisions of the Rome Statute of the International Criminal Court in the interpretation process, in view of Article 24 (1) of the Statute (non-retroactivity), from which it follows that the Statute has a prospective effect.

One can hardly disagree with the SC on this point. Should the Latin maxim *nullum crimen sine lege scripta* be followed, or the principle of legality relied on, one is unable to establish the rationale for the application of Article 7 in determining the criminality of acts committed before the ICC Statute entered into force. The Statute was adopted in 1998 and entered into force in 2002. It cannot be applied in the assessment of acts committed several decades before its entry into force. As with the Decree on Martial Law, which, until announced, could not be a legally applicable act, the Statute should not have a retroactive effect or constitute a reference point for determining the criminality of acts committed before its entry into force. However, this remark of the SC was not reflected in the jurisprudence of common courts, which consistently analyzed Article 7 of the Statute so as to establish the unlawfulness of several-day internments.

For example, the Regional Court in Białystok, after the date of the resolution of 7 SC judges, following an analysis of Article 7 of the ICC Statute,

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[35] Resolution of a panel of seven judges of the Supreme Court…, p. 22.

confirmed that "any deprivation of liberty (even short-term), if it results from a mass-scale persecution of certain groups of humanity by state organs (their representatives) pursued with a view to achieving specific political and social goals, combined with an evident violation of the fundamental rights of individuals and causing suffering, not only of a physical nature, but also of a mental nature, may be considered as meeting the criteria of crimes against humanity in the context of regulations contained in acts of international law."[36]

When considering the reasons for this and not another line of jurisprudence of Polish courts, it is difficult not to take into account the question of statutory limitation. It does not apply to crimes against humanity, as regulated both by international acts to which Poland is party and by national documents. Communist crimes, among which several-day internments can undoubtedly be classified, have so far been subject to limitation under the INR Act. Recently, however, an amendment[37] has been adopted, which extended the non-application of statutory limitation also onto communist crimes. Can one expect that this will prevent the courts from interpreting so readily the several-day internments as crimes against humanity?

Conclusions

As far as the practice of Polish courts is concerned, it should be concluded that, first of all, they use international law unskilfully and selectively. They do not understand the philosophy behind the operation of the ICC (which examines the gravity of crimes and covers with its jurisdiction only the most serious crimes of concern to the international community, and thus not several-day internments). Pursuant to the ICC Statute and the case-law of the Court, unlawful acts consisting of several days (even 7 days) of internment do not reach the threshold for crimes against humanity and cannot be classified as such. To classify single summary offences as crimes against humanity is contrary to the provisions of international documents and the jurisprudence in this respect.

[36] Judgment of the Regional Court in Białystok, 18 October 2016…
[37] Journal of Laws of 2020, item 1273.

Secondly, the courts, by using the ICC Statute in their assessment of unlawfulness of conduct that took place before its entry into force, violate the *nullum crimen sine lege* principle. The only legal definition of crimes against humanity in force 1981 was the definition under the Nuremberg Charter, but that was framed with a view to punishing the top-ranking Nazi criminals, and in no way did it refer to communist crimes. The courts, with a little effort, could opt for an extensive analysis of that definition to prove its nature of a custom and apply it to the acts committed in 1981, in reliance of the work of the International Law Commission for international criminal jurisdiction.

Thirdly, one should expect that after the amendment to the INR Act concerning the non-application of statutory limitation for communist crimes has been adopted (although this raises further serious legal doubts), it will be possible to change the case-law line and to classify – as crimes against humanity – truly serious violations of concern to the international community, and not acts quite peripheral from the point of view of international case-law, which there is no way to punish on another basis because the legislator forgot about the existence of a statute of limitations.

TOMASZ LACHOWSKI

Legislative changes for the abolition of the statute of limitations for the communist crime as an element of initiatives to transform the model of settlements with the communist past in Poland after 2015

Introduction

On 15 July 2020, the Sejm of the Republic of Poland adopted an amendment to the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation of 18 December 1998 (hereinafter: the INR Act),[1] under which communist crimes are not subject to the statute of limitations. The Act entered into force on 31 July 2020. As a result, under Polish law, communist crimes were in practice equated with international crimes, to which the statute of limitations does not apply and which – so far – have been the only example of criminal offences that enjoyed such a privilege. It seems that the amendment to the INR Act fits in a broader context of the initiatives taken by the Polish government after 2015, i.e. the victory in the parliamentary elections of the United Right (a coalition of several parties led by the Law and Justice, PiS), aimed at "completing" settlements with the communist past in Poland, at the same time being an attempt to transform the model of settlements with the legacy of the Polish People's Republic (PRL) developed after 1989.

This article aims to analyze the changes in the legal structure of the communist crime against the background of a wider range of initiatives signalled above, as undertaken by the Polish authorities after 2015 in the light of the concept of transitional justice, including its normative core based on international law, human rights standards and the principle of a democratic state

[1] Journal of Laws of 2020, item 1273.

ruled by law. The study uses research methods characteristic of legal sciences, i.e. theoretical-legal, legal-comparative methods and, to a limited extent, the dogmatic method.

1. Transitional justice mechanisms and models of settlements with the past – theoretical approach

Transitional justice is a set of legal and extra-legal mechanisms used by post-authoritarian or post-war states (societies) as a result of most frequently violent political and social changes leading to a rejection of the yoke of an undemocratic system or a transition from a state of war (understood in factual terms, not as a legal concept) to peace.[2] Research on the issues of transitional justice has been conducted in a comprehensive manner since the turn of the 1980s and 1990s, i.e. the transformation of communist states in the region of Central and Eastern Europe (including Poland),[3] although, it should be emphasized, they also referred directly to the transformations in Latin America initiated a decade earlier.[4] Recently, the literature on the subject emphasizes the importance of the so-called transformative justice, which is a next stage of development in the study of transitional justice.[5] Within its framework, special emphasis is placed on the need for actual strengthening of state institutions in the transitional period, which may help societies avoid a return to the criminal past, but also effectively protect against the temptation of political revenge on the part of the new government. As it seems, this assumption is to be an emanation of the so-called forward-looking justice, i.e. a set of policies focused on the future, and not – as in the classic

[2] See N. Turgis, *What is Transitional Justice?*, "International Journal of Rule of Law, Transitional Justice and Human Rights" 2010, vol. 1, pp. 13–14.

[3] In particular: N.J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Washington DC 1995; R.G. Teitel, *Transitional Justice*, Oxford 2000.

[4] In a retrospective approach, research on the use of transitional justice go much deeper into history. As it is emphasized, both in a legal and symbolic sense, one of the most significant events for the development of transitional justice was the establishment of the International Military Tribunal (IMT) in Nuremberg. Cf. J. Elster, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge 2004.

[5] L. Balasco, *Locating Transformative Justice: Prism or Schism in Transitional Justice?*, "International Journal of Transitional Justice" 2018, vol. 12, pp. 368–378.

version of transitional justice – only on the settlement with past crimes (the so-called backward-looking justice) in isolation from efforts to build a democratic state based on the rule of law.[6] This postulate applies in particular to post-authoritarian countries such as Poland, starting from the socio-political transformations of 1989, which consistently strived to ensure participation in the legal culture of the Western world, which imposes on the authorities an obligation (not only legal one) to act in accordance with the established standards of a fully democratic state.

It is worth emphasizing that the prominent normative core of transitional justice consists of the state's obligations under international human rights law, in particular for theprosecution and punishment of those responsible for the crimes committed,[7] combined with the fundamental rights of victims – the right to justice, the right to truth and the right to reparations. The latter is placed conceptually in the so-called non-derogable rights (those that may not be suspended or restricted), such as the right to life, freedom from torture or the right to a fair trial, which were violated in the past by the actions of undemocratic authorities.[8] Noteworthy, the invaluable contribution to the crystallization of the right to justice and the right to truth has come from the case-law of the Inter-American Court of Human Rights (IACHR),[9] and to the resolution of the dilemmas of post-communist states, e.g. in the context of consistency of the adopted lustration laws with the European Convention on Human Rights (ECHR), from the case-law of the European Court of Human Rights (ECtHR).[10] In view of the example of Poland, a key one from the perspective of this study, it is worth adding that the legal framework of possible initiatives in the field of transitional justice has been specified by the jurisprudence of the Constitutional Court (the CC), e.g. with regard to

[6] P. Gready, S. Robins, *From Transitional to Transformative Justice: A New Agenda for Practice*, "International Journal of Transitional Justice" 2014, vol. 8, pp. 339–361.

[7] Developed on the basis of, *inter alia*, The International Covenant on Civil and Political Rights (ICCPR) of 1966, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, and the European Convention on Human Rights and Fundamental Freedoms (ECHR) of 1950.

[8] For more on this, see: T. Lachowski, *Perspektywa praw ofiar w prawie międzynarodowym. Sprawiedliwość okresu przejściowego (transitional justice)*, Łódź 2018.

[9] Ibid., p. 200 ff.

[10] This group also included "Polish cases", e.g. *Matyjek v. Poland* (application No. 38184/03), *Bobek v. Poland* (application No. 68761/01) or *Chodynicki v. Poland* (application No. 17625/05).

the adopted lustration laws,[11] but also the approval of the constitutionality of extended limitation periods for crimes that could not be prosecuted for political reasons before 1989.[12]

The basic goal of transitional justice is to construe a legal response to mass repression and violations of fundamental human rights by undemocratic regimes or international crimes, serious violations of international humanitarian law (and human rights) committed in the course of armed conflicts. To achieve this, it is possible to use both judicial and extrajudicial instruments, including, in the first place, criminal proceedings, methods of seeking and telling the truth (e.g. through the establishment of a truth and reconciliation commission), reparation programs, institutional reforms or – what is typical for post-authoritarian societies – methods for vetting the functionaries of the *ancien régime* or lustrating collaborators of the services of the undemocratic system.[13] To this mosaic one should also add the initiatives for decommunization (e.g. by clearing the public space of communist symbolism) or building a policy of remembrance of the time of repression, as well as educational activities (characteristic of most post-communist countries in the Central and Eastern Europe, in particular those that have established institutes of national remembrance).[14]

They translate into different but in principle mutually complementary components of the concept of transitional justice. Ruti Teitel points to the following dimensions of transitional justice: penal (retributive) justice, historical justice, restorative justice (putting first the meeting of victims' expectations), constitutional justice, administrative justice and remedial justice.[15] It seems that which dimension(s) of transitional justice a greater emphasis is put on ultimately influences the assessment of which model of settlements with

[11] Judgment of the Constitutional Court (CC) of the Republic of Poland of 11 May 2007 (K 2/07).

[12] Resolution of the CC of 25 September 1991 (S 6/91); judgment of the CC of 6 July 1999 (P 2/99).

[13] These mechanisms are today perceived as complementary instruments. Report of the UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616 (2004), para. 8.

[14] A. Czarnota, *Radykalne zło a prawo, czyli jak mierzyć się z trudną przeszłością. Przewodnik po literaturze*, "Ius et Lex" 2003, vol. 2, No. 1, pp. 349–363.

[15] R.G. Teitel, op. cit., pp. 6–9.

undemocratic past a state has chosen. Michał Krotoszyński distinguishes three basic models – the retribution model, the historical clarification model and the thick line model.[16] The first of these assumes the widest possible use of criminal law instruments as part of transitional justice (liability of specific individuals), but also legal and administrative measures aimed at excluding certain categories of persons from public life (e.g. by verification, vetting or decommunization – this is most often a manifestation of the principle of collective responsibility working in practice), being in fact a relatively confrontational model, one that potentially antagonizes various social groups, while allowing for the most radical break with the past. The second one refers to the application of methods of seeking and telling the truth about the time of repression and violations of rights, and the achievement of the fundamental goal, which is not so much the punishment itself as the official determination of the actual picture of how an undemocratic regime operated and what the role of individual persons was in it. The third one, in fact, aims to abandon the policy of settlement of historical accounts, often through the use of amnesty or pardon. In the light of the above-outlined normative core of transitional justice, it is the thick line model that seems to be the most dubious legally, because it most often leads to the state's failure to fulfil its obligations under international law, although the instruments adopted under the other two may also contradict the principles of a democratic state ruled by law and human rights standards.

2. Transitional Justice in Poland after 1989

Moving on to a brief review of the most important mechanisms aimed at settling accounts with the legacy of the Polish People's Republic – which translate as a result into a specific model of settlements with the past – it should be very clearly indicated at the very beginning that after the transformations

[16] M. Krotoszyński, *Modele sprawiedliwości tranzycyjnej*, Poznań 2017, p. 76. As it seems, the above list should be extended with a model of remedying historical wrongs, which emphasizes the importance of restorative justice, most often neglected by post-authoritarian or post-conflict states. Cf. T. Lachowski, *Michał Krotoszyński. Modele sprawiedliwości tranzycyjnej (recenzja)*, „Studia Prawnicze KUL" 2017, vol. 70, No. 2, pp. 201–208.

of 1989, Poland has failed to develop a coherent and comprehensive strategy of transitional justice. Certainly, this was largely due to the contractual nature of the transformation, i.e. the Round Table agreement concluded in the spring of 1989 by the communist authorities with the democratic opposition centred around the then illegal national trade union "Solidarity." This fact was an important political factor, which made it difficult to make an unambiguous legal assessment of the former regime (for example similar to the Czechoslovak solutions of 1991) and prevent the key functionaries of the Polish People's Republic from entering public life after the transformation.[17] As a result, the adopted transitional justice solutions were dispersed; moreover, they were implemented over a considerable time span, which adversely affected the exercise of victims' rights in the transition period and the social perception of the means used.

In addition to the criminal law instruments discussed below, the most important instruments of transitional justice include (chronologically): vetting of former functionaries of the Security Service (SB) in 1990, rehabilitation acts of 1991, lustration acts of 1997 and 2006, the establishment of the Institute of National Remembrance in 1998 (and, consequently, the opening of the archives, but also the empowerment of the Institute of National Remembrance as the central body shaping historical policy) or the 2009 law reducing retirement pay for former communist officials of the Polish People's Republic (the so-called first vetting act).[18] There is no doubt that the jurisprudence of the CC,[19] as already signalled in this study,[20] played an important role in defining the framework of the above regulations permissible under the principles of a democratic state ruled by law and human rights standards.

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[17] For more on the transformation in Poland, see A. Dudek, *Od Mazowieckiego do Suchockiej. Pierwsze rządy wolnej Polski*, Kraków 2019.

[18] Cf. L. Stan, *Poland*, [in:] *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past*, L. Stan (ed.), London 2009, pp. 76–100.

[19] In its judgment of 24 February 2010 (K 6/09), the CC recognized the constitutionality of the provisions of the so-called vetting act of 2009. Similarly, the ECtHR in its judgment of 6 June 2013 in the case *Cichopek and Others v. Poland* (application No. 15189/10 et seq.) stated that the measures applied by the Polish authorities were consistent with the ECHR, being necessary and proportionate to the aim, while realizing a sense of social justice.

[20] See footnotes 12 and 13.

Some of the above-mentioned instruments fall within the retribution model (apart from the criminal proceedings conducted by the IPN's investigative division, this is precisely the so-called vetting act); nevertheless, the vast majority are rather an emanation of the historical clarification model aimed at determining the truth on the operation of the communist regime. An example may be solutions in the field of lustration, based in principle on the construction of the so-called lustration lie, i.e. introducing a sanction for present-day conduct of presenting untruths about one's collaboration with the security services of the Polish People's Republic, and not for actual past collaboration with the structures of the *ancien régime*. At the end of this part, it is worth emphasizing clearly that although a number of important mechanisms were missing in the Polish response to historical injustices (e.g. no lustration of the judiciary community after 1989,[21] which was used politically by PiS to justify the reform of the judiciary in 2017–2022; also, no restitution mechanisms in the field of restorative justice) and, contrary to the "thick line" logan incorrectly attributed to the first non-communist prime minister Tadeusz Mazowiecki, which allegedly confirmed the reluctance of some post-Solidarity elites to put in place any reckoning instruments,[22] Poland has not applied the thick line model. Such claims are of a journalistic nature only and are not supported by the actual actions of the Polish state after the transformation.

3. Abolition of the statute of limitations for the communist crime as a strengthening of the paradigm of retributive justice within the framework of transitional justice instruments

A common challenge for the post-transformation countries of Central and Eastern Europe was to construe of a penal policy that would hold the former regime's officials to account. In this respect, in the foreground was the issue

[21] A. Dudek, op. cit., pp. 213–223.

[22] In fact, T. Mazowiecki spoke of a "thick line", pointing to the need for democratic communities to take over responsibility for building a state ruled by law after transformation.

of restoring or extending the limitation periods for criminal offences, which were not prosecuted for political reasons prior to 1989. This problem was partially solved under the Act of 12 July 1995 (at present no longer formally binding),[23] which specified 1 January 1990 as the starting date of the statute of limitations for a number of crimes committed by public officials in the period from 1 January 1944 to 31 December 1989 during or in connection with the performance of their functions. Nevertheless, the imperfection of that law has significantly affected the options for prosecuting some crimes from the communist period, as discussed below.

The legal framework for the commencement of activities to prosecute past crimes was given by the Act of 4 April 1991,[24] pursuant to which the Central Commission for the Investigation of Nazi German Crimes in Poland was transformed into the Central Commission for the Investigation of Crimes against the Polish Nation. The Act made it possible to prosecute Stalinist crimes (committed by the authorities of the communist state or inspired or tolerated by them until 31 December 1956, to the detriment of individuals or groups of the population). Subsequently, the INR Act[25] introduced a new category of criminal offences into the Polish legal system, namely the communist crime, which, however, escaped the core division into indictable crimes and summary offences under substantive criminal law. The Act of 1998 in its Article 2 (1) provided that the communist crime consists of "actions performed by the officers of the communist state between 8 November 1917 and 31 July 1990 which consisted in applying reprisals or other forms of violating human rights in relation to individuals or groups of people or which as such constituted crimes according to the Polish penal act in force at the time of their perpetration." Subsequent amendments to the INR Act introduced new limitation periods for communist crimes – first 30 years for a crime constituting a case of homicide and 20 years for other crimes (counted from 1 January 1990), and then 40 and 30 years, respectively (counted from 1 August 1990). The expiry of the statute of limitations for communist crimes other than the crime of homicide expiring on 1 August 2020 was the direct reason for the

[23] Journal of Laws of 1995, No. 95, item 475.
[24] Journal of Laws of 1991, No. 45, item 195.
[25] Journal of Laws of 1998, No. 155, item 1016.

enactment of the legislative amendment of 15 July 2020, which abolished the statute of limitations for the communist crime as such. For the avoidance of doubt, it should be added that communist crimes, which were also cases of an international crime under international law, were not subject to the statute of limitations.[26]

The entry into force of the discussed change in the construction of the communist crime does not, however, solve all problems with regard to the free policy of criminal prosecution against communist crime cases. The main problem is the already mentioned Act of 12 July 1995, which restored only some of the limitation periods for criminal offences committed before 1989 and not prosecuted at that time for political reasons. Firstly, offences punishable by up to 3 years imprisonment were not covered by the new limitation period at all, which meant that their penalization ceased either still during the Polish People's Republic or in the first years after the transformation. Secondly, in the case of offences punishable by imprisonment of more than 3 years, the upper limit of which is 5 years imprisonment, the legislator adopted a kind of legal fiction, because – despite the legal restoration of the limitation periods counted from 1 January 1990 – the penalization of these offences had ceased by the time of entry into force of the Act. Will the change of 15 July 2020 restore the options for prosecuting the above-mentioned criminal offences?

There is no unambiguous answer to this question. On the one hand, it is possible to extend a limitation period that has not yet expired, which also results from the jurisprudence of the CC, i.e. to abolish it altogether.[27] On the other, the resolution of the Supreme Court (the SC) of 25 May 25 (file ref. I KZP 5/10) should be mentioned here, in which the SC concluded that limitation periods cannot be revived, if after the political transformation a period has already been renewed once (and that was the case under the aforementioned Act of 12 July 1995). However, this resolution has been criticized in the literature, with an argument that the revival of limitation

[26] What follows from the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968, Article 43 of the Constitution of the Republic of Poland and Article 4 (1) of the INR Act.

[27] B. Janusz-Pohl, M. Żbikowska, *Wpływ modyfikacji dodatkowego okresu przedawnienia karalności przestępstw na efektywność ścigania karnego*, „Prawo w Działaniu" 2018, No. 35, pp. 21–23 and the jurisprudence cited therein.

periods for offences punishable by imprisonment of more than 3 years, the upper limit of which is 5 years imprisonment, was in fact a fiction, which nourished the sense impunity among former regime officers who committed criminal offences. Moreover, it is noted that the vast majority of offences that were in fact abolished were cases of torture and other inhuman or degrading treatment, for which international human rights law introduces a specific nature of positive obligations (the prohibition of torture is also absolute).[28] The INR prosecutors have repeatedly indicated in the indictments the legal classification of a crime as a crime against humanity, thus trying to circumvent the applicable complicated and ambiguous legal status (which, however, in itself was only an *ad hoc* and not systemic solution). It was in a similar vein that the application addressed to the CC by the Commissioner for Citizens' Rights (the CCR) on 20 April 2016 (ref. No. II.519.2824.2014.KŁS) was worded; it raised the unconstitutionality of the solutions of the Act of 12 July 1995. The CCR pointed out that those provisions not only insulted the social sense of justice, but also prevented the democratic state from duly fulfilling its obligations to assess and judge the unlawful actions of the authoritarian regime. Undoubtedly, that conclusion fits into the requirement that the rights be satisfied of victims of mass repression and violations of human rights, i.e. the rights to justice, truth and restitution, which are part of the normative core of transitional justice. However, in the resolution of 28 January 2020,[29] the CC discontinued the proceedings on the request of the CCR, referring to the fact that the Act of 12 July 1995 was no longer in force. As it seems, this formalistic approach deprived the opportunity to open or reopen many inquiries against criminal acts committed during the Polish People's Republic. What is more, the CC decided against the previous line of jurisprudence by the Court itself, in which it allowed for the possibility of adjudicating by the CC in cases of formally derogated provisions, which, however, affect the legal and factual situation of given persons also in the present and future.[30]

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[28] K. Szczucki, *Przedawnienie ścigania wybranych zbrodni komunistycznych w świetle zakazu stosowania tortur*, „Forum Prawnicze" 2016, vol. 33, No. 1, pp. 28–32.

[29] Resolution of the CC of 28 January 2020 (K 22/16).

[30] P. Daniluk, *Glosa do postanowienia Trybunału Konstytucyjnego z dnia 28 stycznia 2020 r. (K 22/16, OTK-A 2020, poz. 9)*, „Studia Iuridica Lublinensia" 2020, vol. 29, No. 3, pp. 201–216. Importantly, while criticizing the resolution of the CC due to its excessive formalism, P. Daniluk

Due to the complicated legal situation regarding the issue of communist crimes as outlined above, the assessment of the amendments of 15 July 2020 must also be complex. On the one hand, the abolition of the statute of limitations for communist crimes demonstrates the state's readiness to effectively apply criminal law measures to hold functionaries of the undemocratic regime to account for the crimes committed, thus allowing victims of repression to exercise their fundamental basic rights (and equitable expectations). Moreover, the equalization of communist crimes with international crimes under Polish law may be a clear signal that a democratic state unequivocally rejects unlawful and disgraceful (in many respects) practices of a criminal regime. Importantly, a limitation *per se* cannot be regarded as the right to limitation (or an expectation of such right) vested in the perpetrator of a criminal offence, but constitutes an element of the criminal policy of a state.[31] Therefore, although the statute of limitations for the communist crime itself has already been changed several times by the legislator, it cannot be claimed that another amendment to the INR Act this respect undermines the principle of legal certainty; rather, it is an example of how strategic thinking was missing in most Polish governments after 1989. On the other hand, however, the context of the enactment of that amendment – which is clearly symbolized by the fact that the College of the Institute of National Remembrance asked the Polish parliament in a special statement only on 26 May 2020 to take a legislative initiative to prevent a situation where certain communist crimes would be irretrievably statute-barred – indicates the lack of a comprehensive policy on the discussed issues on the part of the Polish authorities.[32] As a consequence of the CC's resolution of 28 January 2020, it should be assumed that the options to prosecute offences whose limitation periods were renewed

also raises the controversy of the CCR's request itself, in which the CCR demanded that the possibility of prosecution of criminal acts shall be restored that have ceased due to the expiry of the statute of limitations. The scholar indicates that, apart from the arguments cited by the CCR, such action would undermine the principle of citizen's trust in the state institutions, resulting from Article 2 of the Polish Constitution, and the principle of *lex retro non agit* (Article 42 (1) of the Polish Constitution).

[31] B. Janusz-Pohl, M. Żbikowska, op. cit., p. 17.

[32] E. Flieger, *PiS chce karać za zbrodnie komunistyczne, ale czy zmiana prawa ma sens? Analizujemy ustawę o IPN*, „OKO.press", 19 July 2020, https://oko.press/pis-chce-karac-za-zbrodnie-komunistyczne-analizujemy-ustawe-o-ipn/ [accessed: 18.11.2022].

only formally are still none or close to none. As it seems, the abolition of the limitation period introduced by the Act of 15 July 2020 does not have a retroactive effect, as it cannot restore the possibility of criminal prosecution of those communist crimes that had ceased to be penalized, acting only "for the future", i.e. against criminal acts that are not yet time-barred.

To summarize thread of discussion, apart from the significant legal context, namely enabling the Polish state to fulfil its obligations (also under international law) towards victims of violations, the abolition of the statute of limitations for communist crimes also has a political dimension. After all, it fits into a broader policy of "tightening the course" of reckoning up with the legacy of the Polish People's Republic (see below), to ultimately shift the emphasis from the model of historical clarification, which is a result of the mechanisms of transitional justice used by the Polish state in 1989–2015, to the model of retribution. Interestingly, contrary to the fairly common opinion about the lack of a criminal legal settlement with the undemocratic regime, over the last 20 years, INR prosecutors have brought 387 indictments against nearly 600 persons, which means that for years Poland has been the leader in this respect among Central and Eastern European countries.[33] At the same time, though, the most important cases from the perspective of social expectations, i.e. those of the operators of the martial law or those responsible for the massacre of miners at the "Wujek" mine on 16 December 1981, dragged on for almost three decades, to conclude with only disappointing convictions.[34] The question remains whether the abolition of the limitation period will really contribute to the quantity (and quality) of actual proceedings; after all, each year we are farther from the material time, it is harder to find witnesses or other evidence, and more and more potential perpetrators of communist crimes are dead.[35]

[33] Cf. Institute of National Remembrance, https://ipn.gov.pl/pl/sledztwa/akty-oskarzenia [accessed: 18.11.2022]; W. Pieciak, *Bilans ćwierćwiecza (wywiad z Łukaszem Kamińskim)*, „Tygodnik Powszechny", 14 June 2015, No. 24, pp. 3–9.

[34] For more on this, see: A. Dziurok (ed.), *Zbrodnie stanu wojennego – aspekty prawne*, Katowice–Warszawa 2017.

[35] It should be noted, though, that the INR Act itself allows the proceedings to be conducted even despite the death of a potential perpetrator (Article 4), to identify, *inter alia*, the aggrieved parties, which is a side-line operation of the right to truth in the Polish legal system.

4. Review of other initiatives to settle with the legacy of the People's Republic of Poland adopted after 2015 in the light of the settlement model

The above-discussed amendments to the INR Act fit into a broader context of the activity of Polish authorities in the last seven years focused on settlement with the undemocratic past. Due to the limited scope of this study, the most important of these will only be signalled in this part of the discussion, without an in-depth analysis.

Firstly, in 2016, the first comprehensive decommunization law in democratic Poland was passed, which aimed to remove the remnants of communist symbolism from the public space. The Act obliged local governments to change any name of a street or square or, for example, to remove a monument, which may in principle promote communism (or another totalitarian system), and the INR was authorized to propose new names. In the event of a breach of this obligation by local authorities, the decision regarding the change rests with the competent provincial governor.[36]

Secondly, also in 2016, the so-called second vetting act was passed, which again reduced retirement benefits for functionaries of the communist regime, with the concept being significantly expanded in comparison with the previously binding definition, and an ambiguous term introduced, of a "service for the benefit of the totalitarian state."[37] Moreover, in the light of the opinion of a vast majority of scholars and practitioners, the Act was based on the principle of collective responsibility (to cover also persons who had passed the vetting process in 1990), while it also violated the principle of legal certainty (through a repeated reduction of benefits).[38] Due to the constitutional crisis

[36] As practice has shown, due to the acute political dispute between the central government and the local government, which is mostly in the hands of parties opposing PiS, in a significant number of cases the final name of a street or square was decided by a competent administrative court, which often overruled the decisions of governors. T. Kulicki, *Ustawa dekomunizacyjna w orzecznictwie sądów administracyjnych (cz. I)*, „Temidium.pl", 27 March 2019, https://www.temidium.pl/artykul/ustawa_dekomunizacyjna_w_orzecznictwie_sadow_administracyjnych_cz_i-5176.html [accessed: 18.11.2022].

[37] Consolidated text: Journal of Laws of 2019, item 288, as amended.

[38] M. Krotoszyński, *Transitional Justice and the Constitutional Crisis: The Case of Poland (2015–2019)*, „Archiwum Filozofii Prawa i Filozofii Społecznej" 2019, No. 3, p. 25.

that has been ongoing since the end of 2015, the CC has not yet examined the complaint regarding the constitutionality of that Act[39]; some of the persons covered by the Act have decided to file complaints against Poland with the ECtHR, based on possible violations of the right to a fair trial, the right to protection of property or the right to an effective remedy.[40]

Thirdly, in the discussed period, the catalogue of people who are required to submit a lustration declaration when running for public offices was significantly expanded; the role of university rectors (including private universities) may serve as an example. This may raise constitutional objections, in particular given the judgment of the CC of 11 May 2007 (K 2/07), which found that very similar solutions were unconstitutional in the original wording of the 2006 Act (which, in turn, was an attempt to reformat the lustration process towards the model of retribution during the rule of PiS in 2005–2007). Moreover, to continue to extend the list of those subject to lustration over 30 years after the transformation is questionable from the perspective of the proportionality principle. Also, the Act provides that a significantly greater number of public functions than originally specified may not be performed by employees, officers or associates of security services of the Polish People's Republic, by considerably changing the proportions in the structure of the lustration lie and the *de facto* sanction for past collaboration with the communist regime. Combined with the application of the principle of collective responsibility, this brings the Lustration Act closer and closer to the model of retribution.

Finally, the reform of the judiciary, which started in 2017, including the reorganization of the Supreme Court and the National Council of the Judiciary (the NCJ), can also be analyzed from the perspective of the concept of transitional justice. The rationale for this may be found in the explanatory notes to the amendment put forward by the ruling party and then

[39] It is worth pointing out that, without waiting for the final decision of the CC, some Polish domestic courts have already determined that the Act is inconsistent with the Constitution of the Republic of Poland and EU law (e.g. the decision of the Regional Court in Częstochowa of August 2019).

[40] M. Suchodolska, *Wierzę, że ETPC zajmie się sprawami osób objętych ustawą dezubekizacyjną – mówi mecenas Anna Rakowska-Trela*, „Gazeta Prawna.pl", 12 October 2018, https://www.gazetaprawna.pl/artykuly/1297691,ustawa-dezubekizacyjna-skargi-do-etpc.html [accessed: 18.11.2022]. The hearing over the vetting act before the CC was scheduled for September 2020.

repeated in the so-called a white paper submitted to the European Commission (the EC) during the dispute between the Republic of Poland and the European Union (the EU) over the shape of the Polish judicial reform (issues related to the rule of law), which led to the initiation of the procedure under Article 7 of the Treaty on European Union by the European Commission.[41] The amendments to the Acts on the Supreme Court, the National Council of the Judiciary and the common judiciary, in the opinion of, notably, the Court of Justice of the European Union (CJEU)[42] or ECtHR,[43] likewise many domestic (the CCR) and foreign (Venice Commission) institutions, as well as expert communities, have significantly undermined judicial independence in Poland.[44] Looking through the prism of the main topic of this study, it is worth noting that the changes in the composition of the National Council of the Judiciary and the Supreme Court, i.e. the removal of some of the existing members of these bodies, should be called as a sheer purge based on the principle of collective responsibility, which aimed – according to the assumptions of the authors of the reform – to clear the judiciary of those who adjudicated in the communist Poland, especially during the martial law (thus providing for a *de facto* decommunization).[45] At the same time, the serious

[41] Kancelaria Prezesa Rady Ministrów, *Biała Księga w sprawie reform polskiego wymiaru sprawiedliwości*, Warszawa 2018, p. 13 ff.

[42] For instance, the CJEU judgment of 24 June 2019 in case of *European Commission v Republic of Poland* (rectification order of 11 July 2019) (case No. C-619/18); the CJEU judgment of 19 November 2019 in cases of *A.K. and Others v the Supreme Court, CP v the Supreme Court and DO v Supreme Court* (independence and impartiality of the National Council of Judiciary) (cases No. C-585/18, C-624/18 and C-625/18); the CJEU judgment of 15 July 2021 in case of *European Commission v Republic of Poland* (case No. C-791/19).

[43] See: the ECtHR judgment of 7 May 2021 in case of *Xero Flor w Polsce sp. z o.o. v Poland* (application No. 4907/18); the ECtHR judgment of 22 July 2021 in case of *Reczkowicz v Poland* (application No. 43447/19); the ECtHR judgment of 8 November 2021 in cases of *Dolińska-Ficek and Ozimek v Poland* (application No. 49868/19 and 57511/19); the ECtHR judgment of 3 February 2022 in cases of *Advance Pharma v Poland* (application No. 1469/20).

[44] For more on this, see: M. Mastracci, *Judicial Independence: European Standards, ECtHR Criteria and the Reshuffling Plan of the Judiciary Bodies in Poland*, "Athens Journal of Law" 2019, vol. 3, No. 5, pp. 323–350; W. Sadurski, *Poland's Constitutional Breakdown*, Oxford 2019, pp. 96–106.

[45] The doctrine also points to a desire on the part of the ruling camp to "punish" the judges of the Supreme Court, especially for two resolutions: the resolution of 25 May 2010, already mentioned in this work, which does not allow for the revival of the limitation periods for communist crimes that have already been renewed (under the Act of 1995), and the

constitutional crisis around the CC that has continued since the end of 2015, in the opinion of many scholars, does not allow for the treatment of this Court as free from political influence and fully independent, which hinders the (desirable) judicial review of the constitutionality of the adopted laws falling within the concept of transitional justice (it serves as an example of the peculiar "abdication" of itsrole that the CC performed effectively earlier).

Conclusions

Despite the fact that certain instruments aimed at settling with the communist past were put in place, after 1989 Poland has failed to construe a comprehensive transitional justice strategy. The victory in the 2015 parliamentary elections of the United Right (with the key role of PiS) brought about a clear return to the subject of settlements with the legacy of the Polish People's Republic, as well as an attempt to reformat the model of settlements with the past developed after 1989 (in the *fait accompli* fashion).

The transitional justice initiatives described briefly in this study as undertaken in the last seven years definitely shift the emphasis of the Polish model of settlements with an undemocratic past from the so far dominant model of historical clarification (with some elements of the model of retribution) to the model of retribution, strictly based on the paradigm of retributive justice. This in itself cannot be judged to be "good" or "bad", and is an expression of a sovereign political decision of a parliamentary majority. Nevertheless, the fact that most solutions were based on the principle of collective responsibility, in violation of a number of other principles of a democratic state ruled by law and human rights standards, makes the return to the instruments of transitional justice after 2015 dubious from the perspective of its normative core

resolution of 20 December 2007 (case ref. I KZP 37/07), which in practice guaranteed impunity for judges and prosecutors who adjudicated or brought indictments on the basis of the decree on martial law of 12/13 December 1981 for acts committed on 12 December in breach of the *lex retro non agit* principle. As it seems, in view of the judgment of the CC of 16 March 2011 (case ref. 10/2/A/2011), which found the decision on the introduction of martial law unlawful, the resolution of 2007 became irrelevant. Cf. M. Krotoszyński, *Transitional Justice and the Constitutional Crisis…*, pp. 33–34.

(sometimes resembling a revolutionary effort, ignoring applicable national, EU and international laws[46]). It seems that this way of action also fails to meet the postulates of transformative justice, aimed at strengthening the institution of a democratic state ruled by law in the process of reckoning up with the past.

Importantly, compared with other solutions adopted by the Polish authorities in 2015–2022, it is precisely the abolition of the statute of limitations for the communist crime – although not without the legal and factual imperfections outlined above – that appears to be mostly in line with the rule of law, with a potential to satisfy the fundamental rights of the victims of repression from the communist period. The analyzed legislative amendments are also a clear confirmation of the model of retribution as the most appropriate from the perspective of the policy of the Polish state authorities after 2015, and ultimately strengthen the paradigm of retributive justice of Poland.

[46] Cf. M. Rzeczycki, *Patriotyzm rewolucyjny. Antyinstytucjonalna filozofia PiS bliżej Schmitta niż Platona*, „Klub Jagielloński", 6 May 2020, https://klubjagiellonski.pl/2020/05/06/patriotyzm-rewolucyjny-antyinstytucjonalna-filozofia-pis-blizej-schmitta-niz-platona/ [accessed: 18.11.2022].

MACIEJ PERKOWSKI
ARKADIUSZ WASZKIEWICZ

Victims of the "New Deal" – Polish Independence Underground in the years 1944–1963 in the light of the then international law

Introduction

The mass crimes of communist regimes give a shocking picture of the atrocities of the twentieth century. A major part of the perpetrators of mass purges, deportations, imprisonments in labour camps and terror campaigns have never been held to account. Moreover, attempts intensify here and there to relativize history and clear the names of obvious criminals (*vide* the history policy of the Russian Federation). As a result of border changes following the Yalta agreements, large numbers of previously democratic societies and members of their armed forces fighting both the Third Reich and the Soviet Union fell victims to communist terror. Guerrilla units were targeted repeatedly as part of large-scale murders and deportations. Contemporary historiography hailed that as a justified fight against criminal groups. A narrative of historical events tends to follow a parabolic pattern, where a negative presentation of certain phenomena gets replaced by glorification attempts. Often, both directions of the narrative lack the necessary reflection. A black legend is being replaced with a white one. The tendency to generalization and going extremes is something that is understandable but unnecessary from the perspective of scholarly discourse.[1] The argument presented in this article addresses the complexities of the status of members of the armed underground and the international legal protection to which they were entitled. The legal classification of members of the independence underground under

[1] A. Solak, *Krucjata wyklętych. Z bronią w ręku przeciw komunie*, Kraków 2015, p. 16.

international law is also important for an assessment of the lawfulness of the actions taken by the communist authorities in fighting them. In the opinion of the authors, it is necessary to outline the evolution of the armed forces operating within the Polish independence underground, changes in their recognition as subjects under public international law and possible consequences in terms of legal accountability.

1. Geopolitical and military conditions of the Polish independence underground

The theory of international relations recognizes international order as a construct determined and structured by the configuration of relations between states, in particular between great powers.[2] The Versailles order that was in effect since the end of World War I, as a result of political transformations and the consequences of World War II, was replaced by the Yalta order. The erosion of the existing system based on the institution of the League of Nations and local strategic agreements can be traced back to the 1930s. The partition of Czechoslovakia and the *Anschluss* of Austria were visible examples of this.

The system of relations shaped as a result of agreements reached during the conference of The Big Three was based on two levels – the formal legal one as defined under the Charter of the United Nations, and the political one as defined in Yalta and Potsdam. The formation of the Yalta order was tainted with an atmosphere of secrecy. A number of its provisions were kept secret from both the allied states concerned and those participating in the war on the side of the Allies. Doubtful legal bases, violation of the of the right of nations to self-determination, neglect and lack of care over seemingly insignificant details became the source of the Cold War and the suffering of nations.

The situation that was brought about by the hostilities of September 1939 made it necessary to transfer the seat of the centre of power to maintain the continuity of the Polish state government and to manage resistance efforts. After the internment of the government in Romania, the incumbent

[2] *Leksykon współczesnych międzynarodowych stosunków politycznych*, Cz. Mojsiejewicz (ed.), Wrocław 2007, p. 227.

president Ignacy Mościcki, on the basis of the April Constitution, appointed his successor, Władysław Raczkiewicz, who was sworn in as president on 30 September 1939.[3]The next steps taken in exile included the appointment of General Władysław Sikorski as Prime Minister, the dissolution of the Sejm and Senate and the appointment of the National Council of the Republic of Poland. One of the attributes of a government, though not necessary for its existence under international law, is its international recognition. The government in exile was recognized by its pre-war allies. As a result of the collapse of the treaty between the Third Reich and the USSR and the outbreak of war between these countries, on 30 July 1941, the Sikorski-Majski Polish-Soviet Agreement (named after the signatories) was concluded, which led to the recognition of the government in exile and the establishment of diplomatic relations. It should be emphasized that the occupation of state territory does not deprive it of its legal basis for continued operation. Although to be capable of exercising authority over a territory is a constitutive feature of the state, under the conditions of occupation, as long as there is active resistance against the occupying forces the state does not lose its status of a subject under international law.[4] In this sense, through almost the entire period of World War II, the Polish Government-in-Exile effectively exercised its authority.[5] However, the situation got gradually complicated by the establishment, in 1944, and operation of the Polish Committee of National Liberation. This resulted in a dualism of power between the legal government in London and the government that actually ruled in the country. The international position of the government in exile degraded with the establishment of the Provisional Government of National Unity on 28 June 1945. The accession to the government by Stanisław Mikołajczyk significantly undermined the position of the government in exile, which led to the withdrawal of recognition of the London-based government by a major part of the allied states. Part of the underground also withdrew its support.[6]

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[3] P. Wywiał, *Mąż stanu*, Biuletyn IPN – „pamięć.pl" 2013, No. 7–8 (16–17), p. 23.

[4] R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, Warszawa 2004, p. 146.

[5] S.A. Karowicz, *Status prawny Polskiej Rzeczpospolitej Ludowej w świetle prawa międzynarodowego publicznego*, Białystok 2015, p. 19.

[6] A. Solak, *Krucjata wyklętych…*, p. 107.

A concise presentation of the genesis and fate of the soldiers of the independence underground cannot do without a reference to the Polish Underground State (the PUS) The PUS, which operated in the years 1939–1945 in the territories occupied by the Germans and the Soviets, was a unique phenomenon in the war-torn Europe. Its roots date back to 27 September 1939, when the Service for Poland's Victory was established, then transformed into the Union of Armed Struggle, and then into the Home Army. The overriding goal of the key movements in the Polish underground was to regain the independence of the Polish State.[7] According to historians, the PUS was the best organized underground political and military structure in the entire occupied Europe. Civil administration of the PUS was ready to take power in the territories liberated from the German occupation.[8] The Home Army was the only military force to have a mandate from the Polish government and its soldiers were considered the Polish Army. The other military formations of underground political organizations, such as the Peasants' Battalions, the National Armed Forces or the People's Army, remained outside of the Polish Army structures.[9]

2. Polish independence underground under the Yalta order

The entry of the Red Army into the territory of Poland, combined with the lack of diplomatic relations with the government in exile, gave the USSR an opportunity to install their own government. This opportunity was not missed and in the night of 31 December 1943 and 1 January 1944, the State National Council was established. The establishment of successive executive bodies lead to a kind of duality of power in the occupied country. On the one hand, there was a legal government based in London, but real power over the territory and population in the occupied country was exercised by the authorities supported by the Soviet Union. On 12 January 1945, the Red Army started the Vistula-Oder operation, which resulted in the complete displacement

[7] T. Muczyński, *Działania „żołnierzy wyklętych" na Podlasiu w świetle prawa międzynarodowego publicznego* (M.A. thesis), Białystok 2014, p. 10.

[8] M. Markowska, *Wyklęci. Podziemie zbrojne 1944–1963*, Warszawa 2013, p. 175.

[9] T. Muczyński, op. cit., p. 11.

of German troops from the occupied territories. With military outcomes on the fronts of World War II, the territory of the Polish state was liberated from the six-year German occupation but as a result of The Big Three agreement the country found itself in the Soviet sphere of influence. The underground army became the main obstacle to the realization of the plans for the sovietization of Poland by the USSR.[10] By a secret order of Stalin to the military commanders of 21 July 1944, under the pretext of exposing German spies, the Home Army and other armed units were to be disarmed. In view of the dangers to the Home Army units remaining active in the operational area of the Soviet troops, General Leopold Okulicki (the Chief Commander of the Home Army at that time), on 19 January 1945, issued an order dissolving the Home Army.[11] A similar situation took place on the political level when after the dissolution of the Council of National Unity on 1 July 1945, Polish anti-communist underground did not have any command centre that would gather all underground organizations. It is estimated that 120,000–180,000 members passed through the post-war ranks of armed organizations. At that time, around 340 armed units were active throughout Poland.[12]

After the end of military operations in Europe and the signing of the act of surrender by the Third Reich, the Polish independence underground lived in the conviction of the inevitability of World War III. The picture of the world as seen from a forest is somewhat devoid of objectivity. At that time, the Allies firmly rejected the possibility of another military conflict.[13] In turn, the Soviets, together with their Polish cronies, focused on fighting the underground. In July 1945, in the territory of a theoretically sovereign state, which the then Poland was, the armed forces of the USSR (with the support of Polish security forces and a few army units) carried out a military operation. The operation, historically known as the "Augustów Manhunt", was directed against the Home Army and the Lithuanian underground. It covered an area of 3.5 thousand square kilometres, and nearly 40 thousand troops were

[10] M. Markowska, op. cit., p. 175.

[11] S. Poleszak, Polskie *podziemie niepodległościowe w 1945 roku*, [in:] *Sowieci a polskie podziemie 1943–1946. Wybrane aspekty stalinowskiej polityki represji*, Ł. Adamski, G. Hryciuk, G. Motyka (eds.), Warszawa 2017, pp. 356–358.

[12] M. Markowska, op. cit., p. 176.

[13] N. Pietrow, *Nowy ład Stalina. Sowietyzacja Europy 1945–1953*, Warszawa 2015, pp. 146–147.

involved. That operation resulted in the arrest of several thousand members of underground organizations and the death of at least about 600 of them, which is why it is also called "Little Katyn Massacre."[14]

The elimination of the structures of the Polish Underground State did not mean an end of resistance to totalitarianism or a resignation by Poles before the "new order." The Home Army was transformed into the organization named "NO" (NIE), and after the arrest of its leaders, into the Armed Forces Delegation for Poland. In view of the decisions made during the latest conference of The Big Three, it was decided to transform the underground armed forces into the "Freedom and Independence" Association.[15] Next to it, there were armed representations of the national camp in the form of the National Military Association, established through a merger of the National Military Organization with the National Armed Forces. On the basis of the disbanded Home Army, fragmented and often locally formed organizations emerged, e.g. the Home Army Resistance Movement, the Civic Home Army, the Polish Underground Army, the Greater Poland Independent Volunteer Group "Warta", and the Independent Operational Battalion.[16] Estimates show that in the years 1946–1947, between 15,000 and 20,000 members fought in the armed units, with a total headcount of the then underground, together with supporters, estimated at about 200,000 people.[17] During this period, the underground's goal was to survive until a potential armed conflict.

The scale of terror and the intensification of repression brought an incremental increase in the number of new members joining the underground after the war. People joined existing units but also new ones were set up. The underground reality, the lack of a uniform command and military discipline, as well as the need to ensure minimum living conditions in the underground sometimes led to criminal activity. The criminal cases detected were what communist propaganda only waited for. In an environment, where predominantly criminal groups operated next to ideologically motivated units, it was easier to stigmatize the whole movement. Public communication messages

[14] A. Dziurok, M. Gałęzowski, Ł. Kamiński, F. Musiał, *Od niepodległości do niepodległości. Historia Polski 1918–1989,* Warszawa 2011, p. 211.

[15] Ibid., p. 212.

[16] Ibid., p. 220.

[17] Ibid.

used phrases such as gangs, bandits. The broad range of propaganda instruments included in particular cinematography (e.g. motion pictures: *Action Brutus*, *Firemaster Kaleń*), literature (e.g. *White Spot*, *Fire Glows in Bieszczady*) and poster art (e.g. the famous poster *Destroy NAF bandits*).

The rigged parliamentary elections of 19 January 1947 ended with an absolute victory for the pro-Soviet Democratic Bloc. One of the first laws passed by the newly elected parliament was the Act of 22 February 1947 on amnesty.[18] After mass uncovers during the post-election amnesty, due to the collapse of expectations for an intervention by great powers, no more than two thousand people remained in the anti-communist independence armed underground.[19] One can conclude that it was precisely the amnesty that practically brought an end to the armed underground in the form that could pose a challenge or threat to the communist government. At the same time, the support for the underground among the public was waning, not least due to the brutality and radicalism of some guerrilla units and the massive nature of actions organized by the security units and the Soviet services, which led to a high death toll among the civilian population. The underground continued to operate regardless, although more and more often only on the local scale. Nationwide structures were tracked down and sometimes mystified for the purposes of intelligence provocation. Field structures were more and more often represented by single persons, with their operating area covering the area of operation of subordinate members of the underground. In early 1950s, the underground was practically so overwhelmed that one could speak of "survival groups" or individual hiding (most often ended with capture or killing in the fight against communist security forces). The symbolic date is 1963, when sergeant Franczak (codename "Laluś" (Dude) was killed in the Lublin region in a Security Service raid.

[18] Act of 22 February 1947 on amnesty, Journal of Laws of 1947, No. 20, item 78.

[19] A.L. Sowa, *Historia polityczna Polski 1944–1991*, Kraków 2011, p. 78.

3. In search of a subject's identity and legal status of "accursed soldiers"

From the legal perspective, the term "accursed soldiers" does not carry any substantial value that would be relevant under international law. It is a collective term reflecting the entire complexity of war events and post-war reality. The adjective "accursed" basically refers to those soldiers who did not accept that World War II had ended and, having defeated one criminal totalitarianism, turned against another. The armed struggle, despite all heroism, was doomed to failure. In Polish journalism, the phrase "accursed soldiers" was used for the first time in 1992, during an exhibition organized by the Republican League Association (a Polish right-wing organization cherishing anti-communist activism, existing in the years 1993–2001).[20] It took a decade to install the phrase in the public political debate. On 14 March 2001, the Sejm of the Republic of Poland, for the first time in post-war history, emphasized the positive role of the armed organizations in the struggle for the independent existence of Poland after the end of World War II.[21] Another decade had to pass on lobbying efforts by veterans' organizations, as a result of which the then president L. Kaczyński submitted a bill establishing March 1 as the National Day of Remembrance of the Accursed Soldiers. The bill was supported by an overwhelming parliamentary majority, and was thus referred to signature by the president, and then signed by the next-term president Bronisław Komorowski on 9 February 2011.

For a long time, states avoided comprehensively regulating the status and protection of insurgents. In 1912, a draft Convention on the protection of the victims of non-international conflicts (Civil Wars) was presented during the International Conference of the Red Cross. Due to the resistance of the countries associated in the organization, the draft never came into force.[22] The matters of ensuring insurgents and participants of an internal conflict with any humanitarian protection, were not always obvious. In the legislation

[20] M. Markowska, op. cit., p. 5.

[21] Resolution of the Sejm of the Republic of Poland of 14 March 2001 on the tribute to the fallen, murdered and persecuted members of the organization "Freedom and Independence" Association, Official Gazette of 2001, No. 10, item 157.

[22] R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, Warszawa 2004, p. 431.

of most countries at the turn of the 19th and 20th centuries, insurgents were treated only in criminal terms. The then emerging evolution of views in this regard was authoritatively expressed by Zygmunt Cybichowski, who emphasized that "*a criminal code can be applied only when the number of criminals does not exceed a certain level*."[23] Cybichowski's view was not isolated at the time, as reflected in the preamble to the 1907 Hague Convention IV:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[24]

At the Teheran conference in 1943, the leaders of the allied powers recognized the existence of an organized resistance movement and established rules of conduct for it. According to the assumptions, a resistance movement should cooperate with the army whose aim is to liberate a country from occupation. Such cooperation would consist in the transfer of all intelligence materials about the organization of defence and manoeuvres of enemy troops, and the destruction of supply routes. After the liberation of an occupied country, resistance troops would be disarmed.[25]

According to the 1907 Hague Regulations, a belligerent party, to qualify as a subject under international law, must meet certain conditions, i.e.:

- to have a single, centralized command,
- to exercise actual control over an area, to have proper identification of persons belonging to the armed forces,
- to respect the laws and customs of war.[26]

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[23] Z. Cybichowski, *Międzynarodowe prawo wojenne*, Lwów 1914, p. 10.

[24] Convention respecting the Laws and Customs of War on Land, Journal of Laws No. 1927, No. 21, item 161.

[25] A. Ciupiński, M. Gąska, *Międzynarodowe prawo humanitarne konfliktów zbrojnych. Wybrane problemy*, Warszawa 2001, p. 46.

[26] Act of 23 March 1929 on the approval of the accession of the Republic of Poland to the Convention for the Peaceful Settlement of International Disputes concluded at The Hague on 18 October 1907 declared by the Polish Government on 14 October 1920, Journal of Laws

Given the realities of post-war Poland, the independence underground met the conditions necessary to be recognized as a belligerent party. The recognition of an entity as a belligerent has a number of consequences in terms of rights and obligations under international law. A recognized belligerent to a certain extent enjoys the principle of equality, may be a party to international obligations and enter into relations with states and other belligerents. The recognition of a subject under international law entails its responsibility for the actions taken. The organization itself and its individual members bear responsibility in the light of the laws and customs of war. According to Article 91 of Protocol I,

> A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.[27]

If captured, its members should enjoy the rights provided for prisoners of war, which, however, was not the case in most situations.

As to the status of guerrilla groups, it should be noted that slightly different requirements apply for the recognition of these as subjects under law. The recognition does not depend on exercising actual control over a territory, while the other conditions related to the conduct of armed struggle remain unchanged. It is emphasized in the doctrine that the recognition of guerrillas has always caused numerous problems.[28] The complications resulted from reasons of a political nature and from the dispersion of individual groups, which undermined the capability to coordinate activities. This is somewhat in conflict with the view expressed by Hersch Lauterapacht, who was of the opinion that recognition is not necessary for the qualification of guerrillas

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of 1929, No. 25, item 256. Moreover: Annex to the Convention: Regulations concerning the Laws and Customs of War on Land (the 1907 Hague Regulations) of 18 October 1907, Journal of Laws of 1927, No. 21, item 161. Cf. B. Mielnik, *Kształtowanie się pozapaństwowej podmiotowości w prawie międzynarodowym*, Wrocław 2010, p. 95.

[27] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977 (Journal of Laws of 1992, No. 41, item 175, Appendix).

[28] B. Mielnik, op. cit., p. 98.

as a subject under international law, citing as an example the agreements concluded between the Government of the United Kingdom and the National Government of Spain.[29]

The recognition of belligerents or guerrillas by states has a constitutive, temporal and conditional nature. Moreover, it depends on the existing international situation and policy determinants. As a result of recognition, a new subject of international law emerges, but it should be noted that only in the relations between the recognizing state and the belligerent/guerrilla group.

According to the doctrine a state is responsible for the actions of non-state armed forces only if the following criteria are met:

- the state has been established as a result of the activities of these groups;
- a group is engaged in military operations in its territory and the failures to ensure compliance with international humanitarian law may be attributed to the state.[30]

The generally accepted norms of customary law place particular emphasis on the requirement that an armed group must be recognized by other states in order to qualify as a belligerent party or a guerrilla unit. The concept of a belligerent is strongly related to the exercise of the right to self-determination and the law of armed conflicts.[31] The goal of these groups is to change the civil and administrative authorities operating in an area. This can be achieved by ousting the government or by tearing off part of the territory in order to establish a separate state entity. According to M. Flemming, guerrilla activities during World War II and after its end became the main form of armed struggle for the liberation of nations from foreign rule and for taking over and maintaining power in specific areas.[32]

Basically, the doctrine of humanitarian law of armed conflicts divides underground groups into the following categories:

a) members of an armed resistance movement in an internal war,

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[29] H. Lauterpacht, *International Law, Being the Collected Papers of Hersch Lauterpacht, vol. I General Works,* Cambridge 1970, p. 495.

[30] P. Grzebyk, *Cele osobowe i rzeczowe w konfliktach zbrojnych w świetle prawa międzynarodowego*, Warszawa 2018, p. 226.

[31] B. Mielnik, op. cit., p. 94.

[32] M. Flemming, *Jeńcy wojenni. Studium prawnohistoryczne*, Warszawa 2000, p. 47.

b) members of an armed national liberation movement fighting to create their own sovereign state,
c) members of an armed resistance movement in a war between states.[33]

The international legal framework in force during World War II did not regulate the legal status of guerrilla groups. In principle, it was domestic legislation that could be accepted as applicable by the decision-making bodies of an opponent, who seized a guerrilla member. Neither was this matter settled under the Convention relative to the Treatment of Prisoners of War of 27 July 1929, which was in force during World War II.[34] In order to determine the legal regime and international legal protection enjoyed by guerrilla units of the Polish independence underground, a reference must be made to the position expressed by the International Military Tribunal. In its judgment of 1 October 1946, the International Military Tribunal concluded that in 1939, the Hague norms on military occupation had been recognized by all civilized nations and considered an affirmation of the laws and customs of war.[35]

In the light of the analyses carried out by post-war lawyers (e.g. Ehrlich, A. Peretiatkowicz), in the situation of an illegal armed conflict, the population of an occupied country, in face of the prospect of extermination and loss of freedom, is in a state of ultimate necessity, manifested in its armed resistance.[36] In this context, it would be necessary to demonstrate whether in post-war reality of Poland there was an illegal occupation that could exculpate and justify armed resistance to the Soviet authorities and the "Lublin-based government" (PCNL and subsequent governments).

Article 3 of the Hague Convention IV imposes an indemnification obligation on states. It reads as follows:

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[33] Ibid., p. 47.

[34] Act of 18.02.1932 on the ratification of the Convention relative to the Treatment of Prisoners of War, signed at Geneva on 27 July 1929, Journal of Laws of 1932, No. 31, item 318.

[35] The position confirmed in the Resolution of the General Assembly of the United Nations of 11 December 1946, ref. No. 95/I, http://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_ph_e.pdf [accessed: 17.07.2019].

[36] L. Ehrlich, *Prawo narodów*, Kraków 1947, p. 385.

> A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.[37]

According Remigiusz Bierzanek, Article 3 imposes an obligation on states to pay compensation for the harm caused as a result of violations of the Hague Regulations, and, on the other hand, makes states responsible for all acts committed by their armed forces. It is believed that the states' motive for adopting Article 3 was first to strengthen discipline and then to ensure justice to the victims of a war by way of compensation from the belligerent responsible for unlawful conduct.[38]

The doctrine shows that the control of commanders over the actions taken by their subordinates, especially unlawful actions, is a key factor in the assessment of compliance with the rules of international humanitarian law. The direct responsibility of a commander should be noted, for violations of the law of armed conflicts and humanitarian law by private soldiers. According to Jean De Peux,

> (…) three conditions must be fulfilled if a superior is to be responsible for an omission relating to an offence committed or about to be committed by a subordinate:
> a) the superior concerned must be the superior of that subordinate ("his superiors");
> b) he knew, or had information which should have enabled him to conclude that a breach was being committed or was going to be committed;
> c) he did not take the measures within his power to prevent it.[39]

[37] Convention respecting the Laws and Customs of War on Land, Journal of Laws of 1927, No. 21, item 161.

[38] R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, Warszawa 2005, p. 431.

[39] J. De Peux, *Commentary on the Additional Protocols of 8 June 1977 o the Geneva Conventions of 12 August 1949*, Y. Sandoz, Ch. Swinarski, B. Zimmermann (eds.), Geneva 1987, pp. 1012–1013.

In the light of the above considerations and historical reflection, it would be reasonable to distinguish the following categories of the Polish independence underground:

1. The underground during the war with the Third Reich;
2. The underground during the war with the Third Reich and the USSR as the occupier and the new Polish rule established with its support;
3. The underground of the time of war with the new Polish rule (established with the support of the USSR), acting in hope to lawfully oust it;
4. The underground that stood no chance or hope to oust the new rule.

Conclusions

In view of the presented historical background and legal conditions, the following conclusions can be put forward:

I. the features of the entities listed in para. 1, 2 and 3 mean that in the light of the then applicable norms of international law of armed conflicts, these should have been considered the armed forces of a lawfully operating state. The withdrawal of international recognition from the government in exile does not deprive these armed units of the status of a legal armed force, and their members should therefore have not incurred negative penal and military consequences. Thus, under international law, the actions of the communist authorities fighting the underground were unlawful,

II. despite the fact that the entities specified in para. 3 were not reporting to a uniform command, the military goal that they pursued was consistent with the goal pursued by the armed forces controlled by the government in exile,

III. those starting guerrilla operations aimed at restoring the existence of an independent state, after the end of World War II, do not meet the criteria to qualify as a belligerent party, as the following constitutive features are not met: exercise of authority over a territory; having the capacity to establish diplomatic relations; conduct in line with the conventions and laws of war,

IV. the entities specified in para. 3 should have been recognized as guerrilla groups within the meaning of Article 1 of the Hague Convention IV and enjoyed the protection it guarantees. The actions of the communist authorities in violation of the above should be regarded as unlawful,
V. it is unfounded to recognize the entities specified in para. 4 as a belligerent party or guerrilla groups. These persons and military formations should be qualified under the norms of criminal law in force at the time of the commission of criminal offences, with all the punitive consequences of such qualification. Thus, the communist authorities' operations to eliminate them were, in principle, lawful, although the methods employed could raise justified doubts or disapproval.

The assessment of the attitudes of soldiers and the activities of the troops of the Polish independence underground will never be unequivocal. The use of categorical judgments in terms of "white – black", "good – bad", "heroic – bandit-like", "right – wrong" will always be inadequate, or even unjustified. Few post-war events can be judged unambiguously. The activity, achievements, and historiographic inaccuracies related to the phenomenon of "accursed soldiers" make room for a range of free interpretations of the events from about seventy years ago. Therefore, the aim of the authors is not to position themselves as censors of ethical and moral attitudes, but to present the matter identified in the title in a historical and international legal context. After all,

> the task of a theoretician of law is to conduct such an analysis that unveils what is veiled and examines the mechanism of new concepts so as to enable a distinction between a play of interests in disguise and the actual struggle for progress.[40]

No doubt, one may add, *historia magistra vitae est*, both in terms of law and practice. Unfortunately, we never learn enough from it.

[40] J. Sawicki, *Ludobójstwo. Od pojęcia do konwencji 1933–1948*, Kraków 1949, p. 18.

DAWID ZDRÓJKOWSKI

The criminal trial of Adam Karol Tyczyński as an example of an unsettled judicial crime

Introduction

The criminal case of Reserve Major Adam Karol Tyczyński examined in the first instance before the so-called secret section of the Provincial Court for the Capital City of Warsaw, attracted my attention owing to the publication of the Institute of National Remembrance, edited by M. Zaborski. It contains source materials on the violation of socialist rule of law in the People's Republic of Poland.[1] One of the published documents is the report of 9 February 1957[2] by a commission set up to investigate the activities of the so-called secret section of the Provincial Court for the Capital City of of Warsaw. In the wake of the thaw in 1956, the question of bringing those responsible for the distortions and violations of the rule of law to justice during the Stalinist period came to the agenda. The above-mentioned commission was appointed by the Minister of Justice, Zofia Wasilkowska, and was composed of: SC judge Julian Potępa (president), Professor Stanisław Ehrlich of the University of Warsaw, President of the Polish Bar Council, Michał Kulczycki, Professor Józef Litwin of the University of Lódź, Head of the Legislative Department

[1] According to the views of the communists themselves, the rule of law was to consist in a "strict and absolute observance, by all bodies of state power and administration and by individual citizens, of the laws of the People's Republic of Poland, which are an expression of the interests and will of the working people"; see H. Podlaski, G. Auscaler, M. Jaroszyński, G.L. Seidler, J. Wróblewski, *Praworządność ludowa w* świetle *Konstytucji Polskiej Rzeczypospolitej Ludowej*, [in:] *Zagadnienia prawne konstytucji Polskiej Rzeczypospolitej Ludowej. Materiały Sesji Naukowej PAN 4–9 July 1953*, G. Auscaler (ed.), vol. 1, Warszawa 1954, p. 349.

[2] Sprawozdanie komisji powołanej w celu zbadania działalności tzw. sekcji tajnej Sądu Wojewódzkiego dla m.st. Warszawy, AAN. Prokuratura Generalna, 950, [in:] *W imię przyszłości Partii. Procesy o łamanie tzw. praworządności socjalistycznej 1956–1957. Dokumenty*, M. Zaborski (ed.), Warszawa 2019.

at the Ministry of Justice, Zygmunt Opuszyński, associate professor Leon Schaff of the University of Łódź, and vice-president of the Central Board of the Union of Polish Patriots, Sylwester Zawadzki.[3] The commission's task was to identify those responsible for the distortions in the administration of justice that took place within the framework of the secret sections. It has already been rightly pointed out in the literature that, in essence, it was about reckoning up with the perpetrators of communist crimes of the Stalinist era only superficially, and closing that part of history without actually holding the guilty to account.[4] The commission's report characteristically reveals the outrageous backstage of the operation of secret sections, while to a large extent exculpating those who formed that component of the repressive system.

As regards the cases pending under the provisions of the decree on responsibility for the September defeat and the fascization of state life of 22 January 1946,[5] the commission's report first presented a description of the case of Adam Tyczyński (case ref. IV 1. K 36.51),

> an officer of the political police who, from 1927, while in various top-raking positions at the ministry of security, contributed to the imprisonment of over several dozen members of the Communist Party of Western Belarus, using provocation methods and willingly working with an intelligence network of a foreign power.

The case of Tyczyński was decided in the first instance in the so-called secret section of the Provincial Court for the Capital City of Warsaw. That section was established in 1950 to consider cases from all over the country under the above-mentioned decree of 22 January 1946 and under the decree of 31 August 1944.[6] In the second instance, these cases were decided by the

[3] D. Maksimiuk, *Rok 1956 w Polsce, Sądy, prokuratury, prawo karne*, Białystok 2016, pp. 132–134.

[4] Ibid.

[5] Journal of Laws 1946, No. 5, item 46; the genesis of the decree of 22 January is given in the paper: D. Zdrójkowski, *Geneza dekretu o odpowiedzialności za klęskę wrześniową i faszyzację życia państwowego*, „Studia Prawnicze i Administracyjne" 2019, vol. 28, iss. 2.

[6] Decree of 31 August 1944 on the penalty for fascist-Nazi criminals guilty of murdering and tormenting civilians and prisoners of war, and for traitors of the Polish Nation (Journal of Laws 1944, No. 4, item 14).

Supreme Court. The secret section was a special organizational unit designed to hear cases of "special national importance." There is no doubt in the literature that trials before the secret sections violated all the principles of a fair and lawful criminal trial. In these cases, at the stage of the investigation, security officers extracted evidence by means of torture, severe sentences were handed down, including the death penalty, convictions were issued by loyal judges, the right to defence of the accused was often violated, and even cases were heard in prisons.[7] The organizer of the secret sections was Henryk Chmielewski, Head of the Department of Judicial Supervision at the Ministry of Justice.[8]

The report does not contain any in-depth reflections on the case of A. Tyczyński. The case of A. Tyczyński somehow disappears from the pages of the commission's report, despite the fact that the prosecutor Paulina Kernowa,[9] who supervised the investigation, was indicated in that report as one of the persons responsible for the distortion of the justice system. Hence, on the basis of the source materials, I decided to describe the Tyczyński case as a form of addendum to the report of the committee for the secret section.

There are significant doubts in the doctrine over the definition of a judicial crime. The most general definition expressed in legal language indicates that a judicial crime means an act of a judge or a public prosecutor that distorts

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[7] K.M. Piekarska, *Naruszenie zasady jawności w „sądach tajnych"*, [in:] *Prawo karne w okresie stalinizmu*, G. Rejman (ed.), „Studia Iuridica" 27, Warszawa 1995, p. 31; A. Grześkowiak, *Sądy tajne w PRL*, „Tygodnik Powszechny" 1989, No. 28; A. Grześkowiak, *Sądy tajne w latach 1944–1956*, [in:] *Prawo okresu stalinowskiego. Zagadnienia wybrane*, G. Rejman (ed.), „Studia Iuridica" 22, Warszawa 1992, pp. 61–63; Ł. Bojko, *Kilka uwag o sądach tajnych stalinowskiej Polski, Studia nad Autorytaryzmem i Totalitaryzmem 37*, No. 1, Wrocław 2015, pp. 40–41.

[8] E. Romanowska, *„Z braku dowodów winy…" – rehabilitacja prokurator Romany Golańskiej*, „Roczniki Administracji i Prawa" 2014, vol. 14, p. 120.

[9] Paulina Kernowa – the prosecutor who approved the indictment in the case of Adam Tyczyński and accused him before the Provincial Court for the Capital City of Warsaw, was deputy prosecutor of the General Prosecutor's Office and employee of the Special Department (from September 1950 to October 1951) and the Judicial Department. As regards her working methods of prosecutor Kernowa, one should refer to the report of the commission appointed to investigate the activities of the secret section of the Provincial Court for the Capital City of Warsaw. According to the report, prosecutor Kernowa did not react to tortures used by security investigators, as reported by detainees. In the course of the trial held in the court prison against Eugeniusz Grzybowski, she objected to the summoning of witnesses called by the defendant, citing difficulties in bringing them to the hearing, despite the fact that the witnesses were in that prison. In the prosecution opening statement against Grzybowski, she accused him of "provocations and defamation of the authorities of the Ministry of Public Security

the law and causes harm qualified as a serious prejudice to justice. There have been also definitions that narrowed down the meaning of a judicial crime to the use by a judge of the judicial institution solely to take another person's life.[10] However, I consider it most appropriate to assume that an act of a judicial crime is any deliberate issuance of an unfair decision causing serious harm to justice. Such a construction would correspond to the *de lege ferenda* postulates by W. Kulesza. A judicial crime is therefore a conviction issued by a judge with a distortion of the law, in abuse of his or her power, for either the death penalty (judicial murder) or the penalty of deprivation of liberty (unlawful imprisonment).[11] Hence, despite the final penalty of imprisonment, relatively lenient given the conditions of the communist regime, the conviction in the case of A. Tyczyński must be qualified as a judicial crime. In this study, I will discuss the case of A. Tyczyński as an example of such an unsettled judicial crime in its two aspects. First, the closure of the case under discussion in legal terms, that is, whether the unjust conviction has been eliminated from the legal system. Second, the personal responsibility of the leading public officials responsible for the conviction of A. Tyczyński.

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as regards the use of inappropriate methods of investigation," which was reflected in the conviction of the death penalty. Similarly, in the case of Władysław Cisowski, in response to the complaints of the defendant, she told him that "the investigative authorities of the People's Republic of Poland do not use beating." The report in question concluded that approvals of indictments based on forced evidence clearly disqualified Paulina Kernova as a prosecutor. In the final conclusions, Kernowa was identified as one of the prosecutors guilty of violating the rule of law and recommended for dismissal as a person who did not guarantee the due conduct as a prosecutor. According to media reports, Kernowa left Poland in 1968 and was never held accountable for her activities. According to the findings of the Provincial Prosecutor's Office in the rehabilitation proceedings of Fieldorf, Paulina Kern, next to Helena Wolińska and Beniamin Wajsblech, was the main responsible for the rigging of the Fieldorf trial. Cited after D. Maksimiuk, *Rok 1956 w Polsce, Sądy, prokuratury, prawo karne*, Białystok 2016, p. 179; Sprawozdanie komisji powołanej w celu zbadania działalności tzw. sekcji tajnej Sądu Wojewódzkiego dla m.st. Warszawy, AAN. Prokuratura Generalna, 950, [in:] *W imię przyszłości Partii. Procesy…*, M. Zaborski (ed.), Warszawa 2019, pp. 221, 229, 213, 247–249, 255; M. Stanowska, *Odpowiedzialności za łamanie praworządności w organach śledczych, prokuraturze i sądach w latach 1944–1956*, Warszawa 2018, p. 51.

[10] S. Śliwiński, *Polskie prawo karne materialne. Część ogólna*, Warszawa 1946, p. 388; A. Strzembosz, *Zbrodnie sądowe*, [in:] A. Przewoźnik, A. Strzembosz, *Generał „Nil"*, Warszawa 1999, pp. 28–29.

[11] W. Kulesza, *Crimen laesae iustitiae*, Łódź 2013, pp. 463–472.

It should be noted that the case of Tyczyński has aroused the interest of the communist services for many years. It was quoted in the justification of the conviction of Wacław Kostek-Biernacki.[12] Tyczyński himself was a witness in a number of cases initiated under the January decree, e.g. in the case of Wiktor Boćkowski – Boczkowski[13] or in the case of pre-war bacteriologists of the Second Department of the Polish Army.[14]

Such an interest in Tyczyński's case is surprising, especially since, at first glance, Adam Tyczyński was no one special compared to other people convicted under the January decree, such as prime minister Kazimierz Świtalski or ministers Wacław Kostek-Biernacki and Henryk Józewski. Adam Tyczyński was a pre-war officer of the political police in Brześć on the Bug River. He was born on 4 August 1895 in Jarzębia Łąka, in the district of Radzymin. He died on 19 March 1970. Before World War I, he completed 6 years of primary school. During World War I, he served in the Russian army, then in the Polish army until 1922. His official career included work, first in 1925–1926, in the security, administrative and legal departments of the District Office in Pińsk and in Kobryń. Then, from July 1926 to 1929, Tyczyński was a clerk at the Security Section at the Security Department of the Provincial Office in Brześć on the Bug River. From 1929, he was a deputy head, and a few months later, an acting head of that Section. In 1937, Tyczyński passed an exam for a first-class clerk and was appointed head of the above Security Sectrion in Brześć on the Bug River.[15] During World War II, Tyczyński worked in the Security Department of the Government Delegation for Poland. Tyczyński took part in the Warsaw Uprising as a Major under the pseudonym "Urban."[16]

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[12] *"It follows from the justification to the final judgment in the case re. 1V 1.K. 36/51 on the conviction of A.K. Tyczyński and K. Bartniczak, security officers in the Polesie Provincial Office before 1939, that the defendant Biernacki had issued an order to more effectively combat communist organizations by using more severe penal and administrative repressions against members of the communist party than against others"* – IPN 507/93, sheet 9.

[13] IPN GK 317/665, sheet 30, order to bring witness A. Tyczyński to court.

[14] IPN BU 0330/230/4, sheet 20–29, Tyczyński's interrogation in the case of Jan Golba and others.

[15] IPN GK 317/463, judgment of the Provincial Court for the Capital City of Warsaw of 17 August 1951 (1V 1.k.36/51), sheet 63–64.

[16] IPN BU 01439/33, sheet 1–2; https://www.1944.pl/powstancze-biogramy/adam-tyczynski,46732.html [accessed: 26.07.2020].

In view of the above, a description of the case of Tyczyński, indicated somewhat *ad hoc* in the report of 9 February 1957, will help the reader to understand why that case raised the interest of the commission for the secret section. I am of an opinion that the interest of the communist services was mainly due to the fact that Tyczyński was for many years assigned to the Security Department of the Provincial Office in Brześć on the Bug River.[17] Thus, the case of Tyczyński was used to additionally fabricate charges against Wacław Kostek-Biernacki, who, in the eyes of the communists, was the chief executer of the Sanation's "crimes" against pre-war communists.

1. Initiation of criminal proceedings

The criminal proceedings against Adam Tyczyński were initiated by the investigating officer of the Ministry of Public Security in Warsaw, Ensign Bohdan Kiełbasa,[18]

[17] According to the case files, it was political police, whose duties included investigating communist organizations and drawing up relevant reports to the Ministry of the Interior, containing guidelines for combating communist parties. Although this was not the focus of the indictment or the justification of the judgment, it should be noted that the Provincial Offices played a significant role in the preparation of requests filed with investigating judges for imprisonment in the detention centre in Bereza Kartuska. Such requests prepared by heads of districts were submitted to a Provincial Office, which was to "coordinate the entire effort", and then to the governor, who sent the final version of the request to the investigating judge; Ordinance of the President of the Republic of Poland of 17 June 1934 on persons threatening the security, peace and public order (Journal of Laws of 1934, No. 50, item 473, W. Śleszyński, *Obóz odosobnienia w Berezie Kartuskiej 1934–1939*, Białystok 2003, p. 27).

[18] Bohdan Kiełbasa – security service officer in charge of the investigation against Adam Tyczyński. He was born on 21 March 1927 in Brzostowa. He graduated from primary school, then in a vocational school for a baker-confectioner. In 1944, he joined the Polish Workers' Party. Arrested by the Germans, he was imprisoned in the camp in Bodzechów, from which he escaped in December 1944. Initially, he was a guard at the District Public Security Office (PUBP) in Sandomierz. He began his career as an investigative officer at the PUBP in Sandomierz from 16 January 1946. In his application for admission to service, he was to write: "My goal will be to fight fascism and other right-wing parties. I will do my job in earnest." Kiełbasa was an investigating officer successively in the PUBP in Sandomierz, Kozienice, Starachowicze and Pińczów, at the Ministry of Public Security in Warsaw and in the Provincial Public Security Office in Białystok. During his service he was given a penalty of arrest and deduction of his salary for drunkenness and "heedlessness when calibrating a weapon." He ended his service in the security services on 31 December 1953, but there is no information that he would ever be held legally to account for his activities. The biography of Bohdan Kiełbasa and the quoted fragments of his interrogations are cited after the article by

pursuant to the decision of 28 December 1949.[19] Tyczyński was suspected of anti-state activities. The text of the decision does not provide any legal basis for initiating the proceedings. Tyczyński was interrogated 5 times from 7 to 19 December 1949, i.e. even before the decision was issued on the initiation of the investigation and on the pre-trial detention (also dated 28 December 1949[20]). He was arrested on the basis of the decision of 7 December 1949 on pre-trial detention. Apart from the illegible signature, the document does not give any information which authority and on what legal basis issued that decision.[21] The then Code of Military Criminal Procedure, introduced by virtue of the decree of 23 June 1945,[22] did not provide for the institution of pre-trial detention. The detention of the suspect without a decision and without instituted proceedings was in breach of Article 178 of the Code of Military Criminal Procedure, under which the investigation should be initiated within 24 hours of receiving information about a criminal offence. The decision of the Deputy Chief Military Prosecutor, Lieutenant Colonel M. Lityński of 28 December 1949 justified the arrest of Tyczyński with his alleged fulfilment of the criteria of an offence under Article 7 of the decree of 13 June 1946,[23] and fear of his hiding and criminal collusion. The legal basis indicated in the decision was Article 102, 103 and 104 of the Code of military Criminal Procedure of 23 June 1945.[24]

Noteworthy, the case of Tyczyński was joined with the case of Kazimierz Bartniczek, an employee of district offices (in Dubno, in Kamień-Koszyrski and in Łuniniec). From mid-1934 to the end of December 1935, Bartniczek headed the security section at the District Office in Łuniniec. The investigation against Kazimierz Bartniczek was initiated by a decision of 28 December 1949, also issued by Bohdan Kiełbasa. The cases were joined after a year, on the basis

R. Piwo, *Bohdan Kiełbasa, oprawca z bezpieki*: https://krakow.ipn.gov.pl/pl4/edukacja/przystanek-historia/100011,Bohdan-Kielbasa-oprawca-z-bezpieki.html [accessed: 26.07.2020] and after the IPN catalogue: https://katalog.bip.ipn.gov.pl/informacje/29433 [accessed: 26.07.2020].

19 IPN GK 317/462, decision on the initiation of investigation of 28 December 1949, sheet 31.

20 IPN GK 317/462, decision on pre-trial detention of 28 December 1949, sheet 29.

21 IPN BU 01439/33, decision of 07/12/1949 on pre-trial detention, sheet 23.

22 Journal of Laws No. 36, item 216.

23 Decree of 13 June 1946 on particularly dangerous criminal offences in the period of State reconstruction (Journal of Laws of 1946, No. 30, item 192).

24 Journal of Laws of 1945, No. 36, item 216.

of the decision of the investigating officer of the Ministry of Public Security in Warsaw, Ensign Bohdan Kiełbasa of 23 December 1950.[25] The decision was approved on 11 January 1951 (erroneously dates as 1950) by a person who only gave illegible initials). The justification for the joining of the two cases was the fact that the acts of the suspects featured a criminal offence under Article 3 and 5 (2) of the decree of 22 January 1946 and Article 1 (2) of the decree of 31 August 1944, and "the circumstances of the commission of the offences overlap." However, the decision of 23 December 1950 does not contain any legal basis for that joining of the cases. Ultimately, both suspects, i.e. Tyczyński and Bartniczek, were accused on the basis of the same indictment and were convicted under the same sentence.

2. Course of the investigation

The first investigation steps against Adam Tyczyński were taken by an officer of the Ministry of Public Security, Lieutenant Władysław Czyż,[26] who made

[25] IPN GK 317/462, decision on the joining of cases of 23 December 1950, sheet 224.

[26] W ł a d y s ł a w C z y ż – born in 1924, he started his service in the District Public Security Office (PUBP) in Jarosław on 22 November 1944, then he was transferred successively to the PUBP in Bielsko, in Biała Krakowska, in Myślenice, from 1 February 1946 at the Provincial Public Security Office (WUBP) in Kraków, from 1 January 1950 in Warsaw, successively at the Ministry of Public Security at the Committee for Public Security (KdsBP), Precinct Station of the Communist Police (KD MO), Headquarters of the Communist Police (KMO) and Ministry of Interior (MSW). He ended his work in the security services as a Major on 31 December 1967.

According to a memo dated 19 December 1950, "As an investigating officer of Department X, he conducted cases against defence department personnel, political officers at the Ministry of Interior and the Second Department, who were prosecuted for crimes committed against the Communist Party of Poland. Among the more important investigative cases, the above person mentioned the case of Pacyna, a former Dąbrowski Brigade member suspected of having been referred to Spain by the Second Department, and for a certain time he was in charge of the case of F. Wida-Wirski, who had been arrested as a suspect of collaboration with the Home Army and contacts with the Yugoslavian Embassy. After transfer to Division III, Department X, he led the case on the Delegation's anti-communist intelligence. According to Czyż's statements, he did not use physical violence methods in the investigative cases." (sheet 55 archive materials, file ref. IPN BU 0237/22). Czyż's disclaimer of the use of torture, however, contradicts the memo of a prosecutor K. Kukawka of 7 July 1956, where, when listing the investigative officers using violence in investigations, who should be held to account criminally, he mentioned, *inter alia*, Władysław Czyż. The above information is cited after the catalogue of security service officers: https://katalog.bip.ipn.gov.pl/informacje/94715 [accessed: 3.08.2020] and after M. Stanowska,

a personal search on 7 December 1949. The following items were seized: an Omega pocket watch, a wedding ring with the inscription "19.73.19 God Bless Us", a metal pocket knife, a mirror, PLN 5 675 in banknotes of the National Bank, a leather wallet, official ID No. 273 of the Ministry of Public Administration, trade union ID No. 12397 and a Polis People's Party membership card No. 001764.[27] Tyczyński was interrogated for the first time by Władysław Czyż on the same day, i.e. on 7 December 1949[28]. The investigating officers knew very well who they were dealing with. Tyczyński was immediately asked about the details of his activities in the security section before September 1939 and about the personnel composition of that unit.

In total, Tyczyński was interrogated 31 times during the investigation. Noteworthy, Tyczyński was never asked to present his biography. During the first interrogation, the suspect was immediately asked specific questions about his activities in the Security Section and the personnel composition of the Provincial Office in Brześć on the Bug River. In the course of subsequent interrogations, questions were also raised about the activities of Tyczyński during the war. The knowledge of Tyczyński's biography shown by the investigating officers is consistent with the information provided in the report of the commission of 9 February 1957, according to which the original reason for establishing the secret section at the Warsaw court was the "discovery" of the files of the pre-war Second Department of the General Staff and Defa Political Police[29] (i.e. intelligence and counterintelligence service, respectively; most likely these files were not discovered, as briefly mentioned in the report, but simply returned from the USSR). Importantly, already during the interrogation on 10 December 1949, while talking about his wartime activity, Tyczyński mentioned his co-detainee K. Bartniczek as a person he recruited during the war, who was to keep the archives and collate the information he sourced about left-wing activists (this mention was underlined by investigating officers).[30]

Odpowiedzialności za łamanie praworządności w organach śledczych, prokuraturze i sądach w latach 1944–1956, Warszawa 2018, p. 28.

[27] IPN GK 317/462, personal search report of 7 December 1949, sheet 4–5.

[28] IPN GK 317/462, interrogation report of 7 December 1949, sheet 7.

[29] Sprawozdanie komisji powołanej w celu zbadania działalności tzw. sekcji tajnej Sądu Wojewódzkiego dla m.st. Warszawy, AAN. Prokuratura Generalna, 950, [in:] *W imię przyszłości Partii. Procesy…*, M. Zaborski (ed.), Warszawa 2019, p. 197.

[30] IPN GK 317/462, interrogation report of 10 December 1949, sheet 12.

According to Tyczyński, the archive was supposed to be buried by Bartniczek in 1945. During the investigation, witnesses, pre-war and wartime associates of Tyczyński were also interrogated: Myśliwski – 26 October 1950, Wieczorek – 4 December 1950, Ławiński – 7 and 15 December 1950, Gąsiorowski – 13 December 1950, Piotrowski – 19 December 1950.[31]

By the decision of 20 June 1950, the Supreme Military Court extended the period of pre-trial detention of A. Tyczyński until 7 September 1950 due to "special circumstances of the case" (Article 104 § 2 of the Code of Military Criminal Procedure).[32] Then, by the decision of 10 September 1950, the SMC extended that period again until 7 December 1950.[33] Ultimately, the investigation was closed by a decision issued by B. Kiełbasa on 28 December 1950, after the defendant had been presented the material evidence gathered in the case (underground materials and orders). Pursuant to Article 252 § 1 of the Code of Criminal Procedure, the investigation was to provide grounds for a trial.[34] Noteworthy, there was an inexplicable change of procedure, because in the decision on the arrest of Tyczyński, the legal basis was indicated as the Code of Military Criminal Procedure of 23 June 1945, and the decisions on pre-trial detention were issued by a military court, not a common court. The case files do not provide an answer what the legal basis was for the change in the criminal procedure, especially as it was done only after the investigation had been closed.

3. Indictment

The indictment against Tyczyński and Bartniczek was sent to the Provincial Court for the Capital City of Warsaw by the Deputy Head of the Special Department at the General Prosecutor's Office of Poland, Władysław Dymant, on 10 January 1951.[35] In the same document, the prosecutor's office requested that the entire hearing be held behind closed doors, because, as it was justified, open proceedings, in the opinion of the prosecutor's office, could reveal circumstances which had to be kept secret due to the investigation against other persons.

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31 IPN GK 317/462, sheet 199–219.
32 IPN GK 317/462, records of a closed session, sheet 92.
33 IPN GK 317/462, records of a closed session, sheet 100.
34 IPN GK 317/462, sheet 242.
35 GK 317/463, letter of 10 January 1951, sheet 1.

The indictment was drawn up on 30 December 1950 by Ensign Bohdan Kiełbasa.[36] The charges against Adam Karol Tyczyński were that:

I. in the period from February 1927 to September 1939 in the Polesie Province, acting in favour of the fascist movement, he decided public matters to the detriment of the Polish Nation, because as a clerk for communist matters at the Security Section, and later the head of the above-mentioned Security Section at the Security Department, and last the deputy head of that department at the Provincial Office in Brześć on the Bug River, he personally developed and then passed on orders and instructions ordering the investigation and liquidation of anti-fascist organizational units and their members, in particular KPZB, KZMZB, KPZU and KZMZU (communist parties and youth organizations of Western Belarus and Ukraine), to the Investigative Office of the Polesie Province and security departments in the Polesie Province, thus carrying out the tasks of the central security bodies consisting in breaking up the workers' movement and fascization of public life in Poland,
II. in the period from February 1927 to September 1939 in the Polesie Province, in the positions described in para. I, contributed to the harassment of anti-fascist activists in arrests and prisons, in particular members of the KPZB, KZMZB, KPZU, and KMZU, by investigating them with the support of the police and informants, and then submitted reports to the authorities of the Public Prosecutor's Office against the investigated persons and acted as an expert in their cases, as a result of which those persons were arrested and then sentenced to long terms in prison,
III. in the period from 1941 to August 1944 in Warsaw and the Warsaw Province, acting in favour of the authorities of the German state, he acted to the detriment of civilians among the Polish population for political reasons, as part of which while in the position of the head of the Warsaw Brigades of the Union of Armed Struggle (ZWZ – PZP) and the deputy head of the Security Department of the Regional Government Delegation for the Warsaw Province, operating with the aim of investigating and liquidating, with the support of the German Secret Police (the Gestapo) and (…) the Home Army, the activists and supporters

[36] GK 317/463, indictment of 30 December 1950, sheet 2–14.

> of anti-fascist organizations, he investigated, through networks of his subordinate Security forces, several dozen organizational units and hundreds of activists and supporters of the Polish Workers' Party and the People's Guard and People's Army, and he transferred the data sourced about them to the management of the Union of Armed Struggle and the Security Department at the Ministry of Interior of the Government Delegation for Poland, for use in the manner specified above."

The charges were allegedly criminal offences under Article 3 of the decree on responsibility for the September defeat of 22 January 1946, Article 5 (2) of the above-mentioned decree and Article 1 (2) of the decree of 31 August 1944.[37]

The case, pursuant to Article 17 § 1 (3) and Article 20 § 1 and 2 of the Code of Criminal Procedure,[38] was referred to the Provincial Court in Warsaw. The indictment covered basically all of Tyczyński's activity in his official capacity, in both the pre-war (under the decree of 22 January 1946) and occupation period (under the decree of 31 August 1944).

According to the indictment, Tyczyński pleaded guilty to the charges partially (the indictment, however, does not specify to which charges he pleaded guilty). The indictment, by the decision of 11 January 1951, was approved by

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[37] The articles for the alleged crimes of Tyczyński should be quoted at this point:

Article 3 of the decree of 22 January 1946 *Any person who, in favour of the fascist or national socialist movement, has acted in deciding journalistic matters to the detriment of the Nation or the Polish State in a manner other than that provided for in Article 1 or 2 (through central state functions), shall be liable to imprisonment*

Article 5 of the decree of 22 January 1946

1. Any person who has participated in the harassment of a person staying or imprisoned in a place of solitary confinement, camp, detention centre or prison because of their political or social activity, shall be liable to imprisonment.

2. Any person who has contributed to or caused the offence provided for in para. 1 or 2 above shall be liable to the same penalty.

Article 1 of the decree of 31 August 1944

Any person who, acting in favour of the authority of the German state or a state allied with it:

1) has participated in the murder of persons among the civilian population or of military service members or prisoners of war,

2) by identifying or capturing the same, has acted to the detriment of persons wanted or persecuted by the authorities for political, national, religious or racial reasons, shall be liable to the death penalty.

[38] Code of Criminal Procedure of 19 March 1928, as amended in Journal of Laws of 1950, No. 40. item 364.

the prosecutor Paulina Kernowa.[39] Even before the hearing of 15 March 1951,[40] a request for leniency from Tyczyński's wife, Maria, was delivered to the Provincial Court in Warsaw. The document implies two basic things. Maria Tyczyńska knew that her husband's case would be heard in a secret session. The letter also reveals facts from Tyczyński's post-war life; in 1945–1949 (until his arrest) he worked as a counsellor at the Ministry of Public Administration.

4. Court hearing and judgment

The hearing was scheduled by the order of 26 July 1951.[41] Barrister Mieczysław Buczkowski was appointed Adam Tyczyński's defence attorney. However, on 17 August 1951, Tyczyński authorized barrister Antoni Maciejewski as his defence attorney. It is known from the records of the main hearing that Buczkowski ultimately represented the interests of the co-defendant Kazimierz Bartniczek, who was originally appointed another barrister (surname illegible).

The main hearing was held on 11 August 1951 before judge Tadeusz Gdowski[42] and jury members S. Galicz and M. Szymański.[43] The prosecutor's office was represented by Paulina Kernowa. Tyczyński, pleading not guilty to the charges, did not denounce the work he had performed before the war and during the occupation. The taking of evidence consisted in hearing

[39] GK 317/463, decision of 11 January 1951, sheet 15.

[40] GK 317/463, request by Maria Tyczyńska, sheet 23.

[41] GK 317/463, order to schedule the main hearing, sheet 27.

[42] Tadeusz Gdowski – he lived in 1907–1984. A graduate of the Faculty of Law at the University of Poznań. From 1937, a judge at the Garrison Military Court (SSG) in Mikołajów. During World War II, he worked physically in a German enterprise. In 1945, he volunteered for the service of the judiciary and became an SSG in Poznań, and then in Środa. After less than a year, he was transferred to act as the deputy prosecutor of the Special Criminal Court (SSK) in Poznań. In 1949, he became a judge of the Appellate Courts (SSA) in Poznań and Olsztyn. From 1951, a judge of the Provincial Court (SSW) in Poznań, and from 1 September 1950, a judge at the Supreme Court (SSN). Appointed to the Supreme Court on 12 May 1954, he worked as a judge in the Criminal Chamber until 22 May 1972. Tellingly, the official biography of judge Gdowski lacks information about his judicial activity in the Provincial Court for the Capital City of Warsaw, which, in the light of the source materials, is beyond doubt. The biography is cited after A. Bereza, *Sąd Najwyższy 1917–2017. Prezesi, sędziowie, prokuratorzy Sądu Najwyższego*, Warszawa 2017, p. 299.

[43] GK 317/463, records of the main hearing, sheet 46–54.

3 witnesses: Cyryl Zawiński, Karol Wieczorek and Kazimierz Gąsiorowski, all clerks of the pre-war Provincial Office in Brześć. The witnesses quite laconically confirmed the "anti-communist" activities of Tyczyński both before the war and during the occupation. They repeated what had already been included in the indictment in the defendant's biography. They did not specify where exactly they knew the defendant from, but the files of the cases against the above witnesses were attached to the files of the case at hand, so they were Tyczyński's associates accused in other cases, as may be inferred from the similar legal basis. After hearing the witnesses, the trial, as requested by the prosecutor, was suspended until 17 August 1951. After resumption, the court decided to read out the testimonies of the witnesses: Tadeusz Myśliński, who, tellingly, was not summoned to appear due to his health condition, and Dominik Piotrowski.[44] After the trial was closed, the prosecutor Kernowa entered a motion for a judgment of conviction for Tyczyński in accordance with the indictment (the indictment, however, lacks a motion for a specific penalty to be imposed on the defendant). The defence attorney entered a motion for an amnesty, and Tyczyński himself asked for a just penalty. After deliberation, the court announced the verdict[45] in which it found Adam Tyczyński guilty of the criminal offences as charged under para. I, II and III of the indictment (i.e. in full, but changing the legal qualification of the offence charged under para. III of the indictment[46]). The court sentenced him for the above offences:

a) For the offence specified in para. I of the indictment, pursuant to Article 3 of the decree of 22 January 1946, it imposed a penalty of 9 years in prison, which it reduced under Article 6 and 10 of the Amnesty Act by 1/3, i.e. down to 6 years in prison.

[44] GK 317/463, records of the main hearing – continued, sheet 55–57.

[45] GK 317/463, judgement of 17 August 1951, sheet 58–60, 61–70.

[46] For the offence specified in para. III of the indictment, the court applied the legal qualification under Article 2 of the decree of 31 August 31 1944, which read as follows: *"Any person who, acting in favour of the authority of the German state or a state allied with it, acter in a manner or in circumstances other than specified in Article 1 to the detriment of the Polish state, a Polish body corporate, persons from among the civilian population or military service members or prisoners of war shall be liable to imprisonment for not less than 3 years or for life, or the death penalty."*

b) For the offence specified in para. II of the indictment pursuant to Article 5 (2) of the decree of 22 January 1946, a penalty of 8 years in prison,
c) For the offence specified in para. III of the indictment pursuant to Article 2 of the decree of 31 August 1944, a penalty of 15 years in prison.

Pursuant to Article 31 of the Criminal Code, the court issued a joint sentence of imprisonment for a total of 15 years in prison. The defendant Tyczyński, pursuant to Article 7 of the decree of 31 August 1944, was also handed a sentence of the loss of public and civil rights of honour for the period of 6 years and the forfeiture of all property. Then, pursuant to Article 58 of the Criminal Code, the court credited the defendant's time served under pre-trial detention from 7 December 1949 to 17 August 1951 to the total length of the term in prison.

The justification of the judgment does not differ in content from other justifications issued by courts in political trials. At the outset, the court gave its legal and historical assessment of the situation in which Poland found itself:

> It is well known that the Sanation's system of oppression was directed in the first place against the revolutionary movement of the working class, organized and led by the Communist Party of Poland. One of the links in this system of oppression were the so-called Security Departments at Provincial Offices and public safety sections at district offices.

The fault of Adam Tyczyński was therefore due to the very fact of performing functions in those units in the interwar period. The court supported its argument by referring to the defendant's explanations, testimonies of the witnesses Ławiński, Wieczorek and Gąsiorowski, read out accounts of the witnesses Myśliński and Piotrowski, and documents. According to the testimonies of witnesses, the duties of the defendant as the head of the Security Section were to investigate the then illegal left-wing organizations, and thus he exhausted the features of the criminal offences with which he was charged. According to the court, the defendant's professional career and promotions were an expression of "the great trust of the Sanation authorities in the defendant."[47] Also noteworthy is the court's assessment of Tyczyński's activity during

[47] GK 317/463, judgement of 17 August 1951, sheet 66.

World War II, namely, it was for the benefit of the Delegation and, in the court's opinion, also for the benefit of the German authorities. At the same time, the court itself admitted that it had failed to prove that the defendant knew about "the Delegation's contacts with the Gestapo." However, this did not prevent the judgement of conviction, because the defendant, as a man who was "smart, a pre-war employee (…) holding responsible positions", should have foreseen such eventuality.[48]

5. Review proceedings

Tyczyński's attorney for defence, Antoni Maciejewski, in a letter filed on 18 August 1951, gave notice of a motion for review of the verdict and requested that the justification be served.[49] The review proceedings in the case of Tyczyński were initiated by a letter submitted by Tyczyński himself on 31 August 1951 entitled "Application for Appeal."[50] The letter was signed and probably, taking into account the pre-war terminology, drawn up by the convict himself. Tyczyński firmly denied the responsibility assigned to him in the verdict, for "the fascization of public life in Poland." He pointed out that his activity had been only executive, and that he had not had any powers to decide or form the legal order, and thus he had not exhausted the feature of "deciding" in public matters as provided in Article 3 of the January decree. As for the conviction under Article 5 of the January decree, Tyczyński rightly pointed out that the trial had failed to prove that his activities had influenced the way in which the punishments of pre-war political prisoners were adjudicated or executed. In an argument in opposition to the absurd accusations of an alleged collaboration of the Delegation with the Gestapo, Tyczyński pointed out that he had not known and could not have foreseen the actual goals of the Delegation (the alleged transfer of the information he had sourced to the Gestapo, which, incidentally, from the point of view of historical truth, is an outright lie).

[48] GK 317/463, judgement of 17 August 1951, sheet 69.
[49] GK 317/463, notice of motion for review, sheet 71.
[50] GK 317/463, application for appeal, sheet 79–84.

The Supreme Court in Warsaw, composed of K. Bzowski, A. Dąb, I. Iserles, by the judgment of 8 November 1952,[51] quashed the verdict under appeal, while at the same time re-sentencing Tyczyński to a penalty of 8 years in prison under Article 5 § 2 of the decree of 22 January 1946 and a penalty of 12 years in prison under Article 2 of the decree of 31 August 1944, to give the defendant a joint sentence of a total of 15 years in prison with deprivation of public rights and civil rights of honour for 6 years.

Thus, the effect of the motion for review filed by Tyczyński in practice consisted solely in a change of the legal classification of the offence, with the severity of the penalty upheld by the court. The Supreme Court concluded that the entirety of Tyczyński's activity in the period from February 1927 to September 1939 was a single continuous act, which should be classified under a single stricter provision. Thus, Tyczyński was convicted under Article 5 § 2 of the January decree, because, according to the court, in all the positions he held, within the scope of his powers, he had made decisions independently and within these limits he had resolved public matters to the detriment of the Polish Nation:

> especially the terror and violent methods of the Polesie Province governor Kostek-Biernacki in the territory under his competence, against opposition activists, especially left-wing ones, could not have been unknown to the defendant. The defendant, therefore, by persecuting communist activists and supporters and causing their arrest, knowingly and intentionally contributed to their physical and moral torment from their stay in prisons and jails of the Podlaskie Province at that time.

As regards the charges under the August decree, the court concluded that the defendant's activities during the occupation (classified as a crime under Article 2 of the August decree) consisted in that

> as the head of the intelligence brigades of the VII Division of the Warsaw District Command, and then as the head of the Security Department of the Regional Government Delegation (…) he collected information about

[51] GK 317/463, judgement of 8 November 1952, sheet 99–106.

> the activities and members of left-wing independence underground organizations (…) by which he knowingly helped Polish fascist organizations to fight left-wing independence organizations thus acting in favour of the authority of the German-Nazi state.

The defendant, by collecting personal information about left-wing activists, according to the court, had accepted that he could contribute to the elimination of those people once the information got into the hands of the Nazis (conditional intent, *dolus eventualis*).

On 26 April 1956, Tyczyński was released for a six-month break, but he did not return to prison.[52] By the decision of 4 June 1956, the Provincial Court, pursuant to Article 8 (3) of the Amnesty Act of 27 April 1956,[53] applied amnesty to Tyczyński, reducing the penalty of imprisonment from 12 years to 8 years in prison, the penalty of deprivation of rights from 6 to 3 years, and the penalty of 8 years in prison to 4 years. Then it sentenced Tyczyński to a total of 8 years in prison with deprivation of rights for 3 years, with the time served covering the conviction in full.[54]

After the change in the political situation (the "thaw"), the Supreme Court's judgment of 8 November 1952 was appealed in 1957 under a motion for extraordinary review by the Public Prosecutor General, with a request that the judgment be revoked in part as regards the defendant Tyczyński, concerning the conviction under Article 2 of the decree of 31 August 1944 and the verdict on joint penalty, and also regarding the annulment of the decision of 4 June 1956 on the application of amnesty.[55] Thus, the Supreme Court once again examined the case of Tyczyński – Bartniczek. The judgement of 7 November 1957 was issued by a panel of judges chaired by Stefan Kurowski,[56] one of the

[52] GK 317/463, prosecutor's letter of 11 March 1957, sheet 223.

[53] Journal of Laws of 1956, No. 11, item 57.

[54] GK 317/463, decision of the Provincial Court of 04 June 1956, sheet 200.

[55] GK 317/463, judgement of the Supreme Court of 07 November 1957, sheet 213–217.

[56] Stefan Zygmunt Kurowski (Stefan Leon Warszawski), 1897–1959, lawyer, pre-war barrister appearing in political trials, socialist and communist activist, participant in the Warsaw Uprising, prosecutor of the Supreme National Tribunal 1946–1948, 1956, president of the Supreme Court and the Criminal Chamber of the Supreme Court, privately a nephew Adolf Warszawski; cited after *Słownik biograficzny działaczy polskiego ruchu robotniczego*, vol. 3, Warszawa 1992; A. Bereza, *Sąd Najwyższy 1917–2017. Prezesi, sędziowie, prokuratorzy Sądu Najwyższego*, Warszawa 2017, pp. 312–313).

leading authors of the decree on responsibility for the September defeat. In the part of the judgment concerning Tyczyński, the Supreme Court:

1. quashed the sentence in part convicting him for the criminal offence under Article 2 of the decree of 31 August 1944 and as to the joint penalty imposed on him, as well as the decision of the Provincial Court of 4 June 1956 on the application of amnesty to him.
2. acquitted Tyczyński of the charge of the criminal offence under Article 2 of the decree of 31 August 1944.
3. pursuant to Article 8 (3) in conjunction with Article 3 (1) (2a) of the act of 27 April 1956 on amnesty, reduced the penalty of 8 years in prison imposed by the judgment of the Supreme Court of 8 November 1952 for the offence under Article 5 (2) of the decree of 22 January 1946 by half, i.e. down to 4 years in prison, and credited the time served under pre-trial detention and the sentence thus far served from 7 December 1949, thus considering the penalty to be served in full.

In the justification, the Supreme Court concluded that the conviction of Tyczyński under Article 2 of the decree of 31 August 1944 was entirely unjust. The Supreme Court pointed out that there was no evidence that the defendant had known how the organizational authorities used the information on members of left-wing organizations and their activities, and in particular that he had known about the transfer of such information to the Germans (apart from the logical cohesion of this argument, the claim that the Polish underground passed any intelligence information to Germany is an outright lie). At the same time, the Supreme Court stated that the guilt and the penalty imposed on Tyczyński under Article 5 (2) of the January Decree of 22 January 1946 were beyond any doubt.

The case of Adam Tyczyński was finally closed only after the collapse of the communist system. By the decision of 1 February 1996, the Provincial Court in Warsaw, acting on the motion by Zbigniew Tyczyński (son of Adam Tyczyński), pursuant to the Act of 23 February 1991 declaring invalid the judicial decisions issued with respect to the people repressed for activity for the independence of the Polish State,[57] annulled the conviction of 17 August 1951, as amended by the judgments of the Supreme Court of 8 November 1952

[57] Journal of Laws of 1991, No. 23, item 149.

and 7 November 1957, which found Adam Tyczyński guilty of the criminal offence under Article 5 (2) of the decree of 22 January 1946.[58] The court, considering the motion for annulment, consulted the Military Historical Institute. It is telling that after the collapse of the communist system, the court adjudicating in the rehabilitation case did not feel capable of making an independent historical and legal assessment of Tyczyński's activity. The opinion of the Institute unequivocally stated that communist organizations were linked to the illegal Communist Party of Poland and the Communist International. Their goal was to detach from Poland its then eastern territories and to that end they committed numerous acts of sabotage in the Eastern Borderlands. As the Court pointed out,

> in this situation it is obvious that Adam Tyczyński was convicted for that activity, which was related to the fight for the independence of the Polish State, and for the sake of accuracy, it can be stated that his activity was related to the maintenance of the independent existence of the Polish State (…).

By the judgment of the Regional Court in Warsaw of 15 May 2008, Zbigniew Tyczyński obtained appropriate compensation for the wrongful conviction of his father.[59]

Conclusions

It should be concluded that although ultimately the judicial crime caused by the wrongful conviction of A. Tyczyński was settled in legal terms, as the wrongful sentence was annulled, that happened several decades after the death of the defendant, thus bringing him no satisfaction in this respect. That crime was not accounted for in the report of the committee for the secret section of the Provincial Court for the Capital City of Warsaw; as indicated in the introduction, the authors of the report did not include any conclusions

[58] GK 317/463, decision of the Provincial Court in Warsaw of 1 January 1996 (VIII-Ko.186/93/Un), sheet 235–236.

[59] GK 317/463, judgment of the Regional Court in Warsaw of 15 May 2008 (VIII-Ko 965/96), sheet 236.

regarding the irregularities in the trial of A. Tyczyński. There is no doubt that there were no legal grounds to prosecute A. Tyczyński for the acts penalized under the January and August decrees, even if one ignores the scandalous nature of those legal acts. It is impossible to accuse Adam Tyczyński of the fact that, as a counterintelligence officer, he acted within the orders, carrying out activities directed against the anti-state communist party. On the other hand, the literature has raised the question of whether it was possible to prosecute political police officers who fought communist organizations in a way that would not lead to a judicial crime. As it seems, it was possible only on the basis of the provisions of the Criminal Code of 1932, that is, for crimes of abuse of power by public officials, unlawful deprivation of liberty and others. The use of a decree with a retroactive effect and obscure elements of crime, such as "weakening the defensive spirit of the nation", constituted a nightmarish forgery of history.[60] Tyczyński's conviction, as it has been pointed out in the literature, is an expression of the extreme antinomy of the meaning of words in the confrontation with the reality that prevailed in the communist system. In these realities, the heroes fighting the saboteurs and the Germans turned out to be traitors and collaborators of the Gestapo, and real traitors, whose authority was only legitimized by the Soviet bayonets, became heroes. The trial of Tyczyński, heard repeatedly by different courts, in my opinion was aimed to increase the burden of charges against Wacław Kostek-Biernacki, who appeared several times in the trial files as an executive party in relation to the allegedly criminal actions of Tyczyński. This is evidenced by the reference to the case of Tyczyński, noted at the outset of this study, in the justification of the conviction of W. Kostek-Biernacki.

In terms of the closure of the case regarding the persons involves, it is depressing fact that none of those involved in the court farce, which Tyczyński's trial was, were ever held to account for their activities. Although the files of Tyczyński's case do not provide such information, the investigative practices of Bohdan Kiełbasa, known from other cases, clearly indicate that he brutally tortured the detainees. The same signals are true for Władysław Czyż, who performed the first investigative activities. In turn, prosecutor Paulina Kernowa repeatedly ignored the signals of such practices

[60] W. Kulesza, *Crimen laesae iustitiae*, Łódź 2013, p. 368.

used by other investigators in other cases. These people were never held to account other than the exit from the investigative services of the People's Republic of Poland. The judge of the Provincial Court for the Capital City of Warsaw, Tadeusz Gdowski, was promoted to the Supreme Court after a few years, and his judgments have been operative in general legal practice to this date.[61] According to the official biographies of T. Gdowski, his work in the secret section is not widely known. All this adds to a depressing picture of the lack of any accountability for the destruction of the life of a man of merit to Poland. At present, it is virtually impossible to deliver such restitution due to the passage of time and the death of all *dramatis personae*. This raises fundamental questions whether the rule of law can really operate in the absence of settlement with the past, and also about the message that this sends to contemporary judges, prosecutors and investigating officers as to their responsibility for what they do.[62]

[61] Decision of the Supreme Court of 20 April 1962, case ref. IV KZ 36/62, Published: OSNKW 1962/5/85.

[62] B. Padło, *Odpowiedzialność sędziów stalinowskich za zbrodnie popełnione w przeszłości*, [in:] *Wina i kara. Społeczeństwa wobec rozliczeń zbrodni popełnionych przez reżimy totalitarne w latach 1939–1956*, P. Pleskot (ed.), Warszawa 2015, pp. 343–344.

SYLWIA AFRODYTA KAROWICZ-BIENIAS

"Running away from Themis" – powerlessness of Polish authorities concerning extradition of Stefan Michnik

Introduction

At the end of World War II, during the Yalta conference in February 1945, as a result of decisions made by the Allied states, Poland found itself in the Soviet zone of influence[1]. Representatives of the communist rule taking shape in the territory of the Republic of Poland, in line with the slogan "Who is not with us, is against us", while striving to strengthen their domination, chose independence communities reluctant to the installation of a totalitarian system in Poland as the target of persecution. Soldiers of the Home Army, members of the Polish Army in the West returning to the country, and the youth associated in scout and paramilitary organizations were considered the greatest enemies.[2] Although in the vast majority of cases they were targeted through military operations carried out by uniformed services,[3] the undesirable "reactionary element" was also fought on less obvious frontlines, including the judicial and administrative one. The means used to that end was an expediently framed law,[4] which was enforced by the hands of prosecutors

[1] 11 February 1945, Yalta Conference Agreement, Declaration of a Liberated Europe, http://digitalarchive.wilsoncenter.org/document/116176 [accessed: 01.08.2020].

[2] J. Pruszyński (ed.), *Katalog wystawy „Zbrodnie w majestacie prawa 1944–1956"*, Warszawa 2004, p. 5.

[3] The uniformed services operating at that time included, *inter alia*, Communist Police (MO), Voluntary Reserves of Communist Police (ORMO), Internal Security Corps (KBW), Security Service (SB), as well as People's Commissariat for Internal Affairs (NKVD), units of the Polish Army and the Red Army. *Aparat bezpieczeństwa w Polsce. Kadra kierownicza 1944–1956*, vol. I, K. Szwagrzyk (ed.), Warszawa 2005, pp. 5–27.

[4] For more on the law passed by the communist authorities, see P. Kładoczny, *Prawo jako narzędzie represji w Polsce Ludowej (1944–1956) – prawna analiza kategorii przestępstw przeciwko państwu*, Warszawa 2004; A. Rzepliński, *Przystosowanie ustroju sądownictwa do potrzeb*

and judges, [5]as well as recruitment of those who came from circles faithful to the communist ideology as public officials.

The numerous acts of criminal law enacted at that time, despite specific differences, shared many common features. They were characterized, above all, by a considerable severity and unclarity of the dispositions,[6] which offered multiple ways for deductive fraud, giving judges not so much freedom as arbitrariness in interpreting the evidence, which was most often done in disfavour of the accused.[7] That is why it was so important to appoint the right personnel to adjudicating panels, who would support the world view of the ruling camp, so that they could be used to efficiently and effectively eliminate ideologically inconvenient people from the society. Hence, the top-ranking positions in the post-war judiciary were entrusted to officers of the Soviet Army delegated

państwa totalitarnego w Polsce w latach 1944–1956, [in:] *Przestępstwa sędziów i prokuratorów w Polsce lat 1944–1956*, W. Kulesza, A. Rzepliński (ed.), Warszawa 2000, pp. 9–38.

[5] The basis for legislative efforts aimed at persecuting opponents of the new system of power was the Act of the State National Council (KRN) of 15 August 1944 on the temporary procedure for issuing decree-laws. It made it possible to pass legal acts with the force of law in almost all matters for which such a form was provided for in the Constitution of 17 March 1921, also known as the March Constitution.

[6] The disposition is one of the components of a legal norm, in which the legislator indicates the desired conduct of the addressee of the norm under certain conditions. The disposition may set out both the obligations and the rights of the entity to which a provision applies.

[7] An example of such an act of criminal law was, inter alia, decree of August 31, 1944 on the penalty for fascist-Nazi murderers guilty of murdering and tormenting civilians and prisoners, and traitors of the Polish Nation (the so-called August decree) (Journal of Laws of 1944, No. 4, item 16)). Although it might seem that it was used to prosecute and punish representatives of the German side, in fact, it was also used to sentence soldiers of the Home Army and activists of the Polish Underground State who did not cooperate with the new government. A. Lityński, *Historia prawa Polski Ludowej*, Warszawa 2013, pp. 114–120. Other similarly shaped criminal law acts were: the decree of the Polish Committee of National Liberation on the protection of the state of October 30, 1944 (Journal of Laws of 1944, No. 10, item 50), the decree of November 16, 1945 on particularly dangerous crimes during the period of state reconstruction (Journal of Laws of 1945, No. 53, item 300) and the circular of the Minister of Security of July 6, 1946 "on the prosecution of people who help bandits." The last of the aforementioned acts provided for severe penalties for any activity that could fulfill the features of an indeterminate act in the form of "showing aid." It could include supplying conspiratorial soldiers with weapons or ammunition, as well as offering them a cup of milk. See S.A. Karowicz-Bienias, *Odpowiedzialność karna sędziów i prokuratorów za zbrodnie sądowe*, [in:] *Zbrodnie sądowe w latach 1944–1989. Konformizm czy relatywizm środowisk prawniczych?*, D. Palacz, M. Grosicka (eds.), Kielce–Warszawa 2022, p. 28–29; J. Ślawski, *Żołnierze wyklęci*, Warszawa 1995, p. 34.

to the Polish Army,[8] and graduates of the Officers' Law Schools were also recruited for service.[9]

Military courts became institutions of particular importance as they were assigned the jurisdiction over a range of cases involving civilians as defendants.[10] The organization of the military judiciary was laid down in the decree of the Polish Committee of National Liberation of 23 September 1944 – Law on the system of military courts and prosecutor's offices,[11] however, to a large extent, they operated in accordance with the guidelines of the Supreme Military Court, which interfered with the work of bodies within the sphere of direct interest of the central authorities.[12] Judges often received precise instructions from the Military Judiciary Board as to the level of penalty to be imposed in specific cases.[13]

1. An ideologically exemplary judge

One of the members of the judiciary acting in favour of the ruling camp was Stefan Michnik, born in 1929 in Drohobycz.[14] He came from a family of communist activists, whose status could be defined as "working intelligentsia."[15]

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[8] K. Szwagrzyk, *Zbrodnie w majestacie prawa,* Warszawa 2000, pp. 79–82.

[9] M. Zaborski, *Oni skazywali na śmierć. Szkolenie sędziów wojskowych w Polsce w latach 1944–1956*, [in:] R. Bäcker, P. Hübner, *Skryte oblicze systemu komunistycznego. U źródeł zła…*, Warszawa 1997, p. 121 ff. The Officers' School of Law (OSP) was established by the organizational order of the Minister of National Defense No. 095 / Org. of 19 May 1948. M. Zaborski, *Szkolenie „sędziów nowego typu" w Polsce Ludowej: część 3: Oficerska Szkoła Prawnicza*, „Palestra" 1998, vol. 42, iss. 5, p. 133.

[10] Under the organizational order No. 023/org. of the Supreme Commander of the Polish Army of 20 January 1946, the Military District Courts were assigned the powers of garrison, regional and division courts in civilian cases. M. Zaborski, *Oni skazywali na śmierć…*, pp. 142–145.

[11] Decree of the Polish Committee of National Liberation of 23 September 1944 – Law on the system of military courts and prosecutor's offices (Journal of Laws of 1944, No. 6, item 29).

[12] *Skazani na karę śmierci przez Wojskowy Sąd Rejonowy w Rzeszowie 1946–1954. Studia i materiały*, T. Bereza, P. Chmielowiec (eds.), Rzeszów 2004, p. 21. One of the courts of special importance for the judiciary was the Military District Court in Warsaw, where Stefan Michnik sat as a judge. *„My sędziowie nie od Boga." Z dziejów sądownictwa wojskowego PRL 1944–1956. Materiały i dokumenty*, J. Poksiński (ed.), Warszawa 1996, p. 223.

[13] Ibid., pp. 108–109.

[14] At that time within the borders of the USSR.

[15] S 51.2019.Zk, vol. IX, sheet 1685.

From his teen age, he was active in organizations promoting ideas that were in line with the world view of his parents.[16] In 1949–1951, he was a student of the Officers' Law School, from which he got a diploma with honours.[17] While at the school, on 13 March 1950, he was listed as an informant of the Information Section at the OLS No. 2 in Jelenia Góra (codename "Kazimierczak"). He was quickly promoted in the internal structures of the organization and received his first salary a month after recruitment in reward for his diligent work.[18] Soon after graduating from the OLS, he was employed as an assistant judge at the Military District Court in Warsaw, in the rank of a Second Lieutenant. He was only 22 at the time.

Just two weeks after taking office, he handed down his first life imprisonment, and six months later he was sat on the bench in the rigged trials of almost one hundred soldiers of the Polish Army. As part of the proceedings, as many as forty death sentences were passed, half of which were carried out.[19] In August 1951, Michnik was allowed to chair court sessions.[20] The official opinions attached to the judge's personal files show that he was conscientious, tactful and professional in conducting political hearings, however, he showed no interest in matters of minor importance. In addition, he was often given disciplinary penalties for disregarding back-office activities in terms of both formal and procedural requirements, unsystematic work, carelessness and sluggishness.[21] However, it was emphasized that he was ambitious and talented person, dedicated to *"Marxist-Leninist ideology."*[22]

Stefan Michnik worked at the Military District Court in Warsaw until 20 November 1953.[23] It is necessary, however, to emphasize that at that time

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[16] At the age of 18, he joined the Polish Workers 'Party, and shortly afterwards the Polish United Workers' Party. S 51.2019.Zk, vol. XL, sheet 7944.

[17] S 51.2019.Zk, vol. X, sheet 1687.

[18] Michnik did not end his activity as an informant until 1953. S 51.2019.Zk, vol. XL, sheet 7945–7946.

[19] S 51.2019.Zk, vol. XL, sheet 7946.

[20] S 51.2019.Zk, vol. X, sheet 1687.

[21] For these faults he was punished with reprimands and even house arrest. S. 51.2019. Zk, vol. IX, sheet 1685–1686 and vol. XVII, sheet 3390–3392.

[22] S. 51.2019.Zk, vol. IX, sheet 1685.

[23] After judicial career, Michnik worked briefly in administrative positions. J. Poksiński, op. cit., p. 125. By order of the Ministry of National Defence No. 0735 of 26 July 1957, he was transferred to the reserve, officially due to the inability to perform military service duties

he had never obtained a complete legal education.[24] He was known for his severe treatment of the accused who expressed views unfavourable to the ruling camp. One of the examples confirming the repressive nature of his sentences, disproportionately high to the offences, may be the trial of one of the Polish People's Party activists in 1945–1948. She was sentenced to life imprisonment along with the forfeiture of property and the deprivation of public and civil rights of honour for 5 years for correspondence with the former PPP leader Stanisław Wójcik, who stayed in the USA. The parcels that she received were considered to be accepting financial benefits in exchange for activities detrimental to the state, and the content of the letters allegedly indicated attempts to violently change the ruling system. In fact, the correspondence was strictly between friends, and the parcels sent mainly contained everyday items.[25] Michnik also repeatedly and unlawfully applied a preventive measure in the form of pre-trial detention, and held proceedings in judicial panels in breach of the then applicable legislation. He made arbitrary, not free, assessment of the evidence, taking into account only the circumstances to disfavour of the accused. He could sentence defendants to severe punishments without objective grounds confirming their guilt, stating that they did not promise any improvement, despite the lack of any criminal record or even a very young age.[26] In the course of just over 2.5 years of

for organizational reasons. S 51.2019.Zk, vol. XVII, sheet 3385. From 27 November 1953, he was the head of the office of the Department of Military and Legal Sciences at the Military-Political Academy. From 10 December 1955 – 12 September 1957, he served as an inspector of the Training Department at the Reserve Military Service (ZSW). He was conferred the rank of a Captain on 6 June 1956. S 51.2019.Zk, vol. XVII, sheet 3360. For several months in 1957–58, he worked as a barrister, and in 1958–69 as an editor of the Ministry of National Defence Publishing House. On 5 March 1969, he emigrated to Sweden. S 51.2019.Zk, vol. XVIII, sheet 3471; K. Szwagrzyk, *Prawnicy czasu bezprawia. Sędziowie i prokuratorzy wojskowi w Polsce w latach 1944–1956*, Kraków–Wrocław 2005, p. 373.

[24] The files of the criminal proceedings conducted by the Institute of National Remembrance contain information that he only completed the 1st degree of legal studies.S 51.2019.Zk, vol. XL, sheet 7946. Courses conducted at OSP did not constitute full-fledged legal studies, and there were practically no requirements for the candidates regarding the level of education already obtained. Their completion guaranteed only the possibility of occupying specific positions in military courts, not in common ones. Upon graduation, the graduates received the first officer degree and were able to apply for university law studies. M. Zaborski, *Szkolenie „sędziów nowego typu"…*, pp. 135–138.

[25] Judgment of the Military District Court in Warsaw of 27 April 1953 (case ref. Sr.316/53).

[26] S 51.2019.Zk, vol. X, sheet 1824–1825.

his career, he issued dozens of long-term prison sentences, as well as seven death sentences.[27] At times, he would personally attend the executions. That was what happened on 10 October 1953, when he attended the execution of a Silent Unseen, Cavalry Captain Andrzej Czaykowski (codename "Garda") in the Mokotów prison.[28]

2. An ideologically condemned judge

For the first time in Polish history, the operation of the military justice bodies was critically analysed in 1956, when the so-called "Mazur's Commission" was established.[29] Its task was to investigate the manifestations of violations of the rule of law in the central bodies of the judiciary and prosecutor's service; however, the Military District Courts were only mentioned where cases were investigated as related to their superior institutions. The final report of the work of the Commission of 1957 indicated that *"The activities of some judges* (…) *seem to take on the features of judicial murder,"* and the greatest intensity of manifestations of unlawful sentencing was identified in 1948–1954.[30] Stefan Michnik was also listed among the officials who had violated the law while

[27] One of the high-profile sentences was the death penalty for Major Zefiryn Machalla (case ref. Sn 13/51), whose basic fault was his professional military service in the Second Polish Republic and his subordination to its legal successors during the war. He was executed by firing squad on 10 January 1952. The family was not informed of this for a long time. S 51.2019. Zk, vol. X, sheet 1829–1830 and vol. XXIX, sheet 5676.

[28] S 51.2019.Zk, vol. XL, sheet 7947.

[29] The commission to examine the responsibility of former staff of the Chief Information Board, the Supreme Military Prosecutor's Office and the Supreme Military Court was established on 10 December 1956, after the death of Bolesław Bierut, by agreement between the Ministry of National Defense, the Ministry of Justice and the Public Prosecutor General of the People's Republic of Poland. Its common name comes from the name of the first chairman, Deputy Prosecutor General of the People's Republic of Poland, Marian Mazur. D. Maksimiuk, *Rozliczanie stalinizmu na fali „odwilży" 1956 roku. Dokumenty archiwalne dotyczące odpowiedzialności sędziów i prokuratorów wojskowych za łamanie praworządności w latach 1948–1954*, „Miscellanea Historico-Iuridica" 2010, vol. 9, p. 83 ff.

[30] Although motions for criminal proceedings were filed against three judges listed in the report (Feliks Aspis, Teofil Karczmarz and Marian Krupski), the communist authorities decided not to press charges. *Raport komisji Mazura*, published in Gazeta Wyborcza daily on 22 January 1999, available at https://wyborcza.pl/1,76842,7603376,Raport_komisji_Mazura.html [accessed: 20.08.2020].

adjudicating, as the lowest-rank officer.[31] However, no further disciplinary or penal action was taken against him. It was only in 1990s, due to the evident unlawfulness of the judgments he had passed, that the courts of the Third Polish Republic began to award compensation to the families of victims.[32]

After the end of World War II, international law developed as regards the rules on crimes against humanity and the non-applicability of statutory limitations these.[33] The reception of these rules into the domestic legal order allowed for the prosecution of crimes dating several dozen years back, which is currently the task of the investigative division of the Institute of National Remembrance[34]. The act on the basis of which this institution was established, in its Article 2, contains a definition of a specific type of criminal offence, i.e. the communist crime.[35] The INR Act defines the communist crime as

> actions performed by the officers of the communist state between 8 November 1917 and 31 July 1990 which consisted in applying reprisals or other forms of violating human rights in relation to individuals or groups of people or which as such constituted crimes according to the Polish penal act in force at the time of their perpetration.[36]

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[31] S 51.2019.Zk, vol. XL, sheet 7948.

[32] By way of example, the decision of the Warsaw Military District Court in Warsaw of 21 March 1991 (case ref. Żo.6/91).

[33] A milestone in the development of international law concerning the prosecution and punishment of crimes against humanity was the adoption of the Statute of the International Military Tribunal in Nuremberg and the UN Convention on the non-applicability of statutory limitations in the proceedings in such cases. International Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis; Charter of the International Military Tribunal, London, 18 August 1945 (Journal of Laws of 1947, No. 63, item 367); UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968 (Journal of Laws of 1970, No. 26, item 208; Appendix – Journal of Laws of 1971, No. 7, item 85.

[34] S.A. Karowicz-Bienias, *„By sprawiedliwości stało się zadość" – rozwój idei nieprzedawnienia zbrodni przeciwko ludzkości w ustawodawstwie polskim,* [in:] S.A. Karowicz-Bienias, R. Leśkiewicz, A. Pozorski (eds.), *Nazwać zbrodnie po imieniu. Ustalenia Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu w sprawie zbrodni z okresu II wojny światowej*, Warszawa 2021, pp. 41–52.

[35] Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws of 2019, item 992).

[36] Article 2 (1) of the INR Act. For more on the definition of communist crimes, see P. Piątek, *Glosa do wyroku Sądu Apelacyjnego w Katowicach z dnia 28 lutego 2003 roku, sygn.*

On the other hand, a communist state officer is "*a public functionary, as well as a person who was granted equal protection (…), in particular a public functionary* (…)."[37] Crimes committed by judges and prosecutors are referred to as judicial crimes, although this is a concept outside the legal language,[38] and as such it constitutes an informal generic separation from a number of criminal offences classified as communist crimes.[39] A judicial crime occurs when a sentence passed by a communist judge is in itself an act of repression, harming the elementary sense of justice by imposing a penalty disproportionate to the act committed or when it constitutes an act of retaliation for ideological reasons.[40] It is important, however, to emphasize that in order for such a sentence to be classified as a communist crime, it had to be issued in breach of the legal order in force at the material time.[41]

A number of the judgments issued by Stefan Michnik while in the Military District Court in Warsaw met the above criteria, hence the prosecutors of the Commission for the Prosecution of Crimes against the Polish Nation initiated several independent proceedings against him, which in 2019 were joined into a single investigation with case ref. 51.2019.Zk.[42] According to the position of the Institute of National Remembrance, the collected evidence provided grounds to allege that Michnik

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II AKa 298/02, [in:] *Zbrodnie przeszłości. Opracowania i materiały prokuratorów IPN*, vol. 9, P. Piątek (ed.), Warszawa 2006, pp. 25–30.

[37] Ibid., Article 2 (2).

[38] For more about the characteristics of judicial crimes, see S.A. Karowicz-Bienias, *Odpowiedzialność karna sędziów i prokuratorów*…, pp. 28–29.

[39] R. Kopydłowski, *Analiza definicji zbrodni komunistycznej*, [in:] *Zbrodnie przeszłości. Opracowania i materiały prokuratorów IPN*, R. Ignatiew, A. Kura (ed.), Warszawa 2012, vol. 12, p. 21 in conjunction with the jdgement of the Court of Appeal in Warsaw of 10 February 2005, case ref. II AKa 440/04.

[40] W. Kulesza, *Odpowiedzialność karna sędziów i prokuratorów za zbrodnię sądową*, [in:] *Przestępstwa sędziów i prokuratorów w Polsce lat 1944–1956*, W. Kulesza, A. Rzepliński (eds.), Warszawa 2000, pp. 510–512.

[41] L. Rączy, *Zbrodnie sądowe sędziów i prokuratorów – wybrane zagadnienia odpowiedzialności karnej na podstawie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu*, [in:] *Zbrodnie przeszłości. Opracowania i materiały prokuratorów IPN*, vol. 9, P. Piątek (ed.), Warszawa 2006; E. Leniart, *Odpowiedzialność karna funkcjonariuszy komunistycznego państwa za zbrodnie komunistyczne,* „Miscellanea Historico-Iuridica" 2015, vol. 14, iss. 1, p. 338.

[42] At the time of work on the article, the proceedings in the case of Stefan Michnik has not been closed yet, therefore the author only publishes limited material in this regard.

> breached the principle of objectivity, as set out in Article 5 of the Code of Military Criminal Procedure in force at that time, and when ruling in criminal cases, he was primarily guided by ideological reasons, striving for the physical elimination of people perceived by the then authorities as political opponents.[43]

The fact that the convictions passed by the accused were evidently unequitable and unjust, and motivated by ideological reasons, is confirmed for example by the wording that he used in the justifications of the decisions. They contained such terms for convicts as *"a long-known enemy of People's Poland",*[44] *"acted under the influence of hatred towards his homeland"* or *"disgracefully betrayed his class."*[45] Moreover, this conclusion can be drawn from the statements Michnik himself made at a party conference:

> We were then impressed with the saying about the intensification of class struggle, and those who claim that they were reluctant to examine the cases at that time will not tell the truth

or

> (…) we were easily adaptable to the system, easy to use as (…) a tool of terror against innocent people.[46]

The acts committed by Michnik are therefore clearly unlawful, wilful and culpable,[47] because he acted knowingly in and to the benefit of totalitarian structures, persecuting members of an identifiable group for political

[43] Official statement by the Head of the Chief Commission for the Prosecution of Crimes against the Polish Nation, Deputy Prosecutor General Andrzej Pozorski. S 51.2019. Zk, vol. LXXIV, sheet 14649.

[44] S 51.2019.Zk, vol. XXVII, sheet 5266.

[45] S 51.2019.Zk, vol. XXXIII, sheet 6541.

[46] A party conference of the Supreme Military Court and the Military Judiciary Board on 20–21 November 1956. S 51.2019.Zk, vol. X, sheet 1858. Interestingly, however, he also emphasized the need to raise the lower age limit of adjudicating judges, *"because it is unacceptable that a young, unexperienced judge should decide about a person's life and freedom."* S 51.2019. Zk, vol. XVIII, sheet 5462.

[47] S 51.2019.Zk, vol. X, sheet 1855. These are the necessary elements of a judicial crime in accordance with the judgment of the Supreme Court of 2 April 2001 (case ref. WA 7/01).

reasons.[48] According to the position of the Supreme Court, this gives grounds for classifying them as crimes against humanity.[49]

However, the proceedings against Stefan Michnik were hindered with multiple difficulties. They were repeatedly suspended due to a long-term obstacle preventing the continuation of the proceedings for the inability to perform procedural steps with the participation of the suspect (no permanent residence in Poland, living in Sweden, unjustified failure to appear before Polish authorities).[50] Although the application for a European Arrest Warrant against Stefan Michnik was considered as early as 2007, it was unsuccessful. On 31 July 2009, the Institute of National Remembrance submitted a request to the Military Garrison Court in Warsaw for a preventive measure in the form of pre-trial detention for a period of three months, but the request was rejected. In its justification, the MGC pointed out that during the period covered by the charges against Michnik, he enjoyed judge's immunity in connection with his duties[51] and the commencement of proceedings against him should be preceded by a permit for prosecution issued by the Disciplinary Court. Although the INR prosecutor argued that Michnik, as an assistant judge and not a fully-fledged judge, could not enjoy the immunity, that argument was refuted. The prosecutor in charge of the investigation appealed against that decision, but the appeal was also rejected.[52] It was only by the decision of the Military Regional Court in Warsaw overruling the appealed decision that the Military Garrison Court changed its position and issued a decision on pre-trial detention, on 25 February 2010. This led to the initiation of a procedure for the issuance of the first European Arrest Warrant,[53] dated on 10 August 2010,

[48] This criterion is included in Article 7 of the Rome Statute of the International Criminal Court drawn up in Rome on 17 July 1998 (Journal of Laws of 2003, No. 78, item 708).

[49] Decision of the Supreme Court of 4 December 2001 (case ref. II KKN 175/98).

[50] S 51.2019.Zk, vol. XII, sheet 2239–2240.

[51] Which resulted from Article 53 § 2 of the PCNL Decree of 23 September 1944 – Law on the System of Military Courts and Military Prosecutor's Offices, and Article 22 § 1 of the Act on the System of Military Courts of 8 June 1972.

[52] S 51.2019.Zk, vol. XXVIII, sheet 5556–5597.

[53] Pursuant to Article 607a of the Code of Criminal Procedure, the locally competent regional court, at the request of the prosecutor, may issue an EAW when the act falls under the jurisdiction of Polish courts and the suspect stays in the territory of the EU. Act of 6 June 1997 – Code of Criminal Procedure (Journal of Laws of 1997, No. 89, item 555).

by the Military Regional Court in Warsaw, together with a request for extradition of the accused.[54]

However, the EAW turned out to be unenforceable. By the decision of the Regional Court in Uppsala of 5 November 2010 (B 7071–10), the request for extradition of the suspect to the Polish judicial authorities was dismissed. The Swedish court concluded that the acts committed by Michnik consisted, under Swedish law, in unlawful deprivation of liberty and an error in the performance of official duties. The justification stated that the reason for the dismissal of the request was that the offences Michnik was charged with were statute-barred in the light of the domestic legislation, and Michnik, as a citizen of the Kingdom of Sweden, was not subject to extradition in such case. Interestingly, the Swedish court did not refer at all to the legal qualification of the acts as crimes against humanity, which are not subject to statutory limitation. This position prevented any further proceedings in the case, especially since Michnik had ceased receiving correspondence and contacting the Polish diplomatic mission from 2008. The searches for the suspect under the arrest warrant turned out to be ineffective.[55]

Subsequent decisions on the presentation of charges against Stefan Michnik with a request for action under Article 586 § 1 of the Code of Criminal Procedure were not even sent to the Consular Section of the Embassy of the Republic of Poland in Stockholm, as all embassies of foreign states accredited in the Kingdom of Sweden are prohibited from carrying out requests to interview Swedish citizens in its territory.[56] Sweden based this position on the interpretation of Article 5 (j) of the Vienna Convention on Consular Relations of 24 April 1963.[57]

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[54] The EAW was issued pursuant to Article 30 § 1 of the Code of Criminal Procedure, Article 93 § 1 of the Code of Criminal Procedure and Article 607a of the Code of Criminal Procedure in conjunction with Article 654 § 4 and 5 of the Code of Criminal Procedure for acts under Article 248 § 2 of the Criminal Code of 1932 in conjunction with Article 2 (1) and Article 3 of the INR Act. The request covered a total of 20 criminal offences consisting in unlawful extension of a preventive measure in the form of pre-trial detention. S 51.2019.Zk, vol. IX, sheet 1698–1702.

[55] S 51.2019.Zk, vol. LX, sheet 11910–11921.

[56] S 51.2019.Zk, vol. XXXV, sheet 6891. Official memo of 19 January 2016 regarding the decision to present charges to SM of 14 January 2016 (S 71/15/Zk). A similar situation also took place in 2011 and 2012.

[57] Vienna Convention on Consular Relations, drawn up in Vienna on 24 April 1963 (Journal of Laws of 1982, No. 13, item 98).

Another European Arrest Warrant was issued on 26 October 2018 and covered a total of 30 criminal offences, also classified as non-statute-barred crimes against humanity.[58] The response of the District Court in Gothenburg, however, was again not the one expected by the Polish authorities. The Swedish court examined the case without a trial, and even without notifying Stefan Michnik of the arrest warrant issued, because as the acts he was charged with were statute-barred, it was obvious in the court's opinion that his extradition would not be approved. Again, the justification completely ignored the qualification of the offences as crimes against humanity prosecuted under international law.[59]

After Sweden again refused to extradite Michnik, on 19 January 2019, Swedish Ambassador Stefen Gullgren was summoned to the Ministry of Foreign Affairs, where he met with Deputy Minister Szymon Szynkowski vel Sęk. The Polish representative delivered a *démarche*[60] to the ambassador and expressed his indignation at the situation. He recalled that the qualification of the acts committed by Michnik prevented the use of the statute of limitations. Therefore, Sweden was obliged to surrender the accused not only on the basis of Community agreements, but also under *ius cogens* norms of international law. According to the Swedish diplomat, although he confirmed the openness of his country to talks about the responsibility for the crimes of various regimes, in the case of this particular proceeding, the decision to refuse to extradite Michnik in the legal sense at the stage of the court's verdict is a matter that has been finally settled and remains beyond the sphere of diplomatic actions, as the courts are an institution independent of diplomacy.[61] In practical terms, the positions of both interested parties have remained unchanged to date.

On 30 August 2019, the INR prosecutor in charge of the investigation decided to join the two separate proceedings conducted so far into one and supplement them with new charges, at a total of 93, including seven

[58] S 51.2019.Zk, vol. X, sheet 1799–1815.

[59] S 51.2019.Zk, vol. LXXII, sheet 14223–14227.

[60] A formal diplomatic representation of one government's official position, views, or wishes to an appropriate official in another government, etc. *Démarche*, [in:] PWN Polish Language Dictionary, available at https://sjp.pwn.pl/sjp/demarche;2451693.html [accessed: 20.08.2020].

[61] *„Wyraziliśmy nadzieję, że Szwecja wyda Polsce Michnika." Po spotkaniu* z *ambasadorem Szwecji*, 19 January 2019, available at https://tvn24.pl/polska/wiceszef-msz-spotkal-sie-z-ambasadorem-szwecji-w-sprawie-stefana-michnika-ra911028–2294721 [accessed: 20.08.2020], [source: PAP].

concerning unlawful sentencing to the death penalty.[62] All of them were communist crimes that met the criteria of crimes against humanity.[63] The judicial offences committed by Michnik consisted of both acts and omissions, and were pursued despite being evidently defective. They also had the features of a continuous act, undertaken in agreement with other persons, and constituted an act of repression against those who had previously fought for the independent existence of the Polish State in various organizational structures. On 28 September 2019, the Military Regional Court in Warsaw received a request for the issuance of another, third EAW.[64] The grounds for the request indicated that the investigation established that the acts of Stefan Michnik

> had the nature of a planned (deliberate) and systematic (repeated) attack against a large group of Polish citizens, indeed considered to be political enemies (…),

who were affiliated, for example, with legal political parties such as the Polish People's Party, pre-war Polish Army, and even followers of the Roman Catholic Church or members of the Theosophical Society.[65] Moreover, the applicant prosecutor argued that avoiding contact with the Polish authorities by taking advantage of living abroad was Michnik's deliberate effort aimed at obstructing the conduct of the proceedings, which demonstrated the legitimacy and necessity of previous requests for a preventive measure in the form of pre-trial detention. Taking into account the earlier arguments of the Swedish, it was also argued that there were no negative premises for issuing such a warrant under Article 607b of the Code of Criminal Procedure.[66] The Military Regional Court in Warsaw accepted the request of the Institute of National Remembrance and issued an EAW on 14 October 2019.[67]

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62 S 51.2019.Zk, vol. LXXII, sheet 14243–14343.
63 S 51.2019.Zk, vol. LXXIV, sheet 14779.
64 S 51.2019.Zk, vol. LXXIV, sheet 14652.
65 S 51.2019.Zk, vol. LXXIV, sheet 14775.
66 S 51.2019.Zk, vol. LXXIV, sheet 14781.
67 S 51.2019.Zk, vol. LXXV, sheet 14803.

3. Successful escape from Themis

On 30 January 2020, the prosecutor of the Branch Commission for the Prosecution of Crimes against the Polish Nation issued a decision to suspend the investigation due to a long-lasting obstacle preventing the conduct of procedural steps with the participation of the accused, which would lead to the closure of the proceedings, as until the date of that decision, the Swedish court had not presented its official position in the case.[68] A certified translation of the Swedish court's decision of 19 December 2019 was received by the Institute of National Remembrance on 17 February 2020. As with the previous requests, that one was also refused. However, a new aspect was that the justification stated that under Swedish law in force until 1 July 2014, all the criminal offences were statute-barred no later than in 1978 or 25 years after their commission, and the legislation applicable as at the date of the decision, covering crimes that are not subject to statutory limitation, did not apply to any offences that had already been statute-barred under the laws in force before. This means that all the offences that Michnik was charged with, despite the fact that they meet the criteria for crimes that cannot be statute-barred, were actually statute-barred.[69]

Unfortunately, one cannot help drawing depressing conclusions from this case as regards the enforcement of international law. Sweden is bound by numerous international agreements, which provide for an obligation to facilitate the prosecution and extradition of EU citizens, and, like every country in the world, it is obliged to comply with the law on crimes against humanity qualified among the most serious crimes of a transnational nature. The Kingdom of Sweden, however, completely ignores both the Community and international legal order without incurring any consequences. Therefore, Polish authorities remained powerless over extradition of a criminal who is responsible for the persecution and death of many innocent citizens of our country.

Finally, it is worth quoting Stefan Michnik's interview for the Swedish newspaper "Dagens Nyheter" – *"I believed that I was serving my country.*

[68] S 51.2019.Zk, vol. LXXVI, sheet 15066–15067.
[69] S 51.2019.Zk, vol. LXXVI, sheet 15069–15071.

Today I see that I had been deceived."[70] In light of the considerations above, can one believe that this statement is truly sincere? We will never know the answer to this question. Stefan Michnik died on July 27, 2021 in Gettysburg, with impunity forever.

[70] S 51.2019.Zk, vol. XL, sheet 7948.

MARTA PASZEK

Crime and no punishment. The responsibility of military judges for communist judicial crimes as illustrated by the example of the case of Anna Krużołek

The sense of justice demands that every crime be punished. However, to this day, many crimes committed in the first decade of the People's Republic of Poland by public officials, including military judges, have not found a conclusion that would comply with the standards of a state ruled by law.

Perhaps the most outrageous case of a judicial crime in that period occurred before the Military District Court in Katowice in 1946.

The adjudicating panel of the Military District Court in Katowice, by a judgment of 24 October 1946, sentenced Anna Krużołek to the death penalty for hiding two members of the National Military Organization in her home.

In a joint trial,[1] Anna Krużołek was found guilty of the offence under Article 88 § 1 CCPA[2] in conjunction with Article 86 § 2 CCPA,[3] as well as under

[1] Archives of the Institute of National Remembrance, Katowice Branch (hereinafter: AIPN Ka), Military District Court in Katowice (hereinafter: WSR Ka), case ref. 256/2 vol. 1–2, Case files ref. R 1114/46 against Józef Gabzdyl, Teofil Młotek, Wilhelm Wardas, Jan Gapp, Rudolf Stanek, Jan Stanek, Maria Badura, Wanda Dudzianka, Jan Brudnek, Anna Krużołek, Ludwik Waleczek.

[2] Article 88 § 1 of the decree of 23 September 1944 – *Criminal Code of the Polish Army* (Journal of Laws of 1944, No. 6, item 27) provided as follows: "Any person who, in order to commit the offence referred to in Article 85 or 86, enters into agreement with other persons, shall be liable to imprisonment." Article 88 § 2 of the CCPA provided as follows: "Any person who, having taken part in an agreement, notifies the authority established to prosecute criminal offences of the same, before the authority learns about the agreement and before any negative consequences for the State emerged, shall not be liable to punishment. Any person who has led to the establishment of such an agreement shall not enjoy such impunity." For more about the offence under Article 88 of the CCPA, see: Z.A. Ziemba, *Prawo przeciwko społeczeństwu. Polskie prawo karne w latach 1944–1956*, Warszawa 1997, pp. 136–141.

[3] Article 86 of the CCPA provided as follows: "§ 1. Any person who tries by force to remove the established organs of the supreme authority of the People or seize power, shall be

Article 28 CCPA[4] in conjunction with Article 1 § 2 and 3 of the decree of 13 June 1946 *on criminal offences that are particularly dangerous in the period of state reconstruction*.[5] The conviction was passed despite the fact the evidence taking failed to prove any collaboration of the defendant with the NMO unit.

The court imposed a joint penalty on Anna Krużołek. She was sentenced to death with the loss of public and civil rights of honour forever and forfeiture of all property.[6] Moreover, the adjudicating panel issued an opinion in which it decided that Krużołek did not deserve grace, similarly to the other defendants sentenced to death, i.e. Józef Gabzdyl and Teofil Młotek.[7]

Both the defence attorney of the convict and the Chief Military Prosecutor's Office opposed the court's decision. Both parties filed an appeal with the Supreme Military Court in favour of A. Krużołek.

The defence attorney of the convict entered a motion for acquittal of the first of the offences charged, and for revocation of the sentence as regards

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liable to imprisonment for not less than 5 years or to the death penalty. § 2. Any person who tries by force to change the political system of the Polish State shall be liable to imprisonment for not less than 5 years or to the death penalty." For more about the offence under Article 86 of the CCPA, see: Z.A. Ziemba, op. cit., pp. 109–135.

[4] Article 28 of the CCPA provided as follows: "Any person who helps by deed or word to commit an offence shall be guilty of aiding and abetting the same."

[5] Article 1 of the PCNL decree of 13 June 1946 *on criminal offences that are particularly dangerous in the period of state reconstruction* (Journal of Laws of 1946, No. 30, item 192, as amended), known as the Little Criminal Code (LCC), provided as follows: "§ 1. Any person who commits a violent attack on a unit of the Polish or allied armed forces shall be liable to imprisonment for not less than 5 years or to life imprisonment. § 2. Any person who commits a violent attack on a member of the State National Council, a member of another national council, a state or local government official, a member of the Polish or allied armed forces, or a member of a trade union, social organization with the national reach, during or due to the performance of their duties or because of their position or membership in an organization or the armed forces, shall be liable to the same penalty. § 3. If the offence specified in § 1 or § 2 results in death or serious bodily injury, or if the perpetrator has committed a violent attack with the use of a weapon, or in other particularly dangerous circumstances, they shall be liable to imprisonment for not less than 10 years or to life imprisonment or the death penalty." For the crime of violent attack, see Z.A. Ziemba, op. cit., pp. 151–164. For the decree of 13 June 1946, see D. Maksimiuk, *Krótka historia długo obowiązującego dekretu, czyli o tzw. małym kodeksie karnym*, „Miscellanea Historico-Iuridica" 2010, vol. IX, pp. 83–93; A. Lityński, *O prawie i sądach początków Polski Ludowej*, Białystok 1999, pp. 101–111; Z.A. Ziemba, op. cit., pp. 142–150.

[6] AIPN Ka, WSR Ka, case ref. 256/2 vol. 1, Case files ref. R 1114/46 against Józef Gabzdyl, Teofil Młotek, Anna Krużołek and others, sheet 314–321.

[7] Ibid., sheet 322–323.

the second one. The attorney Adam Romankiewicz argued that there was no evidence that A. Krużołek had entered into an agreement with anyone for the purpose of committing an offence under Article 85 or 86 CCPA. In turn, the Chief Military Prosecutor's Office filed a motion for review as part of judicial supervision, claiming procedural defects (violation of Article 171 § 1 and Article 182 CCPA), and for revocation of the sentence.[8]

The Supreme Military Court, at the session on 6 December 1946, acceded to the prosecutor's motion, quashed the sentence concerning A. Krużołek and remitted the case for reconsideration. In the justification of its position, the review court concluded that no evidence was taken which woiuld confirm the alleged offence under Art 28 in conjunction with Article 86 CCPA, and that, as to the misleading of the Security Service officers, the conduct of Krużołek (to the extent that she had known about the NMO members in hiding) could only be considered to meet the criteria of an offence under Article 148 of the Criminal Code, punishable by no more than 5 years in prison.[9]

Moreover, the Supreme Military Court, in the judicial supervision procedure, concluded that the adjudicating panel of the first instance had passed the conviction of A. Krużołek in breach of procedural rules. The Military District Court in Katowice failed to take into account that Krużołek was held criminally liable only under Article 148 CC[10] for the offence of criminal support, punishable by a prison term of up to 5 years,[11] and she was nevertheless charged with an offence under a more severe provision, i.e. for an offence of aiding and abetting the crime committed by members of an armed anti-communist association

[8] Ibid., sheet 334.

[9] Ibid., sheet 211, 242–250, 282, 314–321, 335–339.

[10] Article 148 of the Ordinance of the President of the Republic of Poland of 11 July 1932 – *Criminal Code* (Journal of Laws of 1932, No. 60, item 571) provided as follows: "§ 1. Any person who obstructs or thwarts criminal proceedings, helping the perpetrator to avoid criminal liability, hides the perpetrator, in particular who obliterates the traces of the crime, damages, hides, forges or modifies evidence or serves imprisonment instead of a convict, shall be liable to imprisonment of up to 5 years or detention. Article 2 Any person who helps as per § 1 the closest person or for fear of criminal liability to themselves or their closes ones, shall not be liable to punishment. Article 3. The court may release the perpetrator who provided help to a close person from punishment."

[11] AIPN Ka, WSR Ka, case ref. 256/2 vol. 1, Case files ref. R 1114/46 against Józef Gabzdyl, Teofil Młotek, Anna Krużołek and others, Decision on holding Anna Krużołek criminally liable of 7 June 1946, sheet 211.

called the "National Military Organization", i.e. the offence specified in Article 28 CCPA in conjunction with Article 1 of the decree of 30 October 1944 *on the protection of the State*[12] punishable with imprisonment or the death penalty.[13] The provision of Article 171 § 2 CCPA was thus infringed.[14] In its judgment, the court changed the legal classification given in the indictment to an even more severe one. A. Krużołek was convicted of the offence of aiding and abetting a violent attack, the statutory criteria and sanction of which were specified in Article 28 CCPA in conjunction with Article 1 § 2 and 3 LCC. The commission of an offence under that article was punishable by a prison term of at least 10 years or a life imprisonment or the death penalty.[15]

Although the verdict of the Military District Court in Katowice was revoked by the Supreme Military Court regarding A. Krużołek, and the case was remitted for reconsideration, the case was never listed again.

In the case, apart from A. Krużołek, also Józef Gabzdyl and Teofil Młotek were sentenced to death. For J. Gabzdyl, the SMC did not accept the motion for review, while for T. Młotek, it changed the legal classification of the offence, while, however, upholding the death penalty.[16] The case was passed to Bolesław Bierut, who did not exercise the right of grace in relation to Gabzdyl and Młotek.[17] By a letter of 17 December 1946, the president of the SMC, Colonel

[12] Article 1 of the PCNL decree of 30 October 1944 *on the protection of the State* (Journal of Laws of 1944, No. 10, item 50) provided as follows: "Any person who establishes an enterprise aimed at overthrowing the democratic system of the Polish State, or who participates in such an enterprise, leads it, provides it with weapons or provides it with other assistance, shall be liable to imprisonment or the death penalty." For more on this legal act, see A. Lityński, op. cit., pp. 78–86; Z.A. Ziemba, op. cit., pp. 99–108.

[13] AIPN Ka, WSR Ka, case ref. 256/2 vol. 1, Case files ref. R 1114/46 against Józef Gabzdyl, Teofil Młotek, Anna Krużołek and others, Indictment of Anna Krużołek, sheet 242–250.

[14] Article 171 § 2 of the decree of 23 June 1945 – *Criminal Code of the Polish Army* (Journal of Laws of 1945, No. 60, item 571) provided as follows: "If, when drawing up the indictment, there is a need to change the qualification of an offence to a more severe one, or to press charges of an offence other than that specified in the decision on holding the suspect criminally liable, a new decision on holding the person criminally liable shall be made and announced to the suspect, and if necessary, the investigation shall be supplemented."

[15] Decree of 13 June 1946 *on criminal offences that are particularly dangerous in the period of state reconstruction* (Journal of Laws of 1946, No. 30, item 192, as amended).

[16] AIPN Ka, WSR Ka, case ref. 256/2 vol. 1, Case files ref. R 1114/46 against Józef Gabzdyl, Teofil Młotek, Anna Krużołek and others, Decision of the Supreme Military Court of 6 December 1946, sheet 335–336.

[17] Ibid., sheet 347–348.

Aleksander Michniewicz, notified the head of the Military District Court in Katowice of Bierut's position towards the two convicts and instructed that the execution order be issued. On the day of receiving the notice, Lieutenant Colonel Julian Giemborek[18] applied to the Military District Prosecutor's Office in Katowice for the execution of death sentences. The letter covered all three persons convicted by the Military District Court's judgment, including A. Krużołek, whose sentence had been revoked by the SMC. On 23 December 1946, the typescript of the conviction issued by the court of first instance was stamped by the secretary of the Military District Court in Katowice with the clause of validity as of 15 December 1946.[19] On 31 December 1946, A. Krużołek was executed by firing squad on the basis of a revoked sentence.[20]

As it turned out after the breakthrough of October 1956, the case of the unlawfully executed woman was known among the lawyers of the military judiciary. At a party conference of the central judiciary units, one of the judges raised the case in a speech against J. Giembork,[21] who in 1946 was the head of the Military District Court in Katowice.[22]

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[18] For more on this, see Archives of the Institute of National Remembrance (hereinafter: AIPN), case ref. 2174/497, Personal files of Julian Giembork; M. Paszek, *Wojskowy Sąd Rejonowy w Katowicach (1946–1955). Organizacja i funkcjonowanie*, Katowice–Warszawa 2019, pp. 343–344.

[19] The typescript of the judgment was stamped and annotated as follows: "The judgment is final given the expiry of the time limit for a review application pursuant to Article 307 § 1 of the Code of Military Criminal Procedure. Katowice on 23 December 1946. The president has not exercised the right of grace. Court Secretary."

[20] AIPN Ka, WSR Ka, case ref. 256/2 vol. 1, Case files ref. R 1114/46 against Józef Gabzdyl, Teofil Młotek, Anna Krużołek and others, Death penalty execution report for Anna Krużołek, sheet 354; AIPN Ka, WUBP Ka, case ref. 032/392a, Prison files of Anna Krużołek, sheet 12. See also T. Kurpierz, P. Piątek, *„Dobić wroga." Aparat represji wobec podziemia zbrojnego na Śląsku Cieszyńskim i Żywiecczyźnie (1945–1947)*, Katowice–Kraków 2007, pp. 385–388; *Skazani na karę śmierci przez Wojskowy Sąd Rejonowy w Katowicach 1946–1955*, with introduction and edited by T. Kurpierz, Katowice 2004, pp. 61–62.

[21] *Protokół narady partyjnej aktywu partyjnego Najwyższego Sądu Wojskowego i Zarządu Sądownictwa Wojskowego, przeprowadzonej z udziałem szefa Głównego Zarządu Politycznego gen. bryg. (Janusza) Zarzyckiego i zastępcy szefa GZP WP płka (Bronisława) Bednarza w dniach 20 i 21 listopada 1956 r.*, [in:] *„My, sędziowie, nie od Boga…" Z dziejów Sądownictwa Wojskowego PRL 1944–1956. Materiały i dokumenty,* J. Poksiński (ed.), Warszawa 1996, p. 170.

[22] AIPN, case ref. 2174/497, Personal files of Julian Giembork, sheet 8; M. Paszek, op. cit., p. 343; K. Szwagrzyk, *Prawnicy czasu bezprawia. Sędziowie i prokuratorzy wojskowi w Polsce 1944–1956*, Kraków-Wrocław 2005, pp. 302–303.

Although the execution of A. Krużołek by firing squad was raised in November 1956, it was not analyzed by any of the commissions established during the "thaw" to investigate violations of the law in the administration of justice during the Stalinist period.[23]

As it turned out, these commissions, including the Mazur commission that dealt with the military judiciary, did not consider criminal cases from all over Poland, but only focused on the central and Warsaw-based law enforcement and judicial bodies.[24]

It should be noted, however, that even if the case of unlawful killing of A. Krużołek had been covered, most probably no one would have been held to criminal or disciplinary account for that crime. In the final conclusions

[23] These were: 1) the Roman Nowak Commission, appointed at the 8th plenum of the Central Committee of the Polish United Workers' Party in October 1956 to investigate the activities of the Political Bureau's Commission for public security, 2) the commission to investigate responsibility for violations of the rule of law by former employees of the Central Information Board, the Supreme Military Prosecutor's Office and the Supreme Military Court, known as the Mazur Commission after its chairman, Deputy Prosecutor General Marian Mazur; 3) the Commission to investigate the manifestations of violations of the rule of law by employees of the Prosecutor's General Office and the Prosecutor's Office for the Capital City of Warsaw, 4) the Commission to investigate the activities of the so-called secret sections at the Ministry of Justice, Courts of Appeal and the Provincial Court for the Capital City of Warsaw. See *Projekt sprawozdania komisji Romana Nowaka, powołanej na VIII plenum KC w październiku 1956 r. dla zbadania działalności komisji Biura Politycznego do spraw bezpieczeństwa publicznego*, [in:] Cz. Kozłowski, *Namiestnik Stalina*, Warszawa 1993, pp. 192–198; *Sprawozdanie Komisji do zbadania odpowiedzialności b. pracowników Głównego Zarządu Informacji, Naczelnej Prokuratury Wojskowej i Najwyższego Sądu Wojskowego*, [in:] *My, sędziowie…*, pp. 239–284; *Sprawozdanie Komisji dla zbadania odpowiedzialności byłych pracowników Głównego Zarządu Informacji, Naczelnej Prokuratury Wojskowej i Najwyższego Sądu Wojskowego*, [in:] *W imię przyszłości Partii. Procesy o łamanie tzw. praworządności socjalistycznej 1956–1957. Dokumenty*, M. Zaborski (ed.), Warszawa 2019, pp. 25–100; *Sprawozdanie komisji powołanej dla zbadania przejawów łamania praworządności przez pracowników Generalnej Prokuratury i Prokuratury m.st. Warszawy*, [in:] *W imię przyszłości Partii…*, pp. 238–257; *Sprawozdanie komisji powołanej w celu zbadania działalności tzw. sekcji tajnej Sądu Wojewódzkiego dla m.st. Warszawy*, [in:] *W imię przyszłości Partii…*, pp. 189–237; M. Szerer, *Komisja do badania odpowiedzialności za łamanie praworządności w sądownictwie wojskowym*, „Zeszyty Historyczne" 1979, vol. 49; A. Steinsbergowa, *Uwagi na marginesie Memoriału dr. Mieczysława Szerera, złożonego w dniu 13 maja 1957 r. Komisji do Badania Odpowiedzialności za Łamanie Praworządności w Sądownictwie Wojskowym*, „Zeszyty Historyczne" 1983, vol. 66.

[24] See also M. Stanowska, *Próby rozliczenia z przeszłością w wymiarze sprawiedliwości*, [in:] *Ius et lex. Księga jubileuszowa ku czci Profesora Adama Strzembosza*, A. Dębiński, A. Grześkowiak, K. Wiak (eds.), Lublin 2002, pp. 307–308; idem, *First Attempts at Undoing the Consequences of Violating the Rule of Law in 1944–1956*, „Prawo w Działaniu" 2019, No. 38, pp. 22–23.

of all the then appointed commissions, only few instances of prosecutors or judges were identified as requiring criminal examination (e.g. in the case of Feliks Aspis, Teofil Karczmarz or Juliusz Krupski).[25] Motions were entered for investigation of cases of military lawyers by the public prosecutor's offices, which was to guarantee the impartiality and objectivity of the proceedings. However, the deputy Prosecutor General Włodzimierz Taraszkiewicz refused to initiate criminal proceedings because, as he stated, *There is* (…) *no evidence that the judges and prosecutors acted with malicious intent, which is a prerequisite for their criminal liability for wrongful, unfounded convictions*.[26]

Also Mieczysław Szerer, a member of the Mazur commission, who submitted a separate report on the commission's work, opined in the final conclusions: *I do not see any possibility of holding the judges to criminal account even for recklessness within the meaning of the Criminal Code. The irregularities on their part did not exceed the limits of the judge's free discretion*.[27]

The then actions of the appointed commissions, as well as of the public prosecutor's offices, were in line with the actual intentions of the new political authority headed by Władysław Gomułka, the First Secretary of the Central Committee of the Polish United Workers' Party. Other than feigned initiatives aimed at calming down public sentiment, the new party camp did not intend to thoroughly change the mechanisms of the justice system, including the military judiciary,[28] the more so as the judiciary followed the guidelines

[25] *Sprawozdanie Komisji do zbadania odpowiedzialności b. pracowników Głównego Zarządu Informacji…*, pp. 273, 277; *Sprawozdanie Komisji dla zbadania odpowiedzialności byłych pracowników Głównego Zarządu Informacji…*, pp. 49–52, 58; *Ramowy plan śledztwa w sprawie odpowiedzialności sędziów i prokuratorów wojskowych za łamanie praworządności w latach 1948–1954*, [in:] D. Maksimiuk, *Rozliczanie stalinizmu na fali „odwilży" 1956 roku. Dokumenty archiwalne dotyczące odpowiedzialności sędziów i prokuratorów wojskowych za łamanie praworządności w latach 1948–1954*, „Miscellanea Historico-Iuridica" 2010, vol. IX, pp. 118–121; eadem, *Rok 1956 w Polsce. Sądy, prokuratury, prawo karne*, Białystok 2016, pp. 124, 127–131; M. Stanowska, *First Attempts…*, pp. 28–29.

[26] K. Szwagrzyk, op. cit., p. 242; D. Maksimiuk, *Rok 1956…*, p. 131.

[27] M. Szerer, *Komisja do badania…*, p. 93; *Memoriał Mieczysława Szerera*, [in:] *W imię przyszłości Partii…*, pp. 177–178.

[28] See e.g. J. Poksiński, *„TUN" Tatar-Utnik-Nowicki. Represje wobec oficerów Wojska Polskiego 1949–1956*, Warszawa 1992, p. 231; A.L. Sowa, *Historia polityczna Polski 1944–1991*, Kraków 2011, p. 273; R. Spałek, *Komuniści przeciwko komunistom. Poszukiwanie wroga wewnętrznego w kierownictwie partii komunistycznej w Polsce w latach 1948–1956*, Warszawa 2014, pp. 1052–1056.

of the managing bodies of the Central Committee of the Polish United Workers' Party, which were in charge to strictly define the penal policy.[29]

Therefore, after the breakthrough of 1956, despite numerous public statements, especially in the press, concerning the need to punish judges who had broken the law in their judicial activity, who had compromised their judicial independence and, consequently, committed judicial crimes, none of the judges was held criminally liable.[30] The conduct of communist state officials continued to enjoy impunity and protection of the political bodies in power.[31]

The options for unhampered research on the jurisprudence of the Polish courts in the Stalinist period and holding judges to account for having compromised the dignity of their office by issuing convictions that constituted crimes against life only opened with the collapse of the communist system in Poland.

To provide for research, *inter alia*, of judicial crimes, the Act of 18 December 1998 established the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation.[32]

The Institute of National Remembrance performs functions for the prosecution of communist crimes, crimes against peace, humanity and war crimes,[33] with an additional task to clarify the circumstances of cases, identify the aggrieved parties and victims, which entails a careful collection of archival materials regarding crimes, description of the historical context of crimes, their victims and perpetrators. As indicated recently in the literature,

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Cf. M. Stanowska, *Próby rozliczenia…,* p. 309; A. Strzembosz, *Zbrodnie sądowe*, [in:] A. Przewoźnik, A. Strzembosz, *Generał „Nil"*, Warszawa 1999, p. 46.

[29] R. Spałek, op. cit., p. 1056.

[30] D. Maksimiuk, *Rok 1956…,* pp. 131, 143.

[31] J.A. Kulesza, *Problematyka przedmiotu ochrony prawnokarnej zbrodni komunistycznych w świetle orzecznictwa sądowego*, „Wojskowy Przegląd Prawniczy" 2006, No. 4, pp. 108, 112. Cf. J. Waszczyński, *W sprawie karania zbrodni stalinowskich*, „Acta Universitatis Lodziensis. Folia Iuridica. Prace z zakresu prawa karnego, postępowania karnego i prawa karnego wykonawczego" 1994, vol. 60, pp. 26–27.

[32] Act of 18 December 1998 *on the Institute of National Remembrance– Commission for the Prosecution of Crimes against the Polish Nation* (Journal of Laws of 1998, No. 155, item 1016, as amended).

[33] The tasks of the prosecutors of the Main Commission for the Prosecution of Crimes against the Polish Nation and of the branch commissions are regulated in Chapter 5, The Investigative Functions of the Institute of Remembrance (Article 45–52 of the Act of 18 December 1998 *on the Institute of National Remembrance– Commission for the Prosecution of Crimes against the Polish Nation* (Journal of Laws of 1998, No. 155, item 1016, as amended).

the activities of the Institute of National Remembrance form part of the transitional justice model.[34]

The introduction by the Act on the Institute of National Remembrance in its Article 2 (1), of the definition of the communist crime,[35] facilitates these tasks.

Within the meaning of the Act, the communist crime are actions performed by the officers of the communist state between 8 November 1917 and 31 July 1990 which consisted in applying reprisals or other forms of violating human rights[36] in relation to individuals or groups of people or which as such constituted crimes according to the Polish penal act in force at the time of their perpetration.

Communist crimes constituting crimes against peace, humanity or war crimes under international law are not subject to statutory limitation.[37] Otherwise, the penalization of a communist crime is statute-barred after 40 years for the offence of homicide and after 30 years for other communist crimes, respectively. Pursuant to the Act, the limitation period commences on 1 August 1990.[38]

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[34] R. Pałosz, *Analiza orzecznictwa wojskowych sadów rejonowych jako narzędzie realizacji celów sprawiedliwości tranzycyjnej*, [in:] K. Bokwa, P. Magiera, R. Pałosz, J. Pokoj, *Praktyka orzecznicza wojskowych sądów rejonowych w Katowicach i w Krakowie w sprawach politycznych w okresie stalinowskim*, Warszawa 2020, pp. 127–131. For the issue of law and justice in the age of transformation, see e.g. L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Ed. III, Warszawa 2003, pp. 293–303; R.G. Teitel, *Rządy prawa okresu transformacji*, „Ius et Lex" 2003, No. 1; G. Skąpska, *Rozliczanie łamania praw człowieka w przeszłości. Analiza kulturowa*, „Ius et Lex" 2003, No. 1.

[35] For the definition of the communist crime and the related doubts, see: S.M. Przyjemski, *W kwestii pojęcia „zbrodni komunistycznej", zdefiniowanej w art. 2 ust. 1 ustawy z dnia 18 grudnia 1998 r. o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu*, „Wojskowy Przegląd Prawniczy" 2006, No. 1, pp. 15–26; R. Kopydłowski, *Analiza definicji zbrodni komunistycznej*, [in:] *Zbrodnie przeszłości. Opracowania i materiały prokuratorów Instytutu Pamięci Narodowej*, vol. 4: *Ściganie*, R. Ignatiew, A. Kura (eds.), Warszawa 2012, pp. 21–27.

[36] For more on the violation of human rights in the context of the communist crime, see: P. Piątek, *Naruszenie praw człowieka jako znamię strony przedmiotowej zbrodni komunistycznej*, „Problemy Prawa Karnego" 2004, vol. 25, pp. 55–73.

[37] Article 4 (1) of the Act of 18 December 1998 *on the Institute of National Remembrance–Commission for the Prosecution of Crimes against the Polish Nation* (Journal of Laws of 1998, No. 155, item 1016, as amended). See also Convention of 26 November 1968 *on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* (Journal of Laws of 1970, No. 26, item 208).

[38] Article 4 (1a) of the Act of 18 December 1998 *on the Institute of National Remembrance–Commission for the Prosecution of Crimes against the Polish Nation* (Journal of Laws of 1998, No. 155, item 1016, as amended).

The actions of public officials may be considered communist crimes only if it is proved that they were committed intentionally[39] and constituted a criminal offence under the Polish criminal law in force at the time of their commission (in line with the *nullum crimen sine lege anteriori* principle).

The provisions of the Act also contain a definition of the perpetrator of a communist crime,[40], i.e. an officer of the communist state. An officer of the communist state, within the meaning of the Act, is a public official, as well as a person who was granted equal protection to that of a public official and in particular, a public official and a person who performed executive functions within the statutory body of the communist parties.[41] In the light of this definition, a judge, as a public official, may be the perpetrator of a communist crime, provided that he has committed an act that meets the criteria of that crime.[42]

What acts or omissions by Stalinist judges will meet the criteria of a judicial crime or, more broadly, a communist crime? Witold Kulesza, who deals with the issues of judges' liability in relation to their judicial activity, concludes as follows: "a court verdict, issued by judges as officers of the communist state, with a sentence of the death penalty or imprisonment, is a communist crime, if in itself it constitutes an act of repression against the convict, and also if it was issued in violation of human rights, in particular if it appears to be

[39] J.A. Kulesza, *Z problematyki strony podmiotowej zbrodni komunistycznej*, „Wojskowy Przegląd Prawniczy" 2005, No. 3, pp. 103–112; S.M. Przyjemski, *W kwestii pojęcia…*, pp. 21–22; G. Rejman, *Zbrodnie komunistyczne w koncepcji polskiego prawa karnego*, „Wojskowy Przegląd Prawniczy" 2006, No. 1, pp. 12–13; L. Rączy, *Zbrodnie sądowe sędziów i prokuratorów – wybrane zagadnienia odpowiedzialności karnej na podstawie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu*, [in:] *Zbrodnie przeszłości. Opracowania i materiały prokuratorów Instytutu Pamięci Narodowej*, P. Piątek (ed.), Warszawa 2006, p. 7; E. Leniart, *Skazani za antykomunizm. Orzecznictwo Wojskowego Sądu Rejonowego w Rzeszowie (1946–1954/1955)*, Rzeszów 2016, p. 282; A. Strzembosz, *Zbrodnie sądowe…,* p. 33.

[40] For more on the perpetrators of the communist crime, see: J. Kulesza, *Funkcjonariusz państwa komunistycznego jako podmiot zbrodni komunistycznych*, „Palestra" 2006, No. 9–10, pp. 84–95; P. Piątek, *Glosa do wyroku Sądu Apelacyjnego w Katowicach z dnia 28 lutego 2003 roku sygn. II AKa 298/02 (dotyczy pojęcia zbrodni komunistycznej)*, [in:] *Zbrodnie przeszłości…*, p. 26; L. Rączy, op. cit., p. 7; S.M. Przyjemski, *W kwestii pojęcia…*, pp. 22–25; G. Rejman, op. cit., pp. 13–14.

[41] Article 2 (2) of the Act of 18 December 1998 *on the Institute of National Remembrance–Commission for the Prosecution of Crimes against the Polish Nation* (Journal of Laws of 1998, No. 155, item 1016, as amended).

[42] S.M. Przyjemski, *W kwestii pojęcia…*, p. 23; J.A. Kulesza, *Problematyka przedmiotu ochrony…*, pp. 107, 115–116.

in breach of the principle that no one's life may be taken arbitrarily, or was issued in violation of the fundamental principles on which the human right to a fair trial is based."[43]

In the case of Anna Krużołek, there is an act of repression in the form of a conviction under which a penalty was imposed contrary to the rules of criminal procedure and contrary to the judicial directives for punishment.[44] It is also an act of repression in which the panel of judges issued the conviction of Krużołek without any evidence.[45] The Military District Court in Katowice chaired by Major dr. Mieczysław Janicki[46] sentenced A. Krużołek to the death penalty, despite the fact that neither the investigation nor the court proceedings had revealed any evidence that Krużołek collaborated with a guerrilla group or entered into an agreement with them to commit a criminal offence. Neither was it proved that the defendant had deliberately misled the Security Service by informing them that no stranger was at home. In the justification of the death penalty conviction, the adjudicating panel failed to refer to the statutory features of the acts attributed to the convict, or to her guilt. The justification contains only a superficial description of the offences she had been charged with.[47]

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[43] W. Kulesza, *Odpowiedzialność karna sędziów i prokuratorów za zbrodnię sądową*, [in:] *Przestępstwa sędziów i prokuratorów w Polsce lat 1944–1956*, W. Kulesza, A. Rzepliński (eds.), Warszawa 2001, p. 510.

[44] Cf. Ibid., pp. 510–511; idem, *Crimen laesae iustitiae. Odpowiedzialność karna sędziów i prokuratorów za zbrodnie sądowe według prawa norymberskiego, niemieckiego, austriackiego i polskiego*, Łódź 2013, p. 396. For the issue of the death penalty in the criminal policy of the Stalinist period, see: P. Kładoczny, *Kara śmierci jako wykładnik polityki karnej państwa w latach 1944–1956*, [in:] *Przestępstwa sędziów…*, pp. 67–81; A. Strzembosz, *Zbrodnie sądowe…*, p. 33.

[45] W. Kulesza, *Crimen…*, p. 424. Cf. A. Strzembosz, *Zbrodnie sądowe…*, p. 38.

[46] For more on this, see AIPN, case ref. 2174/4, Personal files of Mieczysław Janicki; K. Szwagrzyk, op. cit., p. 319; R. Leśkiewicz, *Wojskowy Sąd Rejonowy w Poznaniu (1946–1955). Organizacja, funkcjonowanie, procesy archiwotwórcze*, Warszawa–Poznań 2009, pp. 96–98; *Skazani na karę śmierci przez Wojskowy Sąd Rejonowy w Poznaniu 1946–1955*, W. Handke, R. Leśkiewicz (eds.), Poznań 2006, pp. 96–98; M. Paszek, *Wojskowy Sąd Rejonowy w Katowicach (1946–1955). Organizacja i funkcjonowanie*, Warszawa–Katowice 2019, pp. 345–346.

[47] AIPN Ka, WSR Ka, case ref. 256/2 vol. 1, Case files ref. R 1114/46 against Józef Gabzdyl, Teofil Młotek, Anna Krużołek and others, Judgment the Military District Court in Katowice at out-of-court session in Cieszyn, 24 October 1946, sheet 300–311.

Both in the case of Krużołek and in other cases before the military judiciary, extensive interpretations were used very commonly,[48] which consequently led to a blanket penalization of the conduct of those against whom criminal proceedings were instituted and conducted.[49]

The legal qualifications used by the INR prosecutors in cases of judicial crimes are mainly based on a determination whether a judge in a specific case abused their powers or did not discharge their duties. Based on intertemporal rules, the provisions are applied of Article 231 § 1 of the currently applicable Criminal Code, which is equivalent to Article 286 § 1 of the Criminal Code of 1932.[50] In view of the fact that the abuse of powers or failure by a judge to discharge their duties involved causing harm by depriving convicts of life or liberty, the qualifications of judges' acts also cover these crimes.[51]

Until now, few former military judges have been brought to trial for alleged acts committed while in their tenure. The proceedings have most often ended with acquittal of representatives of the military judiciary.[52] Most cases initiated by IPN prosecutors regarding judicial crimes end with the discontinuation of the proceedings due to the death of the perpetrators.[53]

That was also the reason for discontinuation of two out of three investigations concerning the judicial murder of A. Krużołek.

Mieczysław Janicki, chairman of the panel, died in 1977; a private soldier who was a jury member had also died before the proceedings were instituted.[54] Edmund Ronowicz, in turn, who served as an assistant judge in the adjudicating

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[48] E. Leniart, op. cit., pp. 298–299. For more on this, see K. Płeszka, *Wykładnia rozszerzająca*, Warszawa 2010.

[49] See J.A. Kulesza, *Problematyka przedmiotu ochrony…,* p. 108. Cf. A. Strzembosz, *Odpowiedzialność dyscyplinarna sędziów za sprzeniewierzenie się niezawisłości sędziowskiej w latach 1944–1989*, [in:] *Prawość i godność. Księga pamiątkowa w 70. rocznicę urodzin Profesora Wojciecha Łączkowskiego*, S. Fundowicz, F. Rymarz, A. Gomułowicz (eds.), Lublin 2003, pp. 286–287; D. Szeleszczuk, *Polityka karna na tle ustawodawstwa i orzecznictwa Sądu Najwyższego w Polsce Ludowej*, [in:] *Komunistyczne prawo karne Polski Ludowej*, A. Grześkowiak (ed.), Lublin 2007, pp. 194–200.

[50] L. Rączy, op. cit., p. 11.

[51] Ibid., p. 11; A. Strzembosz, *Zbrodnie sądowe…,* p. 33.

[52] For an overview of the jurisprudence in cases of judicial crimes, see: L. Rączy, op. cit., pp. 12–15.

[53] Ibid., p. 15.

[54] IPN-OKŚZpNP investigation files, case ref. S 73/02/Zk on abuse of powers by members of the adjudicating panel of the Military District Court in Katowice, Decision to discontinue the investigation, sheet 247–255.

panel, died after the charges had been brought and after he had been interviewed as a suspect by the prosecutor of the Institute of National Remembrance.[55]

The judicial crime committed against A. Krużołek is one of many in which the perpetrators will never be punished.

[55] AIPN Ka, IPN-OKŚZpNP investigation files, case ref. S 2/00/Zk on abuse of powers by members of the adjudicating panel of the Military District Court in Katowice, Decision to discontinue the investigation, sheet 942–956.

Information about Authors

ASLLANI NDREKA DORINA – Law Lecturer (Dr.Ius), University "Aleksandër Moisiu" of Durrës

GÓRSKI MICHAŁ – Ph.D. in Law, Attorney-at-law, co-author of legal blogs http://zasiedzenie.net and http://odszkodowanieodpanstwa.net/, ORCID: 0000-0002-8185-0052

GRZEBYK PATRYCJA – Associate Professor (Dr. Hab. Iur.), University of Warsaw, ORCID: 0000-0003-4022-7018

GUBRYNOWICZ ALEKSANDER – Associate Professor (Dr. Hab. Iur.), University of Warsaw, ORCID: 0000-0003-3003-2727

HOFFMANN TAMÁS – Senior Research Fellow, Centre for Social Sciences Institute for Legal Studies; Associate Professor, Corvinus University of Budapest, ORCID: 0000-0001-5392-3165

KAROWICZ-BIENIAS SYLWIA AFRODYTA – Researcher (Dr. Iur.), Institute of National Remembrance in Warsaw, ORCID: 0000-0001-8992-1540

KUCZYŃSKA HANNA – Associate Professor (Dr. Hab. Iur.), Institute of Law Studies, Polish Academy of Sciences, ORCID: 0000-0002-1446-2244

LACHOWSKI TOMASZ – Assistant Professor (Dr. Iur.),
University of Łódź, ORCID: 0000-0002-9026-0409

MASŁO KRZYSZTOF – Assistant Professor (Dr. Iur.),
University of Cardinal Stefan Wyszynski in Warsaw, public prosecutor,
Director of International Cooperation and Human Rights Department in
Ministry of Justice of Republic of Poland, ORCID: 0000-0002-9085-3589

PASZEK MARTA – Assistant Professor (Dr. Iur.), University of Rzeszów,
ORCID: 0000-0002-8143-645X

PERKOWSKI MACIEJ – Full Prof. (Prof. Dr Hab.),
University of Bialystok, ORCID: 0000-0002-3909-3967

STRZĘPEK KAMIL – Assistant Professor,
University Cardinal Stefan Wyszyński

WANG JIA – Assistant Professor, Macau University of Science
and Technology, Law Faculty

WASZKIEWICZ ARKADIUSZ – PhD Candidate, University of Bialystok

WIERCZYŃSKA KAROLINA – Associate Professor (Dr. Hab. Iur.),
Institute of Law Studies, Polish Academy of Sciences,
ORCID: 0000-0002-6205-8991

ZDRÓJKOWSKI DAWID – Attorney at law, PhD student (University
of Białystok), ORCID: 0000-0002-6315-6032

Communist crimes did not give way to Nazi atrocities, and their scale was much greater. Above all, however, political considerations determined that the Communists did not live up to their Nuremberg. In addition, the prosecution of communist crimes involves a number of legal difficulties, both of a material and procedural nature. The authors of this study hope that they have succeeded in signaling these difficulties and at the same time inspire further research that is necessary and urgent – given the advanced age and criminals and victims who are still waiting for justice.

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